IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPLIC. NO. 1437/2011

In the matter between:

NKOMONDZE ATTORNEYS **Applicant**

And

THE MOTOR VEHICLE ACCIDENT FUND **1st**

Respondent

GIBHITHA LION TSABEDZE **2nd**

Respondent

Date of hearing: 27 April, 2011

Date of judgment: 03 May, 2011

Mr. Attorney M. Nkomondze for the Applicant

No appearance for the Respondents

J U D G M E N T

CASE SUMMARY

PRACTICE: Urgent application for payment of funds allegedly due for services rendered. Whether financial hardship constitutes a ground for invocation of urgency procedures. Whether issuance of summons does not provide substantial relief in due course. Inadvisability of attorneys or those in their

employ to serve applications initiating proceedings where the attorneys' firms are applicants. **ETHICS:** Advisability of claims for payment of fees in relation to persons under legal disability to be taxed or submitted to Fees Committee for consideration and assessment. Application dismissed.

MASUKU J.

[1] This is an unusual and in my judicial experience, an unprecedented application. It is brought by a firm of attorneys on an urgent basis. They seek an order compelling the 1st respondent to pay an amount of E72,766-00.

[2] This amount, it is claimed, is in respect of fees due to the applicant from the 1st respondent. The application was not opposed by either of the respondents notwithstanding service, an issue I shall comment on in due course.

[3] The circumstances under which the amount in question is allegedly due to the applicant is described as follows: The applicant alleges that it was instructed to act on behalf of a minor child, Siboniso Tsabedze, who was involved in a motor vehicle accident and sustained serious injuries as a result. The child's father, Bhekithemba Vernon Tsabedze, who initiated the claim unfortunately died and the applicant was instructed to apply for the appointment of the 2nd respondent by this

Court as a *curator ad litem,* an application that was granted by this Court on 4 June, 2010.

[4] The applicant further alleges that an agreement was reached with the minor's curator that on account of the family's indigence, the fees due would be settled from the amount that would be adjudged due by the 1st respondent to the minor from the accident. An amount of E312,668-00, plus a contribution towards costs in the amount of E2,000-00, was offered for the accident and accepted by the curator upon advice.

[5] It is alleged by the applicant that the 1st respondent's procedure is that where an agreement is reached by the claimant and its attorneys for the payment of the fees due from the settlement amount, the 1st respondent issues two cheques; one to the claimant and another to the attorneys acting for the claimant for professional fees rendered. It is alleged that in the instant case, the 1st respondent has unreasonably refused or neglected to issue the cheque in question to the applicant and that it should be forced to do so on the pain of an Order of Court.

Service of application

[6] The Court, *mero motu* raised the issue of whether this was an application that should have properly been served by the applicant as it had a direct interest in the application and the order sought. The question arose particularly in the light of the fact that the applicant was not, as it is wont to in many cases, acting as an agent but as a litigant in its own right and therefor a direct beneficiary regarding the main order sought.

[7] I must state upfront that the service conducted *in casu* is otherwise sanctioned by the Rules. Rule 4 (1), in particular, provides as follows:

> "Service on the person to be served of any process of the court directed to the Sheriff and any documents instituting application proceedings shall be effected by the Sheriff or the Deputy Sheriff or in the case of a document instituting application proceedings by an attorney or any person in his employ: . . . "

I observe, as I did in *Christopher Velaphi Sibandle v Mapopo Gwebu (infra)* that the first words "instituting application proceedings" from

line 3 above, are a misnomer. They should have read "action proceedings". It is clear from the foregoing that whereas the Sheriff or a lawful deputy is authorised to serve Court process, i.e. summons and Court orders, in respect of originating papers in application proceedings, an attorney or a person in his employ may effect service thereof.

[8] The reason behind the prohibition of Court process being served by an attorney or a person in his or her employ, or any person who has an interest is to be found in certain cases. Cases that readily come to mind are *Meintjies v Roets* 1936 CPD 59 and *Barkhuizen Conradie* 1939 CPD 454. In the latter case, Davis J. held as follows at page 455, after citing with approval the *ratio decidendi in* the *Meintjies* case *(supra):*

"For exactly the same reasons, service of a summons by the plaintiffs attorney, or by a partner in the firm of attorneys which acts for the plaintiff, is, in my opinion, also thoroughly undesirable. As was pointed out in that case, the duty of the Deputy Sheriff is not merely to serve documents, but to explain to the defendant their nature and exigency, and in circumstances as the present, just as in circumstances such as those in that case, it seems to me that there may be a conflict of interest and duty . . . In a case as the present, the interest of the client of the attorney may conflict with his duty as Deputy Sheriff."

[9] The learned authors Herbstein *et al,* The Civil Practice of the Supreme Court of South Africa, 4th ed, Juta, 1997, say the following in this regard:

> "The undesirability of a sheriff or deputy sheriff serving process in a matter to which he is a party or in which he has an interest has been stressed in a long line of cases and it has been generally accepted that a suitable independent person should then be appointed to effect service."

I also had occasion to deal with a related matter in *Christopher Velaphi Sibandze v Mapopo Gwebu* Civ. Case No. 5/04. In that case, the plaintiffs attorneys applied to the Sheriff for the appointment of an *ad hoc* deputy sheriff, who was in their employ. I found this to have been undesirable and held that the service effected thereby was bad.

[10] Although the Rules do allow for an attorney or a person in his employ, to effect service of originating papers in application proceedings, I am of the view that if the attorneys themselves are the applicants, the issue of independence and necessary detachedness comes to the fore. For the same reasons that an attorney may not serve Court process because of a conflict of interest and duty, nothing,

in my view, eradicates this concern if the proceedings are instituted by motion. What is sauce for the goose in this regard, must, in my opinion, be sauce for the gander. An exception may be brooked in circumstances where the attorney is acting as an agent for a client.

[11] Where, as here, the attorney is a litigant and has a personal interest in the matter, different considerations should apply and the Rules should, in my considered view, be amended so as to prevent an attorney to serve applications where he or the firm in which he serves is an applicant. I am well aware, and Mr. Nkomondze, argued that the attorney is an officer of the Court. That cannot be disputed. What is, however, paramount, in my view, is that there must be no basis for suspicion, whether rightly or wrongly held, that the attorney, or the person in his employ, succumbed and gave in to the conflict and thereby subjugated his duty to the Court, to his own personal interest and aggrandizement.

[12] In this regard, it is worth pointing out that Herbstein *et al [supra),* state that in the Republic of South Africa, in terms of the authority of

Willies v Willies 1973 (3) SA 257, "Service of any process of the court directed to the sheriff and any document initiating application proceedings must be effected by the sheriff." This shows that there is no distinction in this regard, unless the person to be served is already represented by an attorney. This was, in my view, done to ensure that there is no suspicion of conflict of interest and duty, even in cases where the attorney is not an applicant. This construction would be in conformity with the approach of Lord Simmonds in *Attorney-General v Prince Ernest Augustus of Hanover* (1957) AC 436 (HL), where he said:-

"I conceive to be my right to examine every word of a statute in its context and I use contest in its widest sense which I have already indicated as including not only other enacting provisions of particularly the same statute, but its preamble, the existing state of the law, other statutes in *para materia* and the mischief which I can by those and other legitimate means, discern the statute was intended to remedy."

[13] Having said this, I have no doubt from the affidavits of service filed in the instant matter, read together with a facsimile transmission letter addressed to and received by the 1st respondent, that both respondents were undoubtedly aware of the application and that as they did not attend Court, it cannot in any way be attributed to them

not having been notified by the applicant firm because it stands to have easy passage if the respondents do not come to Court. For future purposes however, I am of the firm view that attorneys, in cases such as the present, particularly for the payment of money, and which all things being equal, would have had to be instituted by action proceedings, should be served by an independent person in order to exude the necessary independence and detachedness, eschewing any suspicions of conflict of interest.

Urgency alleged and related matters

[14] It is now trite that a party which seeks to have its matter heard as one of urgency must comply with the mandatory requirements set out in Rule 6 (25) (b) of this Court's Rules, as amended. In particular, the applicant should explicitly state in the founding affidavit the reasons (i) why he avers that the matter is urgent; and (ii) why he claims he cannot be afforded substantial redress at a hearing in due course. See *Humphrey H. Henwood v Maloma Colliery Ltd and Another* Case No. 1623/98; *H P. Enterprises (Pty) Ltd v Nedbank (Swaziland) Ltd* Case No.

788/99 and *Deputy Prime Minister and Another v Ben M. Zwane* Case No. 199/2000, to mention but a few.

[15] In the present case, the applicant claims that this matter is urgent because it is unable to meet its financial obligations to *inter alia* its members of staff and its landlord. An application for the landlord's hypothec has been attached in support of the applicant's allegation that it has been sued by its landlord for failure to pay its rentals. Do the above allegations render the matter urgent so as to justify the invocation of the special procedures availed by the above sub-Rule?

[16] In answer to this question, Mr. Nkomondze referred the Court to the case of *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W). In that case, Goldstone J. held at page 586, that, "In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances." There is no doubt that the learned Judge

was in this case correct and I fully incline to his reasoning as being impeccable.

[17] The question in the instant matter, is whether this is a case where the applicant, by applying for the invocation of Rule 6 (25) (b), seeks to preserve commercial interests, as envisaged in the *Twentieth Century Fox Film* case *(supra).* Put more bluntly, is a debt owed to an alleged creditor an issue that can be properly regarded as one of "commercial interest" such as to warrant the invocation of the urgency procedures?

[18] I think not. Commercial interests, in the sense used above, in my view, have to do with situations where certain actions and/or decisions are likely to affect another party's operation : regarding the latter's aggregation of rights, privileges, powers and immunities and which vitally attach to that party's ability to effectively conduct or engage in commerce.

[19] Indebtedness, is not, in my view, one circumstance that should be allowed to fall in this category of commercial interests. To do so, would in my view open a Pandora's box, and fling wide open the floodgates

and create a precedent leading to a multiplicity of application proceedings in which persons, both natural and legal, would be entitled to claim debts allegedly owing in a matter of hours, most often, without sufficient notice and literally decimating the alleged debtor's right to a fair hearing. This would be a catastrophic innovation which this Court should decisively steer away from.

[20] For many creditors, it can be accepted that the late or non-payment of debts owed to them, exposes them to ridicule and other harsh economic consequences, including failure to meet their own financial obligations as a result, and their business becoming moribund. This risk is unfortunately, one of the unfortunate realities of doing business. To elevate this hardship to qualify as a reason for urgency would be to introduce a dangerous doctrine which can usher ghastly consequences for the alleged debtors and decimate the smooth, effective and equitable functioning of the Court machinery.

[21] Another difficulty that attaches to this particular application and which concerns the other leg of Rule 6 (25) (b), is the question of

whether the applicant has a suitable alternative remedy in terms of which it can be afforded substantial redress at a hearing in due course. In this regard, I must emphasise that the standard set by the law giver, is "substantial redress" in due course. According to the Collins Concise Dictionary, this word means "of or related to the basic fundamental substance or aspects of a thing; an essential or important element". In other words, the relief need not be exactly the same in measure or degree. It must, however, be a remedy that will be effective and one to be afforded in due course without the need to interpose itself as an urgent panacea.

[22] In the founding affidavit, the deponent claims that the observance of the time limits which attach to ordinary application proceedings and the issuance of a summons shall not afford the applicant substantial relief "because by the time the matter could be heard under the normal Rules in respect of motion proceedings, the Applicant's creditors would have long obtained judgment against the Applicant and executed the same against Applicant's office furniture and equipment thereby causing Applicant to shut down".

[23] What these allegations lose sight of is the traditional requirement that claims for payment must ordinarily be initiated by way of a summons in terms of Rule 17 (1). furthermore, if; as the applicant claims, the 1st respondent has no justification at law for not releasing the funds demanded from it, there are speedy mechanisms even in action for proceedings for obtaining a judgment against it, being a default judgment application or a summary judgment application, if the latter files a notice to defend the claim.

[24] This, in my view, puts paid to the applicant's allegations that it cannot be afforded substantial redress at a hearing in due course. Issuance of a summons would in my view, if the MVA has no defence, as alleged, provide a speedy, effective and adequate remedy. To resort to granting such orders on urgency, as earlier indicated, would usher in a wave of worrisome trends. An example in this regard would do to show how dangerous and unpropitious this approach can be.

[25] For instance, with the economic meltdown, of which this Court can properly take judicial notice of, as it affects this Court's very Operations[1] at'present, it would mean-that ar'-financial institution may approach this Court on urgency and claim payment of money lent and

advanced, allegedly due to it. In this regard, it would file a statement, together with an acknowledgement of debt and claim immediate payment on urgency and cite the fact that if the claim is not paid immediately, it will be unable to pay its staff their salaries and benefits at the end of the month. This would be a very-dangerous precedent indeed which should be nipped in the bud and which should not be allowed to take root.

[26] Another matter of grave concern to me, regardless of the fact that the MVA Fund has not opposed this application is that when one has regard to the Act of Parliament that sets it up, it is only in specified circumstances that the MVA can properly be sued for payment of monies related to injury claims. The current one is not, strictly speaking, one such claim and the arrangement alleged by the applicant herein has not been verified and more importantly, has no support from the relevant legislation. It would be calamitous and possibly irresponsible of this Court, in view of the murky waters mentioned above, to proceed to grant the claim only because there is no opposition from the Fund. I must be satisfied that the Order that the

Court is being asked to grant, is sanctioned by the Act, apart from an unverified practice alleged by the applicant in its depositions.

[27] I now deal with the last issue but *en passant.* This is the question of the very amount claimed by the applicant herein. From a claim of E312,668.00, plus the contribution to costs, the applicant claims a whooping E72,766,00, which amount it is claimed, was agreed between the curator and the applicant. On first principles, this amount appears excessive regard being had to the various amounts claimed for attendances, considered in juxtaposition to the work quoted to have been done. It is my view that payment of such amounts, particularly where they involve minors or persons under legal disability as beneficiaries, should actually be taxed by the Taxing Master or be referred to the Fees Committee of the Law Society of Swaziland for assessment of reasonableness. This Court should not be left with a bad after-taste, that a vulnerable person may well have been conveyed some injustice by its processes.

[28] For the following reasons, it is my view that the application ought to be dismissed as I hereby do.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 3rd DAY

OF MAY, 2011.

T. S./MASUKU
JUSTICE OF THE HIGH COURT

Messrs. Nkomondze Attorneys for the Applicant

No appearance for the Respondent