

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1032/07

In the matter between:

SIVILINO TEMBE

APPLICANT

and

SOFANA DESMOND KHUMALO

RESPONDENT

CORAM

Q.M. MABUZA - JUDGE

FOR APPLICANT

: MR. NZIMA

FOR RESPONDENT

: MR. NDLOVU

JUDGMENT 6/6/07

[1] This **ex parte** application came before this Court on a certificate of urgency and a **rule nisi** returnable on the 13/4/07 was issued. The court order was to the following effect.

(3) the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it"

See also Herbstein and Van Winsen: The Civil practice of the Supreme Court of South Africa (4th edition) at page 367. "***Although, generally, an applicant is entitled to embody in his supporting affidavit only allegations relevant to the establishment of his right, when he is bringing an ex-parte application in which relief is claimed another party he must make full disclosure of all material facts that might affect the granting or otherwise of an order ex-parte. The utmost good faith must be observed by litigants making ex-parte applications in placing material facts before the court, so much that if an order is made upon an ex-parte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the***

order aside

[15] Another point raised by Respondent's Counsel is that the Applicant failed to disclose that there were ongoing negotiations in respect of the balance owing. And that the Applicant failed to disclose the reasons why the Respondent was in arrears. I do wish to deal much on these submissions as they are contentious and under normal circumstances would be referred to evidence.

[16] The final relevant point raised by the Respondent's Counsel is that the Applicants application does not comply with the requirements relating to urgency. The requirements relating to urgency were set out by Dunn J in **Humphrey Henwood v Maloma Colliery and Another** Civil Case No. 1623/94. These are well known as this case forms a backdrop thereto.

[17] They were re-affirmed by Masuku J in **Megalith Holdings v RMS Tibiyo and Another** Civil Case No. 199/2000 page:

"firstly, applicant shall in his affidavit or petition set forth explicitly the circumstance 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 future course. These must appear ex facie the papers and may not be gleaned from surrounding circumstances brought to the courts attention from the bar in an embellishing address by applicants counsel."

See also **Protonics Networking Co-operation v Emcom Africa (Pty) Ltd and Themba Dlamini Case 852/2000**

Applicants

Disclosure

In response Applicant's Attorney states that there was no need to make reference to the earlier case. All that was needed was for Applicant to exhibit a cause of action to enable the Court to grant the order. I disagree. Had the Applicant referred the court to the earlier proceedings several things would have emerged viz:

That there was no urgency in the matter.

That the Respondent had paid well over three quarters of the amount.

That the Applicant would have had redress in due