THE HIGH COURT OF SWAZILAND

JACQUELINE TAFT

Applicant

And

NIGEL ALFRED TAFT

1st Respondent

M. ROZWADOWSKI

2nd Respondent

SMITH GCINA

3rd Respondent

Civil Case No. 268/2006

Coram: S.B. MAP HAL ALA – J

For the Applicant: MRS J. CURRIE
For the Respondents: MR. B. MAGAGULA

JUDGMENT

(2nd February 2006)

[1] The Applicant has filed an urgent application for an order in the following terms:

1. That the usual forms and service relating to the institution of proceedings be dispensing with and that this matter be heard as a matter of urgency.
2. That the Applicant's non-compliance with the Rules relating to the above said forms and service be condoned
3. That a rule *nisi* due issued returnable on a date and time to be determined by the above Honourable Court why an order in the following terms should not be final:

3.1. Ordering the 1st and 2nd Respondents to forthwith furnish the Applicant with a copy of the Deed of Sale entered into between Tea Road View (Pty) Limited, represented by the lsl Respondent and the 3rd Respondent.

3.2. In the event of Applicant agreeing to the aforesaid sale, that 505 of the proceeds are paid by the 3rd Respondent to the Applicant's attorneys within 3 days of receipt thereof.

4.Interdicting the 1st Respondent from selling any further property registered in the name of Tea Road View without the consent of the Applicant.

4.1. Granting costs on the scale as between attorney and own client against 1st and 2nd Respondents.

4.2. That the above order operates with immediate interim effect pending the outcome of the application.

[2] The said application is supported by the Founding affidavit of the Applicant. Various annexures are also filed in support thereto.

[3] In view of the urgency in which the matter has been brought the Respondent has not filed any opposing affidavits but has advanced points of law. These points are the subject-matter of this judgment. The points are formulated as follows:

1. Applicant has failed to set forth explicitly or at all, the circumstances she avers renders the matter urgent and in particular why she claims she cannot be afforded substantial redress in due course, as per the requirements of Rule 6 (25) (b).

1.1. In the entire Founding affidavit of the Applicant, there is nowhere where she evens makes an attempt to tell the court why this matter is urgent. Secondly, she does not even address the second leg of the requirement of Rule 6 (25) (b), which is why she claims she cannot be afforded substantial redress in due course.

1.2. The Applicant has barely given the lsl Respondent anytime to file any papers and come to court in this matter. The application was served on the 1st Respondent's present attorneys at around 3.30pm on Friday afternoon, yet in the Notice of Motion they have made provision that we should file a Notice of Intention to Oppose by 13.00 hours, on the 27th of January 2006. Further down in paragraph (b) of the Applicant states that, if no such Notice of Intention to oppose is given the application will be made on the 27th of January 2006, yet on the Notice of Motion the provision for date of hearing is the 30lh January 2006.

The Applicant's papers are in disarray and very confusing. Even by extension, if it assumed that we should come to court by Monday morning, there are no time limits stated within which we should file our Notice of Intention to Oppose and subsequent papers. See *Ben Zwane vs The Deputy Prime Minister - Civil Case No. 624/2000 (unreported).*

2. There has been a non-joiner of an interested party in this matter, who is Tea Road View (Pty) Limited. The court will note that the relief which the Applicant seeks is that, the 1st and 2nd Respondents must furnish the Applicant with a copy of the Deed of Sale entered in between Tea Road View and the 3rd Respondent. Tea Road View itself has not been cited in this matter, yet the relief sought pertains it in one way or the other. The prayer sought in paragraph 4 as well also pertains to Tea Road View (Pty) Limited. The latter has an interest in the nature of the relief sought, it is imperative that it should have been cited.

3. The nature of Applicant's relief sought in paragraph 3.2 of her Notice of Motion is liquid in nature, yet she has elected to use motion proceedings. In the circumstances motion proceedings are not competent for a claim that is liquid in nature. Those claims are reserved for action proceedings.

4. The Applicant has brought this application prematurely. In the sense that he has not placed the Applicant *in mora,* before rushing to court to seek an order against him.

4.1 One of the relief sought by the Applicant is to order the 1st and 2nd Respondents to forthwith furnish the Applicant with a copy of the Deed of Sale, entered into Tea Road View (Pty) Limited. There is nowhere in the Applicant's Founding affidavit where she avers or demonstrates before court that she has previously asked for the Deed of Sale, in particular from the T1 Respondent. Before one can rush to this above Honourable Court for any relief or claim, she must demonstrate that the person against whom the relief is sought has been placed *in mora.* In the present case Applicant is supposed to demonstrate that, she has previously asked for the Deed of Sale from 1st Respondent and he has refused to furnish her.

[4] I heard submissions on the above points on Monday the 30th January 2006, and reserved my ruling to today the 2nd February 2006. Following is the said judgment

[5] According to *Mr. Magagiila's* Heads of Arguments the above cited issues fall under a number of paragraphs, namely i) urgency, ii) that the 1st Respondent has not been placed *in mora* by the Applicant, iii) the Applicant has failed to cite an interested party in these proceedings, being Tea Road View (Pty) Ltd iv) paragraphs 7.2 to 8.8. must be struck off inclusive of annexure "KT2" and v) the Applicant has failed to satisfy all the requirements of a final interdict. I shall also follow the same format and treat these questions *ad seriatim* hereinunder thusly:

i) Urgency.

[6] The 1st Respondent contends that a proper case has not been made for urgency in this matter. In that the Applicant has not set out explicitly the circumstances which render the matter urgent, as required by Rule 6 (25) (a) and (b) of the High Court Rules.

[7] Rule 6 (25) (a) and (b) reads as follows:

> (25)(a) In urgent applications the court or a 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 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.**

[8] There is a plethora of decided cases in South Africa and this court concerning the requirements of Rule 6 (25) (a) and (b) to the effect that the provisions of the Rule are peremptory and that they must be alleged and satisfied, (see *Humphrey H. Henwood vs Maloma Courier and another - Civil Case No. 1623/1995.*

[9] Sapire CJ (as he then was) in the case of *H.P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Limited, Civil case No. 788/1999* had this to say on the subject:

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

[10] It remains to be seen in *casu* whether the Applicant has fulfilled the above-cited requirements. The proof of whether these requirements have been met is on the Applicant's Founding affidavit.

[11] When one peruses the Applicant's Founding affidavit in an attempt to find the reasoiyTounding urgency, there is nowhere where the Applicant explicitly states why this matter is urgent. When one scrutinises the affidavit in an attempt to find reasons of urgency, one has come across the following paragraph 12.1.3 which states the following: **"It is abundantly clear from the afore-going that the 1st and** 2nd **Respondents intend to sell the property without my consent for whatever reason and possibly defraud me of my only assets"**

[12] The reasons why Applicant avers that she cannot be afforded a substantial redress in due course are found in paragraph 16 of her Founding affidavit as follows: **"I am apprehensive that if the property in question is sold without my consent and the proceeds paid to** the **1st Respondent he will defraud me of my share as to-**date"

[13] On paragraph 12.1.3 *(supra)* it is my considered view that this paragraph does not satisfy the requirements of the Rule in the sense that the relief that is sought by the Applicant is not to stop the sale *per se,* but it is for an order that the 1st and 2nd Respondents forthwith furnish her with a copy of the Deed of Sale. I agree with *Mr. Magagula* that the

flaw with this is that there is no causal connection between the contents of this paragraph and the availability of the Deed of Sale. Furthermore, it would also appear to me that there is another flaw in the said paragraph in the sense that, in her own words she is relying on speculation. There is no allegation in her affidavits that the 1st Respondent intends to sell her share.

[14] On paragraph 16 stated above the difficulty with this averment is that the Applicant does not seek before this court that the sale be interdicted or stopped. Therefore according to her there is nothing wrong with the sale as such.

[15] Further, paragraphs 19, 20, 21 and 22 on urgency fall far too short in satisfying the exacting requirements of the rule and the reasons given in paragraphs 12.1.3 and 16 also apply in relation to these paragraphs.

[16] In view of the above therefore, it is my considered view that the Applicant has dismally failed to meet the peremptory requirements of the Rule as stated above and this court is unable to enrol the said application under the Rule. Therefore, it is not necessary to consider the other points raised *in limine*. I must also state *en passant* that it emerged during arguments that the Deed of Sale is in the possession of the Respondents and there are no objections in forwarding same to the Applicant.

[17] On the question of costs, it is my considered view that costs should follow the event.

[18] In the result, for the afore-going reasons the application is dismissed with costs (costs on the ordinary scale).

S.B. MAPHALALA

JUDGE