

THE HIGH COURT OF SWAZILAND

G.H.B. PLASTIC MANUFACTURING (PTY) LTD

Applicant

And

MFANFIKILE MBINGO

1st Respondent

SIKELELA DLAMINI N.O.

2nd Respondent

In Re:

MFAN'FIKILE MBINGO

Plaintiff

And

G.H.B. PLASTIC MANUFACTURING (PTY) LTD

Defendant

Civil Case NO. 4036/2004

Coram

S.B. MAPHALALALA - J

For the Applicant

MR. W. MABUZA

For the Respondent

MR. F. NHLABATSI

RULING

(On points of law *in limine*) (15th July 2005)

[1] In this matter which came before me under a Certificate of Urgency I granted an interim order in terms of prayers 3 and 4 of the Applicant's Notice of Motion after hearing submissions on points of law *in limine* raised by the Respondent and I intimated that I shall furnish full reasons thereof in due course. Following are those reasons

[2] The Applicant sought for an order in the following terms:

"1. Dispensing with the rules of this Honourable Court regarding notice, service and that the matter be heard as one of urgency and condoning the Applicant for non-compliance thereof.

2. Condoning the Applicant for non-compliance with the said rules of the court.

2. Directing that the sale for the 5th July 2005 under Case Number 4036/2004 be hereby stayed pending finalisation of this matter.

3. That a rule nisi do hereby issue calling upon the first Respondent to show cause on a date and time to be set by the Honourable Court why an order in the following terms should not be made final.

4.1 That the items mentioned in annexure "A" and listed in annexure "B" hereto should be released from attachment immediately and the sale in execution be stopped by the above Honourable Court pending the outcome of application for rescission of judgment pending before court

5. Costs of suit.

6. Further and/or alternative relief."

[3] The Founding affidavit of Applicant's Managing Director Mr. Salim Bagas is filed in support thereto. A number of annexures are also filed of record.

[4] The Respondents have raised points of law *in limine* which are outlined hereunder, thusly:

1. Self-created urgency.

1.1. The Applicant was notified of the sale on 23rd June 2005 by an advertisement in the Swazi Observer. The attachment having been effected on 1st June 2005.

1.2. The Applicant gives no explanation as to why he has taken no action to challenge the sale for 11 days.

1.3. Any urgency has been created by the Applicant's own delay and he cannot rely on such urgency.

Humphrey Henwood vs Maloma Colliery and another - Case No. 1625/93.

2. Redress in due course.

2.1 The Applicant has failed to set out the reasons why he cannot be afforded substantial redress in hearing in due course

2.2 The reasons must appear *ex facie* the paper 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.

3. Form of application.

The Applicant has deviated without any reason from the rules of court regarding the form of notice of application and the application is defective, (see ***Gallagher vs Hormans Transport Lines 1992 (3) S.A. 500W; Herbstein, Civil Practice of the Supreme Court of South Africa*** pages 351 - 352, and the case of ***Ben Zwane vs DPM and another -Civil Case No. 624/2000***)

[5] Having considered all the arguments advanced before me and also all the facts presented in the affidavit evidence I granted a rule *nisi* in terms of prayers 3 and 4 of the Applicant's Notice of Motion. It is trite law that in the granting or withholding of interdicts the court possesses large discretionary powers (see ***CB Prest, The Law & Practice of Interdicts, 1996, Juta & Co. Ltd*** at page 233 and the cases cited thereat). In every situation all the relevant circumstances are taken into account before an interdict is granted. Factors to be considered would be the hardship an interdict, if granted, would inflict upon the Respondents, and the hardship a refusal of an interdict would inflict upon the Applicants (see ***African Consolidated Films Ltd vs Saitta and another 1934 GWLD 55 at 58***). In *casu*, I was persuaded by what is averred in paragraph 5 of the Applicant's Founding affidavit as follows:

"I hereby object to the intended sale *moreso* because there is an application for rescission of judgment before court under Case No. 4036/2005 and which application was heard before his Lordship Justice Matsebula on Friday the 20th May 2005 and judgment was reserved".

[6] Further paragraphs 6.1, 6.2, 6.3, 6.4, 6.5, 6.6 and 6.7 persuaded me that there will be grave hardship on the Applicant if the interim order is refused. In view of this state of affair I allowed the Applicant to dispense with the rules of this court regarding service and that the matter be heard as one of urgency and condoned the Applicant for non-compliance thereof.

[7] The above therefore constitutes my reasons for the interim order I granted on the 5th July 2005.

S.B. MAPHALALA

JUDGE