**IN THE HIGH COURT OF SWAZILAND**

**Civil Case No. 2735/2006**

**LYDIA SIMELANE** — **Applicant 1st**

**GUGULETHU HLANDZE** — **Respondent 2nd**

**C.J. LITTLER & COMPANY** — **Respondent 3rd**

**MENZI DLAMINI N.O.** — **Respondent**

**In Re:**

**GUGULETHU HLANDZE** — **Plaintiff**

**LYDIA SIMELANE** — **Defendant**

**Coram** — **S.B. MAPHALALA - J MR.**

**For the Applicant For the Respondents** — **M. SIMELANE MISS X. HLATSHWAYO**

**JUDGMENT**

**13th April 2007**

**[1] Before court is an application brought under a Certificate of Urgency for an order in the following terms:**

> **1. That the rules relating to forms, service and time limits be and hereby dispensed with and hear this matter as one of urgency.**

2. **That a rule nisi issue calling upon the Respondents to show cause why prayer 3 and 4 should not be made final on Friday the 27lh October 2006.**
3. **That the default judgment granted on the 25th August 2006 be rescinded.**
4. **That the 3rd Respondent returns the Mazda van registered SD 388 GG to Applicant forthwith.**
5. **That leave be granted to Applicant to defend the main matter.**
6. **Cost of suit.**
7. **Further or alternative relief.**

**[2] The application is founded on an affidavit by the Applicant herself supported by a number of annexures being LSI, LS2, LS3, LS4 and LS5.**

**[3] The 2nd Respondent opposes the granting of this application and has filed an opposing affidavit of Cecil John Littler who also has attached a Deed of Sale thereto. In the said opposing affidavit a number of points** *in limine* **have been raised. These points are the subject-matter of this judgment. They read as follows:**

**In limine**

**3.1 Urgency**

**3.1.1** I **verily believe that the matter is not urgent because judgment was granted on the 25th August 2006.**

8. I **verily believe that the present proceedings are solely brought before court to delay and/or frustrate the legal process of the sale.**
9. I **aver that the Applicant was always aware of the proceedings and neglected to defend.**
10. **I submit that the urgency is self-created.**

11. **I verily believe that the requirements of Rule 6 (25) (b) have not been satisfied by the Applicant, in as far as she does not prove that she cannot be afforded substantial redress and/or alternative redress in due course, much as damages can be awarded, if the Applicant's case were to be upheld. Legal authorities in support hereof will be presented in court during the hearing.**

**3.2 Dispute of fact**

12. **I am advised and verily believe that the Applicant ought to have proceeded by way of action, since she was at all times aware and also admitting in her papers that there is a dispute of fact about the way the claim of elO, 000-00 (Ten Thousand Emalangeni) arose.**

13. **I am advised and verily believe that the dispute in relation to the said amount is one that cannot be resolved on the papers without aide of oral evidence. (Full arguments in this regard shall be advanced on my behalf at the hearing).**

**3.3. Requirements of a rescission application.**

**The Applicant has failed to set out the terms on which she is moving a rescission application, that is whether it is in terms of the rules of court or in terms of the common law.**

14. **She fails to allege a bona fide defence to the claim upon which the judgment was obtained.**

15. **She acknowledges indebtedness but is only aggrieved by that she is not allowed to pay in instalments.**

**3.3.3. She does not satisfactorily state her default was not willful or even allege that it was not willful. (Arguments will be advanced at the hearing in this regard).**

[4]I shall therefore address the above cited points *ad seriatim,* thusly:

1. <u>Urgency</u>

**[5] As regards this aspect of the matter the Applicant in paragraphs 23 to 27 of the founding affidavit avers that the matter is urgent by virtue of the fact that the 3rd Respondent will sell his car on the 13th October 2006, who is any event is not entitled to do so because the 1st Respondent has no right to do so. He states further that he uses the motor vehicle to earn a living thus if same is sold his children and**

**granddaughters who are under his care stand to suffer incredibly. Further that he will suffer irreparable harm if the auction goes ahead because the motor vehicle is now his source of livelihood which he uses for a hawking business since he is unemployed. He also transports his paraplegic granddaughter whose mother passed away to hospital now and again. He will not be able to buy another motor vehicle taking into account that same are expensive and since he is not employed and that will be a tall order.**

**[6] The contention by the 1st Respondent in this regard is that the matter is not urgent because judgment was granted on the 25th August 2006. The present proceedings are solely brought before court to delay and/or frustrate the legal process of the sale. The Applicant was always aware of the proceedings and neglected to defend. The urgency therefore is self-created. The requirements of Rule 6 (25) (b) have not been satisfied by the Applicant ,is as far as she does not prove that she cannot be afforded substantial redress and/or alternative redress in due course, much as damages can be awarded, if the Applicant's case were to be upheld.**

**[7] On the other hand on this question it was contended for the Applicant that urgency has been set out at paragraph 23, 24, 25 and 26 of the Founding affidavit. The application cannot be defeated on the basis that the Applicant after receipt of the summons did not file a Notice of Intention to Defend.**

**[8] I have considered the affidavits filed of record and also the arguments of the parties and I have come to the considered view that this point** *in limine* **cannot succeed. I have found that the Applicant averments at paragraph 23 to 26 proves urgency as required by Rule 6 (25) (c) and (2) of the High Court Rules.**

1. **<u>Dispute of Fact</u>.**

**[9] It is contended for the Respondent in this regard that there is a dispute of fact in that Applicant was at all times aware and also admitted in her papers that there is a dispute of fact about the way the claim for E10, 000-00 arose. According to the Respondent the dispute in relation to the said amount is one that cannot be resolved on the papers without the aide of oral evidence.**

**[10] The Applicant has taken the position that what the 2nd respondent claims to be a dispute of fact is in fact what could be termed a ground for rescission. Had the court been made aware that the alleged loan of E10, 000-00 arose from a Deed of Sale which had a clause that exonerates the Applicant from paying the said amount it would have not granted default judgment.**

**[11] I have considered the above arguments and I have come to the considered view that** *Miss Hlatshwayo* **for the Respondent is correct that here there is a dispute of fact as stated in paragraph [9]** *supra.*

S.B. MAPHALALA

JUDGE

**[12] In the result, for the afore-going reasons the point of law** *in limine* **on the dispute of fact succeeds with costs.**