IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.23/06

In the matter between:

SIBUSISO DLAMINI **APPLICANT**

AND

JULY MAGONGO **1st RESPONDENT**

NELISIWE MAGONGO **2nd RESPONDENT**

CORAM: MATSEBULA J

FOR THE APPLICANT: MR. MLANGENI

FOR THE RESPONDENTS: MR. NZIMA

RULING ON PRELIMINARY POINTS
FEBRUARY 2006

Under a certificate of urgency the applicant filed a notice of application requesting the court to grant it the following prayers:-

1. That the normal rules of court as to notice time limits, and procedure be and are hereby dispensed with and the matter be heard as an urgent one.
2. That the first and second respondents be and are hereby directed jointly and/or severally to forthwith release to the applicant his two minor children namely L and P D.
3. Granting costs of suit.
4. Granting further and/or alternative relief.

The reason for the urgency is attested to in paragraph 16 of applicant's founding affidavit which reads:-

"16. The matter is urgent because I have already made arrangements for the older child to start school at Mavukutfu Community School. It is common knowledge that the schools have already started. The application I moved earlier under case no.4584 was unsuccessful due to a number of technicalities.

17. I submit that I cannot be afforded substantial redress in due course because who

should be at school will have missed, and lost time can never be recovered.

The respondents filed their notice of intention to oppose and first respondent filed an answering affidavit on the 31st January 2006. First respondent raised certain points in limine in which he challenged the urgency of the matter as follows:
2.1. The affidavit in support of the application lacks the necessary averments and/or factual circumstances to meet the requirements of Rule 6(25)(a) and (b) of the Rules of Court.
2.2. The matter is pending before his Honourable Court and therefore the doctrine of lis pendis comes into operation. First respondent refers to case no.4548/05.

At the hearing of the matter counsel for first and second respondents handed in case no.4548/05. 2.3. (a) the application before court is pregnant with disputes of facts which are not capable to be resolved on the papers as they stand. The applicant is aware that the purported marriage between my late daughter and himself is denied and/or not know as stated under case no.4548/05. Applicant failed to annex evidence of marriage certificate and/or supporting evidence from the marriage officer, (b) It is trite that in application of this nature a report from a Social Welfare Department is necessary so that the court can decide the best interest of the child, having perused the recommendations of the Social Welfare Department. In this matter such a report is lacking and therefore it is submitted that the application is premature and should be dismissed with costs.

First and second respondents pray that in view of the above reasons the application be dismissed with costs. Mr. Mlangeni in turn argued that the points raised are as a dilatory mechanism. He argued that the question of urgency has been overtaken by events. Respondents have filed their pleas and the parties should have been arguing the matter on the merits.

Mr. Mlangeni also argued that urgency is not about averments lent about substance. If I understood Mr. Mlangeni's argument correctly is that the court should direct its focus on the substances of the contents of applicant's affidavit and not what it is said why the matter is urgent; and why it cannot be heard in due course.

As regards ***lis pendis*** Mr. Mlangeni argued that the matter having been withdrawn was at an end and as good as dead. However, Mr. Mlangeni added, if it calls for that he was prepared to withdraw the matter under case no.4584/05. As regards the question of whether or not a dispute of facts is present, Mr. Mlangeni argued that dispute of facts were present in the case under case no.4584/05. By this argument I took it he meant the merits in case no.4584/05 were different from the merits in the present case i.e. case no.231/06. However, Mr. Mlangeni was quick to add that if it came to a push he was prepared to formally have case no.4584/05 withdrawn.

Mr Nzima informed the court that it was never formally withdrawn. What was withdrawn was a contempt of court charge.

I now turn to deal with the question of urgency.

The failure to comply with the rule in matters brought under a certificate of urgency cannot be overemphasized. In the recent matter of **APPEAL CASE NO.7/2005 NH LAV AN A MASEKO AND OTHERS VS GEORGE MBATHA AND ANOTHER** - a judgment handed down by Zietsman JA with Steyn JA concurring and adding a few comments.

Justice Steyn of the Court of Appeal said the following:
"(3) In several cases before us and in this current matter also the High Court has allowed applications to proceed as matters of urgency where the facts do not justify such a departure from the Rules. Moreover the certificates of urgency submitted by counsel as in this case - are a bland and do not comply with the requirements of sub-rule 6(1)(b)."

The learned judge of the Court of Appeal then proceeded to quote in full the certificate of urgency by counsel concerned. For the purpose of this judgment, I do not propose to repeat the contents of the certificate of urgency; suffice that counsel in that matter states that he has perused the notice of motion together with the founding affidavit and certifies that the allegations made therein justify the dispensing with the time limits provided by the Rules of Court and hear this matter as a matter of urgency.

The learned Judge of the Court of Appeal states:
"As is evidence from the contents of this affidavit no attempt has been made by the deponent to '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."

I find in the present case also the certificate of urgency falls far too short of the requirements.

I find further that the matter is ***lis pendes*** and further that there are serious dispute of facts which cannot be resolved on paper.

It follows that the application is dismissed with costs, the court upholding the preliminary points.

J.M. MATSEBULA

Judge