THE HIGH COURT OF SWAZILAND

DAUDE MOHAMMED

Applicant

And

CITY COUNCIL OF MBABANE

1st Respondent

S & B CIVILS ROADS (PTY) LTD

2nd Respondent

Civil Case No. 3383/2004

Coram S.B. MAPHALALA – J

For the Applicant MR. J. MAGAGULA

For the Respondents MR. W. MAGAGULA

JUDGMENT (05/11/2004

[1] Serving before Court is an application brought under a Certificate of Urgency for an order in the following terms:

1. Directing that the forms of service and time limits prescribed by the rules of Court be dispensed with and this matter dealt with as a matter of urgency.
2. Condoning any none compliance with the Rules of Court already committed by the Applicant.
3. Interdicting and restraining the Respondents from removing or in any manner interfering with any movable property of the Applicant situated on Plot No. 188, Mahwalala Zone 4, Mbabane in the Hhohho district pending the finalisation of these proceedings.
4. Interdicting and restraining the Respondents from demolishing Applicant's house situated on Plot 188 Mahwalala Zone 4, Mbabane in the Hhohho district or any portion of such house until the 1st Respondent allocates Applicant an alternative piece of land and pays him reasonable compensation for his house plus all relocation expenses.
5. Interdicting and restraining the Respondents from constructing a road through Plot No. 188 Mahwalala Zone 4, Mbabane in the Hhohho district or unreasonably close proximity to such plot without first compensating Applicant for his house thereon and allocating him an alternative piece of land as well as pay him all relocation expenses.
6. Awarding costs of this application to the Applicant on the attorney and own client scale.
7. Granting further and/or alternative relief.

[2] The Applicant has filed a Founding affidavit in support of the above-mentioned relief. A number of annexures pertinent to his case are filed thereto.

[3] The 1st Respondent has raised points of law in limine by a Notice dated the 28th October 2004. There are fours points raised in the said Notice, viz

(i) urgency;
(ii) that requirementi of an interdict have not been complied with;
(iii) Applicant has not disclosed his nationality, and
(iv) jurisdiction. The fifth point that Applicant has not annexed certain annexures was

abandoned by the 1st Respondent.

[4] I shall proceed to consider these issues ad seriatim, thus:

[5] Urgency

The 1st Respondent contends in this regard that a proper case has not been made for urgency in that the Applicant does not set out explicitly the circumstances which render the matter urgent as required by Rule 6 (25) (b). The Applicant has only made an attempt to address the second leg of the requirements, that is attempting to state reasons why he claims he cannot be afforded a substantial redress at a hearing in due course. Further on this point it was argued for the 1st Respondent that Applicant, in

bringing this matter has stipulated extremely short times for the Respondent to file their opposing affidavits.

[6] Paragraph 13 of the Applicant founding affidavit seeks to establish urgency. The following averments are made:

13.

"This application is urgent and I cannot be afforded any meaning remedy through a hearing in due cause because the 1st Respondent has stated to my attorneys in no uncertain terms that it shall be removing all my movable property on the plot in question any time from the 25th October 2004, and it shall take it to a place of its choice. The 1st Respondent has also stated that the road construction shall proceed which means my house may be demolished at any time now."

[7] There is a plethora of decided cases in South Africa and in this Court concerning the requirements of Rule 6 (25) (a) and (b) and it is trite that the provisions of the rule are peremptory and that they must be alleged and satisfied (see Humphrey H. Henwood vs Maloma Colliery and another Civil Case No. 1623/93 and H.P. Enterprises (Pty) Limited vs Nedbank (Swaziland) Limited, Civil Case No. 788/99 at page 2 - 3). In the latter judgment Sapire CJ (as he then was) made the following trenchant remarks at page 2-3 of the unreported judgment: and I quote;

"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate that the observance of the normal procedures and time limits prescribed by the rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but must give rise to a reasonable fear that if immediate relief is not afforded irreparable harm will follow".

[8] On the facts of the present case, the Applicant has dismally failed to allege and satisfy the requirements of the first leg of the rule, viz that of urgency. Mr. Magagula for the Applicant tried very hard to read into paragraph 13 of the Founding affidavit that allegations on urgency have been made. In my view, he failed in his quest as there are clearly no averments contained in that paragraph as required by the Rule.

[9] Further on this point of urgency, the Applicant has stipulated time limits which were almost impossible for the Respondents to adhere to. The papers were

served during the afternoon of Tuesday the 26th October 2004 and stipulated that the matter was to be brought before Court the following day on Wednesday the 27 October 2004, at 2.30pm; and that the Respondent should deliver its answering affidavit before 4.30pm the same day. The Applicant gave the Respondents barely two hours to drafting and settling of its affidavits. The Applicant therefore approaches the Court on an extremely urgent basis and it is incumbent on him to make out a case justifying the urgency with which it was brought, (see Luna Mauber Vervaarmigers (EDMS) BPK vs Makin and another t/a Makins Furniture Manufactures 1972 (4) S.A. at 1366 -1376 and Patcor

Quarries CC vs Issroffl998 (4) S.A. 1069 (SE) at 1075). In the present case the Applicant failed to make out a case as required by the Rules,

[10] Therefore, the point of law in limine on urgency is upheld.

[11] Requirements of an interdict.

The point taken in this regard is that in as much as the orders sought by the Applicant is one of an interdict, the Applicant has failed to specify whether the interdict sought is one of an interim or final interdict. I again, agree with the submissions made by Mr. Magagula for the 1st Respondent that the Applicant has dismally failed either to prove an interim interdict or a final interdict. No attempts at all has been made on the Founding affidavit to allege and prove the requirements of either type of interdict. According to Herbstein et at, The Civil Practice of the Supreme Court of South Africa, 4th ED at page 1064 to 1065 the requirements of a final interdict are outlined therein as follows:

a) A clear right
b) An injury actually committed or reasonably apprehended; and
c) The absence of similar protection by any other ordinary remedy,

[12] In the present case requirements (a) and (c) mentioned above have not been alleged at all.

[13] In respect of an interim interdict the learned authors Herbstein et A1 at page 1064 list the requirements as follows:

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a) A prima facie right;
b) A well-grounded apprehension of irreparable harm;
c) The balance of convenience
d) No other satisfactory remedy

[14] From the facts of the present case, the Applicant has failed in respect of requirements (a), (c) and (d) set out above.
[15] Therefore the point of law in limine in respect of the requirements of an interdict succeeds.

[16] Jurisdiction.

It is contended for the 1st Respondent that no facts or allegations have been made by the Applicant to show that the Court has jurisdiction. In this regard the Court was referred to the textbook by Herbstein et A1 cited above at page 364 and the case of Ben Zwane vs The Deputy Prime Minister- Civil Case No. 624/2000 (unreported). In the latter authority of Ben Zwane (supra) Masuku J cited the authorities Erasmus, Superior Court Practice at B - 37 to 38 and Harms, Civil Procedure in the Supreme Court at Page 79 to the general proposition that the allegations must appear in the affidavit and the Court must not be left to deduce that it has jurisdiction.

[18] Mr. Magagula for the Applicant argued with all the force in his command that the Court in the present case ought to deduce from the facts that it has jurisdiction. However, I am unable to do so, in view of the clear legal authority on this subject as outlined above. The necessary factual allegations relating to jurisdiction must be made. It is not sufficient to state the legal conclusion of jurisdiction.

[19] Therefore, the point of law in limine on jurisdiction is accordingly upheld.

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[20] In the final analysis, therefore for the afore-going reasons the application is dismissed and costs to follow the event.

JUDGE