IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No. 431/10

In the matter between:

Bongani Jele	**Applicant**
And	
Tisuka Takangwane	**1st Respondent**
Melusi Qwabe	**2nd Respondent**

In re:

Tisuka Takangwane	**Applicant**
And	
Bongani Jele	**Respondent**

CORAM	MCB MAPHALALA, J
For Applicant	Mr. O. Nzima
For Respondent	Mr. N.D. Jele

Judgment
17th February 2011

[1] The Applicant brought an urgent application on the 28th July 2010 for the following order:

> **1. Dispensing with the normal and usual requirements of the rules of the above Honourable Court relating to notice and service of process and enrolling this matter as one of urgency under the provisions of Rules 6 (25) of the High Court Rules.**
>
> **2. Pending the payment of arrear rentals in the amount of E2 100.00 (Two Thousand One Hundred Emalangeni) due from the Respondent to the Applicant as arrear rentals for the months of January and February 2010, the removal of any goods from the premises known as House No. 97, Bachelors Flats, Magevini, Manzini be and is hereby interdicted.**
>
> **3. That a rule nisi do hereby issue calling upon the Respondents to show cause on Friday the 26th February 2010 why orders 4, 4.1, 4.2, 4.3 and 4.4 should not be made final.**
>
> **4. The sheriff or her lawful deputy sheriff is hereby directed and required to:**

4.1. Forthwith serve this order, the Notice of Motion, and the Founding Affidavit upon the Respondent and explain the full nature and exigency thereof to them;

4.2. Attach all movables upon the premises and keep them under lock and key and do whatever is necessary to prevent their removal;

4.3. Make an inventory thereof; and

4.4. Make a return of service to the Applicant or his attorneys and the clerk of court of what he has done in execution of this order;

5. The Applicant's claim is based on the allegations in the affidavit for:

5.1. Payment of rental in the amount of E2 100.00 (Two Thousand One Hundred Emalangeni);

5.2. Interest on the sum of E2 100.00 (Two Thousand One Hundred Emalangeni) at the rate of 9% per annum a *tempore morae;*

5.3. Ejectment of the Respondent from the premises known as House No: 97, Bachelors Flats, Magevini Matsapha;

5.4. Costs of suit on the scale as between attorney and client including collection commission.

[2] During the hearing in which both parties were legally represented the Court made an interim order in terms of prayers 3 which was amended to read:

- **Staying execution of the order made on the 26th February 2010 pending finalization of this application.**

[3] The basis of the application is that the applicant had not been served with the main application, but, that he was only served with the Rule Nisi; the application had been made *ex parte* resulting in the granting of the Rule Nisi. It is Common Cause that the Rule Nisi was issued on the 19th February 2010 and subsequently confirmed on the 26th February 2010.

[4] The Applicant further argues that the order had been obtained fraudulently and/or erroneously by the First Respondent because at the time the proceedings were instituted, no rental was due and payable to

the First Respondent for the month of February 2010. According to him, rentals are payable at the end of the month and not in advance at the beginning of the month; that in the instant case he had paid rental for the month on the 25th February, 2010 when it was not due and, that the Order complained of was issued on the 26th February 2010.

[5] In addition, he alleges that on the 25th February 2010, after paying his rental, he had met a certain Mr. Jele from the First Respondent's Attorneys office who confirmed to him that the matter between the parties was now settled; hence, he did not appear in court on the 26th February 2010 which was the return day for the Rule Nisi.

[6] The First Respondent has filed an Answering Affidavit in which he has raised the issue of urgency as a Point in *Limine,* arguing that the application is not urgent because five months had lapsed since the order was obtained; furthermore, that the attachment of applicant's goods does not justify urgency because the deputy sheriff has to advertise the sale in execution seven days before the sale. On the other hand, the applicant insist that he was entitled to institute an urgent application because his goods had been attached by the deputy sheriff.

[7] Rule 6 (25) provides that in urgent applications, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

[8] **Sapire C.J.** in the case of **H.P. Enterprises (PTY) Ltd v Nedbank** (Swaziland) Ltd Civil Case No. 788/99 (Unreported) stated the law as follows with regard to Urgent applications:

> **"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate the observance of the normal procedures and time limits prescribed by the Rules which will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow."**

[9] The applicant has demonstrated in the Founding Affidavit the basis of the urgency and why he cannot be afforded substantial redress at a hearing in due course. The fact that his goods have been attached by the deputy sheriff is sufficient to justify urgency; the fact that the sale has not been advertised is irrelevant. In the circumstances the Point of law relating to urgency is dismissed. It is common cause that the First Respondent has abandoned the Point in *Limine* relating to the "Stay of Execution".

[10] At paragraph 4.2 of the First Respondent's Opposing Affidavit it states that "the applicant failed to remit the monthly rentals on two (2)

successive occasions leading to an amount of Two thousand one hundred Emalangeni (E2,100.00) being outstanding for the rentals". However, it is not stated which months are outstanding. In the main application dated 16th February 2010, at paragraph 6 of the Founding Affidavit, it is stated that the amount of E2 100.00 (Two thousand one hundred Emalangeni) being claimed is for the months of January and February 2010. This is denied by the Applicant who argues that only rental for the month of February 2010 had to be paid at the end of the month in terms of the oral lease agreement between the parties.

[11] Two Annexures marked "MN1" in the Applicant's Founding Affidavit show that two payments of E1, 050.00 (One thousand and fifty Emalangeni) each were made on the 15th February 2010. From this it is apparent that when the Rule Nisi was issued on the 19th February 2010, the Applicant had already paid rental for January 2010.

[12] It is apparent that the amount paid on the 25th February 2010 was rental for that month. It is further apparent that when the Rule Nisi was confirmed on the 26th February 2010, the Applicant had already made payment for February 2010 at the Offices of the First Respondent's Attorneys. The First Respondent concedes at paragraph 4.5 of its Opposing Affidavit that: "Apparently Applicant finally settled the arrear rentals on the 25th February 2010 by paying the amount due at my Attorney's Offices."

[13] At paragraph 10.2 of the First Respondent's Opposing Affidavit, they refer to the written lease between the parties which was only signed by the First Respondent, to support their contention that rental is paid in advance on or before the first day of each month and that any failure constitutes a breach of contract. They further contend that when the Rule Nisi was obtained on the 19th February 2010, the Applicant was in arrears with his rentals; hence, they were entitled to institute the proceedings and have the lease cancelled. They cannot rely on an unsigned lease agreement. For this reason the lease agreement between the parties was verbal; hence, the court would be inclined in the circumstances to adopt the Applicant's version that since the lease was oral, it was payable on the last day of the month.

[14] The basis of the rescission application is that the Applicant was only served with the Rule Nisi and not with the application; furthermore, that no arrear rentals were outstanding when the Rule Nisi was confirmed. I have dealt with the latter aspect. I will now deal with the issue of non-service of the application. It is common cause that the same deputy sheriff has issued two Returns of Service; one stating that he only served a Rule Nisi upon the Applicant, and, the other stating that he served both Rule Nisi and the Application. It is to be noted that both documents are not dated. It is not denied that both documents were issued by the same deputy sheriff. The applicant in his Replying Affidavit states that the Return of Service annexed to First Respondent's Answering Affidavit is fabricated since it was not in the Court's file when the present application was lodged. I should state that the conduct of the deputy sheriff smacks of dishonesty. He was

appointed by the First Respondent's Attorney to serve the process; hence, the conclusion is inescapable that the applicant's version is correct.

[15] The present application is brought in terms of Rule 42 (1) which provides:

> "The Court may in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
> (a) An order or judgment erroneously granted in the absence of any party affected thereby;
> (b) An order or judgment in which there is... a patent error...."

[16] The Applicant was absent when the order was made, and, the Court has found that the reason for his absence is that he had not been served with the application but only with the interim order. The Court has found as a fact that when the order was made, the Applicant was not in arrear rental. If the court had been aware of the above circumstances, it would not have made the order. The court is satisfied that the Order was made erroneously in the absence of the applicant.

[17] The following order is hereby made:

(a) The order made by the above Honourable Court in case No. 431/2010 on the 26th February 2010 is hereby rescinded and set aside.

(b) The bill of costs taxed in this matter pursuant to the granting of the order of the 26th February 2010 is hereby set aside.

(c) The Writ of Execution issued by the First Respondent pursuant to the granting of the order of the 26th February 2010 is hereby set aside.

(d) The Respondent is ordered to pay costs of suit on the ordinary scale.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT