

**THE HIGH COURT OF SWAZILAND**

**SMILES TRANSPORT (PTY) LTD**

Applicant

**And**

**CHRISILDA'S TRANSPORT (PTY) LTD**

Respondent

Civil Case No. 2062/2006

Coram:	<i>SB. MAPHALALA - J</i>
For the Applicant:	MISS DLAMINI
For the Respondent:	MR. L. M. SIMELANE

**JUDGMENT**

27<sup>th</sup> June 2006

[1] The Applicant has filed an application under a Certificate of Urgency for an order in the following terms:

1. **Dispensing with the normal rules in respect of time limits, notice, forms and service of this Honourable Court and hearing the matter as an urgent one.**

**2. That the Respondent be and is hereby called upon to show cause on Friday the .... Day of June 2006 at 9.30am or so soon thereafter as the matter may be heard why a final order should not be made on the following terms:**

**2.1. That the Respondent be and is hereby instructed to return to the Applicant the following items:**

- a) A Man truck Tractor registered in the name of Sean B. Miles registered as SD 121 KN.
- b) A Henred Trailer registered as SD 823 CN
- c) A Henred Trailer registered as SD 824 CN.

**2.2. That the Deputy Sheriff be and is hereby instructed to take the truck tractor and trailers referred to in 2.1 above and hand over same to Applicant.**

**2.3. That the Swaziland Royal Police be and are hereby authorised to keep the peace during the execution of the order in terms of paragraph 2.1 and 2.2 above.**

**2.4. That the Respondent be and is hereby directed to and ordered to pay costs of this application.**

**2.5. That paragraph 2.1, 2.2 and 2.3 operates with immediate effect as in terms relief**

**3. Granting further and/or alternative relief.**

[2] The application is supported by a Founding affidavit of its Managing Director Mr. Sean B. Miles together with annexures pertinent to the case including annexure "ST1", "ST2", "ST3", "ST4" and "ST5" being registration documents for the truck which is the subject-matter of this dispute.

[3] The Respondent on the other hand has filed a Notice to raise points of law where firstly, it is averred that there is non-joinder and misjoinder in that the executor of the estate of the late Kevin Dupont should have been joined in these proceedings. Secondly, that in the present case there are serious disputes of fact as to the ownership of the truck. Thirdly, it is contended by the Respondent that the matter is not urgent in that the nature of the urgency averred by the Applicant in paragraphs 11 to 11.3 is of a commercial nature. That financial loss is not a ground for urgency. The fact that the Applicant may suffer financial loss by seeking redress in due course does not entitle it to preferential treatment. Lastly, a point has been raised on the authority of the deponent of the Founding affidavit as there is no resolution authorising him to depose the said affidavit on behalf of the Applicant.

[4] In this judgment I shall first deal with the issue of urgency followed by that

of non-joinder and misjoinder and that of the issue of the disputes of fact. Lastly, I will consider the point on the authority to depose to an affidavit.

[5] The urgency relied upon by the Applicant is founded upon the following facts in paragraph 11 thereof;

11. The matter is urgent, as failure to meet the promised services will result in Applicant losing the transportation to other transporters in a cut throat industry.

a) The income from the transport quotas is "essential" to the Applicant who is now bound to pay the monthly lease instalments to Wesbank, the insurance premiums and ensure the general wear and tear of the vehicles.

Further I as the Managing Director of the company am no longer gainfully employed, and herein after will rely fully on remuneration from the Income of Applicant for my livelihood.

b) Due to the blatancy shown by the Respondent in denying the Applicant access to the vehicles, Applicant has no way of ensuring that these highly valued assets will not continue to be used at whim by the Respondent. As it stands the super link trailer is damaged and to-date necessary repairs have not been effected as per the terms of the agreement. This is detrimental to the economics of a small company the size of Applicant, that relies solely on the work ability of such as asset for its survival.

[6] Further in paragraphs 12 and 13 thereof the Applicant avers **that "there is no other relief available with which to, protect the ownership rights of the Applicant and to secure the obtained transport quotas necessary for the continued existence of the company, other than to enrol this matter on a certificate of urgency"**.

In paragraph 13 it is stated that for the reasons stated in the above redress cannot be obtained in due course.

[7] Rule 6 (25) (a) and (b) governs the above cited averments and it provides as follows:

c) In urgent applications the court of Judge may dispense with the forms and service provided for in these rules any 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 of Judge, as the case may be, seems fit.

d) In every affidavit or petition in support of an application under paragraph (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 he could not

be afforded substantial redress at a hearing in due course".

[8] In *Humphrey H. Henwood (supra)* Dunn J correctly held that the above provisions are peremptory. This view has been endorsed in a number of cases of this court and in *Megalith Holdings vs RMS Tibiyo (Pty) Ltd and another - Case No. 199/2000 (unreported)* at page 5 Masuku J made the following trenchant remarks:

"The provisions of Rule 6 (25) (b) exact two obligations on any Applicant in an urgent matter. Firstly, that 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 a 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 the Applicant's Counsel".

[9] The argument advanced by the Respondent in this regard is that the urgency averred by the Applicant in paragraphs 11 - 11.3 is of a commercial nature. It is contended in this regard that financial loss is not a ground for urgency. The fact that the Applicant may suffer financial loss by seeking redress in due course does not entitle it to preferential treatment.

[10] *Miss Dlamini* for the Applicant advanced a contrary argument in this regard relying on the legal authority in *C.B. Prest, The Law's Practice of Interdicts (1996)* to the legal proposition that **"it does not, however, follow that because a matter is one of a commercial nature, it cannot be treated on an urgent basis, the urgency of commercial interests may justify the invocation of Rule 6 (12) no less than any other interests. Each case must depend upon its own circumstances. It follows that where the rights in question are of an obviously substantial value, and the conduct of the unlawful infringer is established, the circumstances of the case may be such as to justify the court enrolling and hearing the matter as one of urgency"**. For this legal position the learned author has cited the case of *Twentieth Century Fox Film Corporation and another vs Anthony Black Films (Pty) Ltd 1982 (3) S.A. 582 (W)* at 658G E-H where Goldstone J held, *inter alia*, that the urgency of commercial interests might justify the invocation of

uniform Rule of Court 6 (12) no less than any other interest. In the circumstances of the present case, I am persuaded by these legal authorities that Applicant *in casu* has satisfied the provisions of Rule 6 (25) (a) and (b) of the High Court Rules.

[11] It follows therefore on the basis of the above that the point of law regarding urgency cannot be sustained.

[12] I now turn to consider the second point of law raised that of nonjoinder and misjoinder. The argument raised by the Respondent in this regard is that the truck and trailers which are the subject-matter of these proceedings are under the position and control of Christopher Dupont in his capacity as the executor of the estate of the late Kevin Dupont. The late Kevin Dupont was a business partner to Sean Miles the Managing Director of the Applicant. A bigger fraction of the instalments for the motor vehicle were paid by the late Kevin Dupont. Consequently the executor of the estate of the late Kevin Dupont should have been joined in these proceedings. The truck and trailers in issue in these proceedings form part of the estate of the late Kevin Dupont. In the circumstances, the Master of the High Court should have been joined or served with this application.

[13] The position adopted by the Applicant to this argument is that the point of law on non-joinder or misjoinder is mis-conceived because Kevin Dupont did not own the truck but shares in the company. In this regard I am inclined to agree with the Applicant that it appears to be so and therefore the point of law raised is without merit.

[14] Turning to the third point of law raised it has been argued for the Respondent in support thereto that there are serious disputes of facts as to the ownership of the truck. Though the truck is registered in the name of Sean Miles, the instalments for the purchase price were made by the late Kevin Dupont. It is further argued that there was a verbal agreement entered into between Applicant and Respondent regarding the use of the truck. Therefore

oral evidence will be required to prove that agreement.

[15] It appears to me that the argument for the Applicant has more substance than that of the Respondent that in the present case there are no disputes of fact in view of proof of ownership in the Blue Book filed by the Applicant. For this reason I have come to the view that this point of law is without merit.

[16] The last point of law raised in the Notice to raise points of law is that deponent does not have authority to dispose on behalf of the Applicant. There is no resolution authorising him to depose to the affidavit on behalf of the Applicant. On this point Counsel for the Applicant stated that such authority will be filed in due course and having filed the said resolution the point of law raised falls away.

[17] In the result for the afore-going reasons, the points of law raised are dismissed and a rule *nisi* to issue in terms of prayer 2 of the Notice of Motion.

**S.B. MAPHALALA  
JUDGE**