IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE NO. 1543/2008

NHLANGANO TOWN COUNCIL Applicant

And

RUDOLF DIAMOND Respondent

In Re:

RUDOLF DIAMOND Plaintiff

And

NHLANGANO TOWN COUNCIL 1st Defendant

JABU MOTSA 2nd Defendant

Coram: S.B. MAPHALALA - J

For the Applicant: MR. Z. JELE

For the Respondent: MR. S. MNGOMEZULU

JUDGMENT

27th June 2008

[1] The Applicant being the Nhlangano Town Council has filed this urgent application for an order uplifting the "bar" that has been filed of record in these proceedings and directing that the Applicant be given leave to file a plea in this matter within five (5) days of the grant of this order. In prayer 4 thereof granting costs in the event of opposition thereto.

[2] The Founding affidavit of one Mandla Mdluli who is the Town Clerk of the Applicant is filed. In the said affidavit the material facts of the matter are outlined. It is important to outline these facts for a better understanding of the question before the court. The said sequence of events is outlined at paragraph 2 of the Applicant's Founding affidavit as follows:

2. The purpose of this application.

2.1. On or about the 5th of May 2008, the Applicant was served with a combined summons in the above matter.

2.2. Upon receipt of the summons, I promptly instructed the Applicant's then attorneys, Shilubane Maseko and Partners to defend the matter. They (attorneys) entered an appearance to defend on behalf of the Applicant on the same day.

2.3. Subsequently, I caused the full instructions relating to the defence, to be sent to the attorneys, regarding the history of the matter and the Applicant's defence.

2.4. I did not hear anything further from the attorneys until the 17th of June 2008, wherein we were advised that our attorneys (Shilubane Maseko and Partners) had a conflict and could not proceed with the matter. The Applicant's Accountant, liaised with Mr. Shilubane in this respect, and it was agreed that they (Shilubane Maseko and Partners) would withdraw as attorneys of record.

2.5. On the same date, Shilubane Maseko and Partners wrote to us advising us that the matter had been set down for judgment on the 20* June 2008. No further details were communicated to us, and we did not understand as to what the judgment was for or what it was about.

2.6. Pursuant to their withdrawal, and on the 18* of June 2008, we instructed our present attorneys, Robinson Bertram to represent us in this matter.

2.7. It is upon an investigation by Robinson Bertram attorneys, that it was established that a Notice of Bar had been issued on the 5* of June 2008, calling upon the Applicant to file its plea within three (3) days. It was further revealed that the plea was not filed and as such an application had been set down for Friday the 20th June 2008, wherein an order for the dismissal of the Applicant's defence was to be obtained.

[3] The Respondent has raised a point of law on the following terms:

1. **AD URGENCY**

The Applicant had failed to set forth explicitly the reasons why it claims it could not be afforded substantial relief at a hearing in due course and/or has failed to make specific allegations of fact which demonstrate that the non observance of the normal procedures and time limits will result in irreparable loss or irreversible deterioration in the situation giving rise to the litigation as is required by Rule 6 (25) (b) of the Rules of the above Honourable Court.

The Applicant has a substantial adequate alternative remedy in the form of an action for damages against the Respondent.

[4] The present judgment is concerned with the determination of the above-cited point of law.

[5] In argument before me both Counsel filed very comprehensive Heads of Arguments to which I am grateful to Counsel for their high sense professionalism shown.

[6] Counsel for the Respondent premised his arguments on the leading case of *Humphrey H. Henwood vs Maloma Colliery and Another - High Court Case No. 1623/2004* to the proposition that the provisions of Rule 6 (25) (b) are peremptory. The court was further referred to the leading South African case of *Luna Meubelueraardgers vs Makin and Another 1977 (4) S.A. 135 (W)* at *137* where it was held that:

"Practitioners should carefully analyse the facts of each case to determine, for purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12) (d) will not do and an Applicant must make out a case in the Founding Affidavit to justify the particular extent of departure from the norm, which is involved in the time and day for which the matter be set down".

[7] The court was further referred to the decision in *HP Enterprises (Pty) Ltd vs Nedbank Swaziland Ltd High Court Case No. 788/1999, Megalith Holdings vs RMS Tibiyo (Pty) Ltd and*

Another - High Court Case No. 199/2000 and that of *Winnie Muir (born Howard) vs Siboniso Clement Dlamini and two others - High Court Case No. 368/1999* to the general proposition that the Applicant is not entitled (having regard that they were served with summons in April) to now rush to court and seek the order sought thereby depriving the Respondents the time afforded to him by the Rules.

[8] As I have stated earlier on, the Applicant's attorney also filed very comprehensive Heads of Arguments and cited the case of *Megalith Holdings (supra).* After hearing both arguments of Counsel in this matter I am inclined to agree with Counsel for the Applicant that urgency has been proved to satisfy the requirements of Rule 6 (25) (a) and (b). It appears to be that on the facts urgency has been proved. The facts of the matter reveal that the matter was set down for hearing on the 20th June 2008. The erstwhile attorneys withdrew on the 19th June 2008. If the Applicant had observed the normal time limits, the judgment would be granted against it, a situation that is untenable, as the Applicant would then have to file a rescission application. On these facts the first requirement has been fulfilled.

[9] On the second requirement I am again in agreement with Applicant's Counsel as stated in paragraph 4.2 of his Heads of Arguments.

[10] In the result, for the afore-going reasons the points *in limine by* the Respondent is dismissed and the matter to proceed on the merits of the application. Costs to be costs in the main application.

S.B. MAPHALALA

JUDGE