

**THE HIGH COURT OF SWAZILAND
MARHABA INVESTMENTS (PTY) LTD**

Applicant

And

THANDI GININDZA

1st Respondent

THE DEPUTY SHERIFF MANZINI

2nd Respondent

Civil Case No. 516/2006

Coram	S.B. MAPHALALA-J
For the Applicant	MR. M. THWALA
For the Respondent	MR. M. SIMELANE

JUDGMENT

(14th June 2006)

[1] The Applicant by way of urgency has applied before this court for an order to protect her business interests in a supermarket known as Shopper's Stop Supermarket from the Deputy Sheriff of Manzini who had called thereat to demand satisfaction of a writ of execution dated the 20th March 2006. The prayers thereof seek the following relief:

1. That the usual time limits and forms of service prescribed by the Rules of this Honourable court relating to the institution of proceedings be dispensed with and that this matter be heard as an urgent one;
2. That the execution of the writ of execution issued out of this Honourable Court and dated the 20th march 2006, be stayed pending the outcome of prayer 3 below;
3. Enstopping the Deputy Sheriff, Manzini from demanding satisfaction of the writ of execution dated the

20th March 2006 from the Applicant and/or its business establishment known as Shopper's Stop Super Market situate upon Remainder of Erf 78, Nkoseluhlaza Street, Manzini;

4. That orders 2 and 3 operate with interim effect;

5. Costs of suit only in the event this application is opposed;

6. Such further and/or alternative relief as shall appear to the court to be meet.

[2] The Respondent has in answer thereto filed a Notice to raise points of law, the essence of which is to attack the lack of urgency and the noncompliance with the Insolvent Act No. 81 of 1955 and the Registration of Business Act No. 42 of 1933.

[3] Furthermore, Respondent contends that estoppel cannot be used as a weapon of attack, but is raised as a defence. That Applicant has not set out any requirements for the estoppel relief that it is seeking. On this last point it appears to me that Applicant does not rely on estoppel in these proceedings but the word "estopping" in prayer 3 of its Notice of Motion is used in the sense of "restraining" or "stopping" the Deputy Sheriff from demanding satisfaction of the writ of execution and not "estoppel" in the legal sense. Therefore only two points of law remain, namely the issue of urgency and the argument that the sale does not comply with the Insolvent Act and the Registration of Business Act. I shall therefore proceed to determine these two points *ad seriatim* as they appear in the Notice to raise points of law.

[4] On the issue of urgency, it is contended on behalf of the Applicant that the matter is not urgent at all. Firstly, that Applicant had stated in paragraph 8 of the Founding affidavit that the Deputy Sheriff came to the shop in April 2006, and therefore the Applicant has been aware of the writ for a least a period of three weeks. The Applicant does not state why it took so long to bring this application if it was urgent. Secondly. Applicant states at paragraph 13 that the Deputy Sheriff is expected to return to the shop. The Applicant has not set out any basis for the belief that the Deputy Sheriff is expected to return. Therefore on the basis of this paragraph there is no actual harm presently being suffered by the Applicant.

[5] Thirdly, in paragraphs 13.1 and 13.2 the Applicant avers that it will suffer prejudice if goods are removed from the shop. This cannot be a ground of urgency because in every attachment removal of goods is inherent (see *Twentieth Century Fox*

Film Corporation vs Authority Black Films (Pty) Ltd 1982 (3) S.A. 582W. Fourthly and lastly, on this point it is contended for the Respondents that the Applicant has not complied with the mandatory requirements of Rule 6 (25) (b) of the High Court Rules by failing to state why Applicant claims he cannot be afforded substantial redress at a hearing in due course, (see *Humphrey H. Henwood vs Colliery and another - High Court Case No. 1623/95*).

[6] On the other hand the Applicant contends that urgency does not relate only to some threat to life or liberty but the urgency of commercial interests may justify the invocation of the sub-rule no less than any other interests. In this regard the court was referred to what is said by *Erasmus on Superior Court Practice* at page B1 - 54A.

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

a) **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.**

b) **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] it now remains to be seen whether the Applicant in the present case has complied with the above requirements which are mandatory. In addressing the question of urgency, the Applicant states the following at paragraph 13 of the Founding affidavit:

13. The matter is urgent by virtue of the act that 2nd Respondent is expected to return to the shop, any time, to remove the stock and fittings that he attached pursuant to the writ.

13.1 Further, the supermarket is a relatively new establishment, and as such both its goodwill and stock-in-trade will stand to suffer if goods worth E30, 000-00 are removed from the floor. 13.2 The removal of stock in excess of E30. 000-00 stands to prejudice the business of the Applicant for debt that it never incurred and no remedy can possibly be afforded to the Applicant to redress the damages save by the way of this application.

[10] Clearly on the above cited averments it cannot be said Applicant claims it could not be afforded substantial redress at a hearing in due course as required by Rule 6 (25) (b), in particular. The above-cited paragraphs do not fulfil the mandatory requirements of the Rule as stated in the cases I have cited above in paragraph [8] of this judgment. Therefore on this point the application ought to be dismissed. It appears to me further that Counsel for the Respondent is correct that Applicant states in paragraph 8 of its Founding affidavit that the Deputy Sheriff came to the shop sometime in April 2006. Clearly the Applicant has been aware of the writ for at least a period of three weeks. The Applicant does not state why it took so long to bring this application if there was such urgency.

[11] In view of the above I find that it would be purely academic to address the remaining point of law raised by the Respondent.

[12] In the result, for the afore-going reasons the points of law regarding urgency is upheld with costs.

S.B. MAPHALALA

JUDGE