

THE HIGH COURT OF SWAZILAND

ENGKON (PTY) LTD

1<sup>st</sup> Applicant

PIETER HENDRICK ENGELBRECHT

2<sup>nd</sup> Applicant

And

CHEMLOCK GAUTENG (PTY) LTD

1<sup>st</sup> Respondent

ALIKI ENTERPRISES (PTY) Ltd t/a CALSIMENT

2<sup>nd</sup> Respondent

MARTIN AKKER N.O.

3<sup>r</sup> Respondent

Civil Case No. 4239/2005

Coram

S.B. MAPHALALA - J

For the Applicants:MR. J. RODRIQUES

For the Respondents: MR. J. WARING

RULING

(On points of law in limine) (25<sup>th</sup> November 2005)

[1] Serving before court is an application brought under a Certificate of Urgency seeking, inter alia, that the Deputy Sheriff - Martin Akker be directed to release forthwith to Applicant certain movables pending finalisation of the proceedings. These movables being a Lowbed Trailer Registered HHG 246 GP and a W36 Front end loader; that the judgment entered against Applicant on the 14<sup>th</sup> July 2005 be rescinded and set aside; and costs of application.

[2] The Founding affidavit of the Managing Director of the Applicant is filed in support thereto. The sequence of events is outlined in the said affidavit. These goods belonging to the Applicant have been attached by the Deputy Sheriff pursuant to a court order where Applicant was not a party. It is averred

in the said affidavit, inter alia, that Applicant is a South African company registered in that country and also trading there and as such and has no knowledge of these proceedings. The only time Applicant became aware of these proceedings, was when its Managing Director, happened to be at Engkon Swaziland (Pty) Ltd premises in Matsapha when the Deputy Sheriff attached the goods as aforesaid, which goods in effect belong to the Applicant. The goods attached are being leased to Engkon Swaziland by Engkon (Pty) Ltd (the South African company) in terms of a written agreement of lease.

[3] The Respondents have raised points of law in limine in their Answering affidavit of attorney Mr. Joseph Waring. These points are the subject-matter of this judgment. However, before dealing with this point I wish to first address an issue where at the commencement of arguments Mr. Rodriques for the Applicant moved an application from the bar to amend prayer 5 of the Notice of Motion to read "the sale of goods referred to in prayer 2 be suspended with immediate and effective relief pending finalisation of prayer 3 of the Notice of Motion" instead of "granting further and/or alternative relief. Mr. Waring for the Respondent vigorously opposed this application for amendment on the grounds that Applicant has not sought condonation as required by the Rules of this court neither did he seek the consent of the Respondent to such an amendment. Mr. Rodriques replied to this stating that there is no prejudice on the Respondent if Applicant is granted the amendment sought as in the body of the Founding affidavit mention is made of this aspect of the matter, the amendment seeks to address. When Mr. Rodriques was pressed by the court that condonation was not sought he retorted, "We are now applying for condonation". I must say this was a very crude way of seeking the court's indulgence, more particularly where one seeks condonation. However, I am not going to hold this against the Applicant. I have considered the pros and cons of these arguments and agree with Mr. Rodriques that the cardinal principle in such application is the issue of prejudice. In this case I see no prejudice on the Respondent if I grant the said amendment. Therefore, the application for amendment is granted as

prayed for.

[4] Reverting to the subject-matter of this judgment viz the points of law in limine. These are outlined in paragraph 3 of the Respondent's Answering affidavit and are formulated in the following terms:

### 3. In limine

I wish to raise the following point in limine which I believe will resolve the matter without the need to answer to the merits.

#### Urgency

3.1 The Applicants have dismally failed to make substantive allegations of urgency in this matter. Moreso because the Sheriff has not even intimated on a date wherein the movables attached will be sold by Public Auction. Therefore there is no urgency in the matter at all.

3.2 Furthermore if the Applicants allege that they are the rightful owners of the goods attached, then the proper procedure would have been to advise the 3<sup>rd</sup> Respondent of this fact and file an interpleader application to enable the court to determine ownership in the goods.

[5] In argument before me Counsel filed detailed Heads of Arguments for which I am most grateful. The Respondent's argument is premised on a number of local cases dealing with the requirements of Rule 6 (25) (a) and (b) in urgent applications. These include the cases of Humphrey H. Henwood vs Maloma Colliery and another - Civil Case No. 1623/1994 (per Dunn J.), HP. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Limited - Civil Case No. 788/1999 (per Sapire CJ) and that of Megalith Holdings vs RMS Tibiyo (Pty) Ltd and another - Civil Case No. 199/2000 at page 5 (per Masuku J) to the

proposition which was elegantly expressed by Masuku J in *Megalith Holdings* (supra) that "the provisions of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent matter. Firstly, the Applicant shall in the affidavit or petition set forth explicitly 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 the hearing in due course. These must appear ex facie the papers and may not be gleaned from surrounding circumstances brought to the court's attention from the bar in an embellishing address by Applicant's Counsel".

[6] It remains to be seen in casu whether the Applicant has satisfied the peremptory and exacting requirements of the said Rule. The paragraph in the Applicant's Founding affidavit which seeks to address this aspect of the matter is paragraph 18 thereof. The said paragraph reads as follows:

"I submit that these proceedings are urgent in that if they proceed in the normal way in view of the time limits as to service and filing of papers the goods may be sold by public auction to satisfy the judgment before this matter is resolved".

[7] Clearly, on reading the above-cited paragraph the Applicant has dismally failed of satisfy the mandatory provisions of Rule 6 (25) (b) of the Rules. The sub-rule clearly provides that in every affidavit or petition filed in support of an application under (a) of this sub-rule, the Applicant shall set forth explicitly the circumstances which he 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. In casu the averments mentioned in the sub-rule are conspicuously absent, the court is merely invited to consider a legal argument brought forth from the bar to the effect that in terms of Rule 45 (8) of the High Court

Rules the Deputy Sheriff is empowered to cause the goods under attachment to be advertised within 14 days after date of seizure, and sold within 7 days after the publication of the sale in execution. No factual averments are made in the Founding affidavit supporting this legal conclusion. The requirement of the sub-rule that Applicant should advance reasons why it claims it could not be afforded substantial redress at the hearing in due course has not been made, thus disqualifying this application from being enrolled on an urgent basis.

[8] Their Lordships in the Court of Appeal in the case of Nhlavana Maseko et al vs George Mbatha and another, Appeal Case No. 7/2005 stated per Steyn JA at page 2 thereof "our court must be on their guard to protect parties against abuse by these special power". The case in casu is a classical example of this scenario where it is common cause between the parties that the feared sale in execution has not even been advertised.

[9] In the result, for the afore-going reasons the point of law in limine is upheld with costs and I find it not necessary to address the issue raised by Respondent that of interpleader in view of the conclusion I have reached.

S.B. MAPHALALA

JUDGE