THE HIGH COURT OF SWAZILAND

Civil Case No.526/04

In the matter between:

SAMUEL BHEMBE	**1st Applicant**
PETER DLAMINI	**2nd Applicant**

And

HENZERT SHABANGU	**1st Respondent**
PAUL DLAMINI	**2nd Respondent**

CORAM	**MASUKUJ.**
For Applicants	**Mr B.S. Dlamini**
For 1st Respondent	**Mr AM. LukJiele**
For 2nd Respondent	**Mr S.A. Nkosi**

JUDGEMENT

3*" March 2004

Before me is an application filed under a Certificate of Urgency and in which the relief sought is set out hereunder:

1. That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.

2. Pending fmaiisation of this matter, that an order be and is hereby issued directing the 2nd Respondent to stop forth with from using or tampering in whatever form or manner *(sic)* any ofthe unfelled wattle trees sold by 1st Respondent to the Applicants herein.

   2.1. That a Rule Nisi be and is hereby issued calling upon 2nd Respondent to show cause on a date to be determined by the above Honourable Court why prayer (2)

above should not be made final.

That an order be and is hereby issued directing the 1st Respondent to comply with the terms of the Sale Agreement between him and the Applicants in relation to the unfilled wattle trees.

3. Costs of application

4. Further and / or alternative relief. Background

The Applicants claim that in December 2003, they sealed an oral agreement with the 1st Respondent in terms of which the latter sold an acre of wattle trees to them for E55 000.00. In terms ofthe said agreement, the Applicants were required to pay E20, 000.00 as a deposit and were to liquidate the balance in not more than three instalments. The trees, in terms of the agreement, were to be felled within six months.

The Applicants paid only E14, 000.00 as a deposit into the 1st Respondent's bank account but failed to pay the full deposit allegedly dfte to cash flow problems. In view of their handicap, the Applicants approached the 2nd Respondent for financial assistance. On hearing about the request, instead of the 2nd Respondent assisting them, he went to negotiate a contract involving the same trees with the 1st Respondent and offered the latter more money than the Applicants. The 1st Respondent accepted the 2nd Respondent's offer and allowed latter to fell the trees. The Applicants now seek an interdict to prevent the lumbering activities by the 2nd Respondents and further pray that the Court orders the 1st Respondent to abide by the terms of the initial agreement with them.

The matter was brought to my attention by the Deputy Registrar of this Court on the 24th February 2004 and after perusing the papers, I observed that the Respondents are alleged in the application to reside in Nhlangano, a considerable distance from the seat ofthe Court. I accordingly ordered that the matter be set down for hearing on the 27th February, in order to enable the Respondents, not only to timeously receive the papers, but also to seek the assistance of attorneys if they were so inclined.

From the affidavit of service, it is clear that the 1st Respondent was "served on the 23th inThe afternoon, whereas there is no indication of when the 2nd Respondent was served. Two ' issues arise in this matter and they are the following: -

5. Urgency; and

6. Requirements for the grant an interim interdict. I will deal with urgency first.

(a) Urgency

This question is governed by the mandatory provisions of Rule 6 (25) (a) & (b) of the Rules of Court, which read as follows: -

*"(a) In urgent applications the court or judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the Court or Judge, as the case may be, seems fit. **

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. "

There is now a long line of authorities which interpret this sub-Rule. These cases include HUMPHREY H. HENWOOD VS MALOMA COLLIERY AND ANOTHER CASE NO.1623/93, where Dunn J. correctly held that the provisions of this sub-Rule are peremptory. In H.P. ENTERPRISES (PTY) LTD VS NEDBANK (SWAZILAND) LTD CASE NO. 788/99 (unreported) Sapire C.J. (as he then was) had this to say regarding the requirements of the said sub-Rule: -

"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate 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 give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow ".

I am in full agreement with this carefully worded dictum. I also had occasion to examine the requirements of the said sub-Rule in MEGALITH HOLDINGS VS RMS TIBIYO (PTY) LTD & ANOTHER CASE NO. 199/2000 at page 5, where the following appears: -

"The provisions of Ride 6 (25) above exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant <u>shall</u> in the affidavit or petition set forth explicidy the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear ex facie the papers and may not be gleaned from surrounding circumstances prought to the Court's attention from the bar in an embellishing address by the Applicant's counsel. "

The allegations made by the Applicant *in casu* will have to be examined against the yardstick provided by the above cases. In addressing the question of urgency, the Applicants say the following at paragraph 18: -

"The matter is urgent by virtue of the fact that the 2nd Respondent is presently up and down cutting the very same trees which we submit belong to us and will soon be transporting these out of the farm to South Africa. Should the 2'^d^ Respondent begin the process of removing the trees out of the farm, chances of us recovering our loss will be very slim and the order which we may subsequently seek may be rendered hollow. "

The question to determine is whether on the Applicant's papers, the requirements set out above have been addressed. In particular, the issue is whether if immediate relief is not afforded, irreparable harm will eventuate. It is clear *in casu* from the Applicant's own papers

that they breached their agreement by not paying the agreed deposit at the agreed time and this led to the 1st Respondent accepting a new offer. The breacrfby the AppucaritrifTmy view set the whole machinery in motion and in the circumstances, it is clear that the facts giving rise to this urgent application are contrived and are to some extent fanciful. It hardly lies in the mouth of a person who places his hands on a hot stove to complain of being burnt fingers. I say so in full appreciation that the Applicants may not have been put in *mora* by the 1st Respondent. They do not address this issue in their papers though.

Secondly, can it be said that the relevant allegations are made regarding the second requirement that the Applicants will not be afforded substantial redress in due course and that irreparable harm will eventuate as stipulated in the above cited cases? I think not. It is clear ***in casu*** that owing to the Applicant's breach, the 1st Respondent unilaterally entered into a new contract and that the Applicants do have an alternative relief namely, suing for breach of contract and damages. It cannot be true therefor that the Applicants can be said not to be in a position to be afforded substantial redress at a hearing in due course.

I am of the view that the Applicant's allegations fail the litmus test as they are hopelessly inadequate and fall far too short of the high standard required, particularly in Rule 6 (25) (b), as enunciated in the above-cited cases. Prayer 1 must in my view of the attendant circumstances fail. <<

(c) Interim Interdict

C.B. Prest, in his work entitled "Interlocutory Interdicts", 1st Edition, Juta"& Co. 1993, quotes from Corbett J. in L.F. BOSHOFF INVEST IMENT (PTY) LTD VS CAPE TOWN MUNICIPALITY 1969 (2) SA 256 (C) at 267 A - F, where the learned Judge stated the requirements for an interim interdict as follows: -

> *"Briefly these requisites are that the applicant for such temporary relief must show -*
>
> *(a) that the right which is the subject matter of the main action and which he seeks to protect by means of an interim relief is clear or, if not clear, is prima facie established though open to some doubt;*

(a) that; if the right is only prima facie established, there isti well grounded^* — apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;

(b) the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy. " (Prest page 35).

A cursory reading of the Applicants' papers in my view readily shows that not withstanding that they were seeking an interim interdict, the Applicants paid no regard to the above requirements. These requisites should be fully and specifically addressed *ad seriatim* in the papers. *In casu,* the clear right appears to be negatived by the Applicants' breach as shown in the papers. It cannot be said on the papers or even in argument, that the Applicant has a well-grounded apprehension of irreparable harm, nor that he has no other satisfactory remedy. The Applicants' breach may cast a different complexion on the matter and which is unfavourable to the Applicants in addressing the balance of convenience.

In the light of the foregoing, I am un persuaded that the Applicants are entitled to the relief sought, particularly in paragraphs 1 and>2 of the Notice of Motion. The application be and is hereby dismissed with costs.

XS. MASUKU

JUDGFJ