IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.78/2013

In the matter between:

KUSILE AFRICA HOLDINGS (PTY) LTD	**Applicant**
and	
LESLIE CLARENCE BOTHMA	**1st Respondent**
MELUSI QWABE N.O.	**2nd Respondent**

In re:

LESLIE CLARENCE BOTHMA	**Plaintiff**
and	
KUSILE AFRICA HOLDINGS (PTY) LTD	**Defendant**

Neutral citation: *Leslie Bothma vs Kusile Africa Holdings (Pty) Ltd (78/2013) [2013]SZHC 137 (19th July 2013)*

Coram: **MAPHALALA PJ**

Heard: 03 June 213

Delivered: 19 July 2013

For Applicant: Mr. K. Simelane

For Respondent: Mr. L. Mamba

Summary: (i) Application under a Certificate of Urgency for stay of execution of writ of execution.

(ii) Respondent filed opposition that Applicant has not proved urgency in accordance with the provisions of Rule 6(25) (a) (b) of the High Court Rules. Secondly, that Applicant has not proved a case for rescission in terms of Rule 42 of the High Court Rules.

(iii) The Applicant relied on the *dicta* in the Supreme Court case of *Shell Oil vs Motor World (Pty) Ltd t/a Sir Motors Appeal Case No.23/2006* apply to the facts of this case.

Held: The court hold on the facts that the Applicant has not proved urgency in accordance with Rule 6(25) (a) (b) of the High Court Rules. The urgency is not explained at all the court is only told of the event caused by other events which are not spelt out in the Founding Affidavit. In my considered view the *Shell Oil (supra)* judgment should not be used as a strategy by defence by Applicant to avoid the procedures set by Rule 6(25) (a) (b) of the High Court Rules. Moreso, where a lengthy Founding Affidavit has been filed indicating that the attorney had all the time in the world to put together the case for the Applicant.

Cases referred to in the judgment.

*Shell Oil vs Motor World (Pty) Ltd t/a Sir Motors Appeal Case No.23/2006 (Pty) Ltd supra***.**

JUDGMENT

The Application

[1] On the 5th July, 2013 the Applicant Kusile Africa Holdings (Pty) Limited filed before this court an Application under a Certificate of Urgency against the Respondent Leslie Clarence Bothma for an order in the following terms:

"1. Dispensing with the Rules of the Honourable Court as to time limits and service procedure and enrolling this matter as one of urgency;

2. Condoning the Applicant's non-compliance with the Rules of the above Honourable Court.

3. Staying the execution of the writ of execution and/or court order in the above matter pending finalisation of the rescission proceedings herein;

4. Interdicting and restraining the 2nd Respondent from and/or staying the depositing of the post-dated cheques issued by the Applicant in favour of the 2nd Respondent pending finalisation of these proceedings;

5. Rescinding the default judgment and/or order granted by this Honourable Court on the 22nd of February, 2013 and allowing the Applicant to defend the proceedings;

6. Granting costs of suit against the Respondents in the event of opposing this Application;

7. Further and/or alternative relief."

[2] The Founding Affidavit of one Simon Vincent Khoza who is a Director of the Applicant is filed outlining the material circumstances leading to the dispute between the parties. Various pertinent annexures are also filed in support thereto.

The opposition

[3] The Respondent has filed a Notice to raise points of law in a Notice filed with the Registrar of this Court on the same day being the 5th July, 2013 raising the following:

> "1. The Applicant has failed to comply with the peremptory provisions of Rule 6 (25) of the Rules of the above Honourable Court in that the matters complained about are long standing and therefore the urgency, if any, is self-created.
>
> URGENCY TO COMPLY WITH RULE 31(3) (b)
>
> 2. The Applicant has failed to comply with the provision of Rule 31(3) (b) of the Rules of the above Honourable Court in that, the Application being one to rescind a judgment by default.
>
> 2.1 It has not furnished to Respondents security for the costs if the default judgment and of such application to a maximum of E200.00.
>
> 2.2 It has failed to give sufficient explanation for its failure to defend the action timeously.
>
> 2.3 The Application has been filed out of time and the Applicant has failed to explain this omission and to apply for condonation from the above Honourable Court.
>
> WHEREFORE Respondents pray that the points *in limine* be upheld with costs, and/or granting such further and/or alternative relief which the above Honourable Court may deem fit.

[4] Furthermore, the Respondent prays to the court that in the event that the points of law are not upheld, the 1st Respondent reserves the right to file Opposing Affidavit at such times as this court may direct.

[5] The mater came for arguments before me on the same day the 5th July, 2013 when I reserved judgments to the 9th July, 2013. However, I could not give judgment on that day and postponed it to today 12th July 2013. On the 12th July 2013 I against postponed the matter today 19th July 2013 and wish to apologise profusely for these postponements on account of other matter which clamoured for my attention.

[6] I shall proceed to deal with the points raised by the 1st Respondent *ad seriatim* in the following paragraphs.

(i) Urgency

[7] The argument raised for the 1st Respondent in this regard is that the Applicant has failed to comply with the peremptory provision of Rule 6(25) of the Rules of this Court in that the matters complained about are longstanding and therefore the urgency, if any, is self-created.

[8] On the other hand the attorney for the Applicant contended that Applicant has proved urgency in accordance with the Rules of this Court and cited paragraph 39 of the Founding Affidavit where the following is averred:

> "39. I humbly submit that the matter is urgent as a writ of execution has already been issued by the 1st Respondent and its property might be attached by the Deputy Sheriff and removed anytime and sold at a public auction at a great prejudice to the Applicant. Moreover, the post-dated cheques that were issued in favour of the 2nd Respondent were for the 5th July, 2013, and should such date arrive without such stay of execution and/or interdict against the 2nd Respondent from depositing the cheques, the Applicant will suffer grate prejudice in the event that the cheques are dishonoured and/or the 1st Respondent proceed to remove its machinery at the work place which will put the whole operation of the Applicant to a standstill. Furthermore, the evaluation report clearly shows that the agreement of E2,000,000,00 (two million Emalangeni) was concluded in error and the value of the timber too small from the purchase claimed against the Applicant."

[9] In my assessment of the arguments of the parties and what is averred by the Applicant at paragraph [39] it is not clear in my reading of this paragraph how the urgency developed. The court is only told that the matter is urgency as a writ of execution has been issued by the 1st Respondent and its property might be attached by the Deputy Sheriff and removed anytime and sold at a public auction as a great prejudice to Applicant. The court is not told when the

Applicant got to know of the issuance of the said writ of execution. In this regard the attorney for the Applicant cited the often quoted judgment of the Supreme Court that of *Shell Oil* to remedy this glaring question.

[10] In my assessment of the arguments of the attorneys to and fro on this point I have come to the considered view that Applicant has failed to comply with the requirements of Rule 6 (25) (a) & (b) of the High Court Rules. The Supreme Court judgment of *Shell Oil* (supra) should not be used as a *carte blanche* defence to cover for inadequate grafting of Applications under a Certificate of Urgency. As we speak we do not know how the events in this case developed up to the issuance of the writ of execution. The attorney for the Applicant filed a lengthy Founding Affidavit which does not explain the fact of urgency except the conclusion stated in paragraph [39] *supra.*

[11] On this point it would appear to me that the Application ought to fail.

[12] On the second argument I also agree with the submissions by Mr. Mamba for the 1st Respondent that the Applicant has failed to comply with the provisions of Rule 42 of the High Court Rules. I must also state that the views I have on the second point *in limine* are expressed *obiter dicta* to what I said on the first point raised by the Respondent.

[13] I must state finally, that the Rules of this Court are important to control litigants from jotling with each other and thus causing confusion to all of us.

[14] In the result, for the aforegoing reasons the points of law raised by the 1st Respondent are upheld with costs. I must state on costs that the attorney for the 1st Respondent urged me to impose costs at a punitive scale. On the facts I decline to do so and order costs on the ordinary scale. The Applicant is at liberty to relaunch the Application on properly drafted papers.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE