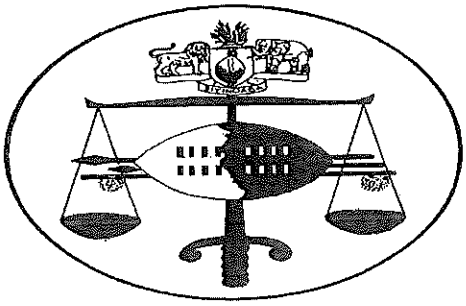

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE No. 2196/2023**

In Matter between:

GBH PLASTICS MANUFACTURING (PTY) LTD	**1st APPLICANT**
JSSM INVESTMENTS (PTY)	
t/a EDEN	**2ND APPLICANT**
PLASTIC INTERNATIONAL	
t/a SWAZI PLASTICS MANUFACTURES	**3RD APPLICANT**
MNF PLASTICS MANUFACTURES (PTY) LTD	**4TH APPLICANT**

and

MINISTER OF TOURISM AND ENVIRONMENTAL	
AFFAIRS	**1ST RESPONDENT**
ESWATINI ENVIRONMENTAL AUTHORITY	**2ND RESPONDENT**
THE CLERK OF PARLIAMENT	**3RD RESPONDENT**
THE MINISTER OF JUSTICE AND	
CONSTITUTIONAL AFFAIRS	**4TH RESPONDENT**
THE ATTORNEY GENERAL NO.	**5TH RESONDENT**

Neutral citation: *GBH PLASTICS MANUFACTURING (PTY) LTD and 3 OTHERS v MINISTER IF TOURISM AND ENVIRONMENTAL AFFAIRS and 4 OTHERS(343/23) SZHC 266 [2023] (26.09.2023)*

CORUM: Z.Magagula

Date heard: 22.09.23

Date delivered: 26.09.23

JUDGMENT ON URGENCY

[1] The four Applicants are manufactures and distributors of plastic products, all carrying on business at the Matsapha Industrial site, ESwatini. They are variously engaged in the business of recycling waste plastic products salvaged from the land fills scattered around the courtesy's towns and cities. From these waste products, they manufacture plastic bags and other plastic products for diverse industries from construction, health to pre-packers.

[2] The Applicants, in the founding affidavit deposed to by Bilal Bagas who is the managing director of the first Applicant with supporting affidavits from representatives of the 2nd, 3rd and 4th Applicants as well as Mr Macford Sibandze who was a member of Parliament in the outgoing Parliament set, out the following; and for purpose of saving time I shall paraphrase some of the more salient averments.

[3] The Applicants have become aware that the first Respondent, the Minister for Tourism and Environmental affairs attempted to have passed **the Control of Plastic Bags Regulations 2021** promulgated under the **Environmental Management Act no. 5 of 2002** – This was in the year 2019. The deponent does not indicate when the applicants become aware of this issue – more will be said on this later in the judgement.

[4] According to the deponent, certain members of Parliament, (MPs) including former MP Mr Marwick Khumalo indicated to the speaker that

they wanted the Regulations to be debated before being passed. I pause here to take a brief look at how sub-ordinate legislations is passed.

Section 253 of the constitution provides;

> **1...**
>
> ***" [2] every subordinate legislation shall before commencement be laid before each chamber parliament for a period of at least 14 days.***
>
> ***[3] Subject to the provision of subsection (4), if during the period of fourteen days that legislation is not called upon for debate by motion of any member, then the legislation shall be deemed to have been approved by the chamber conceded.***
>
> ***[4] Where the legislation is called up for debate, that legislation shall only come into force when after the debate the chamber concerned resolves to approve the legislation with or without alterations"***
>
> ***[5]...***

[5] The Applicants further averred, that as advised by former MP, Mr Macford Sibandze, who was a member of the Portfolio Committee on Environmental affairs, that another attempt to pass the regulations was made around March 2021 and MP's objected and required that they debated the regulations. Mr Sibandze has filed and affidavit to support this. Despite the objections from the MPs the first Respondent went on to publish the Regulations through the Government gazette on the 21st may 2021. A copy of the Gazette was annexed to the founding affidavit. In terms of section 1 (2) of the Regulations they were to come into force on the date of publication in the Gazette and that date was Friday 21st May 2021.

[6] The Applicants, aggrieved by what they perceived to be the unlawful action of the first Respondent, engaged members of Parliament who were equally shocked and undertook to take up the matter in Parliament. Subsequently Applicants were advised that the matter had been raised with the speaker who had sought to have sometimes to verify the complainant. The Applicants also allege that on the 29th November 2021 the speaker stopped the implementation of the Regulations until the Environmental Affairs portfolio Committee had

considered them then and consulted also with the Applicants. A copy of the Hansard report of the relevant date was attached.

[7] The pertinent part of the Hansard is found at item (VI) of the report. My translation of item VI which is otherwise written in SiSwati is;

> *" On another note, following that Honourable members had sent me concerning the issue of plastics, can I respond by saying the speaker had given himself time to consider the matter and recommends that the Portfolio committee for the Ministry of Tourism and Environmental Affairs should meet and consider the matter together with the concerned MPs to see how the matter may be taken forward, a date would be arranged on which this may take place"*

[8] The Applicants allege that the first and second Respondents on the 18th March 2023. [This date was corrected in arguments to be the 18th August 2023] I accept that this was typographical error and no consequences should flow from it; issued a notice that they would be implementing the regulations. The notice is annexed to the pleadings, no benefit would be gained by reproducing it in this judgement.

[9] The applicants, on receipts of the "notice" on the 21st August 2023 wrote a letter of complaint to the Prime Minister, when this failed to elicit a response, they wrote another letter to the first respondent which was also sent to the Attorney General. This letter also went without response. On the 23rd August 2023 Applicants wrote to the clerk of parliament requesting a copy of the Hansard which was only received on the evening of the 12th September 2023.

[10] The Applicants argue that the Hansard is the basis of their application.

[11] The present application was launched under a certificate of urgency, served on the Respondents on the 19th September with notice that it wold be heard on Friday 22nd September 2023 seeking the following relief.

1. *That the Applicants are condoned for the non-compliance with the time limits and manner of service and this matter be enrolled as one of urgency.*

2. *A rule nisi hereby issue calling upon the Respondents to show cause why a final order in the following terms should not be made final;*

2.1 *The implementations of the Control of Plastic Bags Regulations 2021 is hereby suspended.*

2.2 *The Control of Plastic Bags Regulations 2021 is hereby set aside as unlawfully promulgated.*

2.3 *The Respondents are ordered to pay costs of the application.*

2.4 *Applicants are granted further and/or alternative relief.*

[11] The Respondent filed what they termed preliminary affidavits both pointing out that given the nature of the application and the time available to then, they were only addressing the issue of urgency.

[12] In this jurisdiction urgent applications are dealt with under Rule 6 (25) of the Rules of court. The rule provides:

(a) *In urgent applicants the court or Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as the court or Judge, as the case may be, seems fit.*

(b) *In every affidavit or petition filed in support of an application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course.*

[13] The provisions of Rule 6 (25) were held, by Dunn J, to be peremptory in the case of **Humprey H. Henwood v Maloma Colliary Limited and Another 1987-1995 (4) SLR 48**, and I respectfully agree therewith.

[14] In addressing the requirements of Rule 6 (25) (a) (b) applicants stated the following:

"[39] The matter is urgent in that the regulations can be implemented at any time now. I can confirm that they have not as yet been implanted to us.

[40] If the Applicants were to adhere to the time limits the order may serve an academic purpose as we would have been fined at different times the sum of E 50 000.00 (Fifty Thousand Emalangeni) or imprisoned for one year or both. This is why we seek the interim stay. We submit that prima facie we have a right provided by Section 153 of the constitution to have regulations passed by Parliament. This was not done on the facts pleaded herein. The balance of convince favours the granting of the interim interdict as it will not operate unduly harshly on the Respondents as it will be for a limited period. The rule will ensure that our application is fully heard without a threat of imprisonment.

[41] I submit that on the facts pleaded herein the Applicants are entitled to the order sought"

[15] I am not satisfied that the Applicants have done enough to meet the requirements of Rule 6 (25) (a) and (b). As observed by Masuku J in **MEGALITH HOLDINGS V RMS TIBIYO (PTY) LTD AND ANOTHER HIGH COURT CASE NO. 199/2000**, the provisions of Rule 6 (25) (b) exact two obligations on an applicant in an urgent matter. The first is that the Applicant shall in the affidavit or petition set forth explicitly the circumstances which he avers renders 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 due course. These must appear *exfacie* the papers and may not be greaned from surroundings circumstances brought to the court's attention from the bar in an embellishing address. His Lordship was to repeat the same sentiments in **Ben Zwane v Deputy Prime Minister and Another (unreported) High Court case no. 624/00** and I may say I find no reason to disagree.

[16] Flemming DJP in **Gallagher v Normans Transport lines (PTY) LTD 1992 (3) SA 500,** stated.

" The mere existence of some urgency cannot therefore justify on applicant not using form 2 (a) of the uniform Rules. The Rules do not tolerate the illogical knee-jerk reaction that once there is any amount of urgency, that form of notice of motion may be jettisoned and often that a rule nisi be sought. The Applicant must, in all respects responsibly strike a balance between the duty to obey Rule 6

(5 1 and the entitlement to deviate, remembering that the entitlement is dependent upon and is limited according to the urgency which prevails"

[17] In *casu* the Applicants were always aware that the Regulations came into effect on the 21st May 2021. They have annexed a copy of the gazette in the founding affidavit. They did nothing. In my considered view, it cannot be reasonable for Applicants to place any Reliance on the newspaper article that seemed to suggested that the regulations could not be implemented because this was not an official Parliamentary report. The Hansard of the 29th November 2021 only reports that the speaker had given himself time to consider the concerns raised by certain members of parliament and referred the matter to the Portfolio committee and the MPs who had raised concerns. It certainly does not imply that the implementation of the Regulations was suspended.

[18] It seems to me just to conclude that either Applicants were aware that the implementation of the Regulations was never suspended or they were labouring under a misapprehension that they were. In either case, their belief was not well founded. There are no facts averred in the founding affidavit that would justify them believing that the facts were what actually they were not.

[19] Even if the court were to accept that letter dated 18th August 2023, received by the Applicants on the 21st August 2023 was a notice that the Respondents intended to implement regulation, which is in doubt. They went on a cause of extra-judicial *maneuver* that in the end did not yield the results they desired. The question then is that given the failed out of court action, are the Applicants entitled to rush to court without affording the other parties adequate notice. In my view the answer is a clear no. The yet uncontroverted account of the history of the matter is that Applicants have been aggrieved by the promulgation of the Regulation as early as 2019. They ought to have set the law into motion at the earliest possible opportunity, not a month later.

[20] The Applicants devoted a considerable amount of time on the adverse effects the implementation of the regulations would have, that is they stand to be fined amounts of about E 50 000.00 or imprisonment. But this does not render the matter urgent nor does it mean they will not be afforded substantial relief in a hearing in due course.

[21] The threat of arrest, or the imposition of a fine is, in my view not imminent and certainly cannot cause irreparable harm; that is harm or injury that cannot be adequately compensated or remedied by any monetary award of damages that may be awarded later. Neither in the certificate of urgency nor in the founding affidavit have the Applicants alluded to this. I agree with both counsel for the Respondents that no arrest or fine is imminent as the Applicants would still have to be heard before a fine or imprisonment is ordered for a transgression of the Regulations; that is should they be found to have contravened any of its provisions.

[22] Mamba j (as he then was) in **Sikhatsi Dlamini v The Mayor –Mbabane Municipal Council and Other (1814/18) [2019] SZHC 11 (05 February 2019)** makes the point that:

> *"[24]...[T] he harm envisaged by the rule and the law in matters of urgency is irreparable harm in the sense that it is irreversible and cannot be redressed by an adequate relief in due course. Vide* ***Nhlavana Maseko and 2 Others v Gearge Mbatha and Another Appeal case 7/2005, Frederick Maphandzeni and Others v Standard bank, Yonge Nawe Environmental Action Group v Nedbank (Swaziland) LTD case no.4165/2007, New Mall v Trincor International (pty) LTD case no.302/2012, Megalith Holdings v RMS Tibiyo (pty) LTD case no.199/2000 and Swazi MTN Limited v Prending Judge of Industrial court and Others (325/16) [2016] SZHC 33 (23 February 2015)"***

[23] I hold that the Applicants have failed to bring this Application within the prevision of Rule 6 (25) (a) and (b). The relief claimed in prayer (1) is therefore refused.

[24] I was addressed on the appropriate order to make in the event the court were to find that the matter was not urgent or that urgency was not established b the Applicants. Mr Simelane for the second Respondent urged me to dismiss the matter with an appropriate order as to costs. Mr Shabangu for the rest of the Respondents, argued that in the event urgency was found not to have been established, I should order that the matter should take its normal course. While Mr N.D Jele for the Applicants argued that the proper cause would be to strike the matter off the roll with an order as to costs.

[25] The, contention by Mr Shabangu and Mr Jele finds traction in the authorities vide **Nedbank (Swaziland) Limited v Kenneth G. Gcamphalala and Another (08/13) [2013] [SZCS] S 2 (29 November 2013), Humprey H.Henwood v Maloma Colliery Limited and Another (Supra), SARS v Hawker Air Services (pty) LTD 2006 (4) SA 292 (SCA)** and in **Luna Meubel Vervaardiger (EDMS) BPK v Makin t/a Makins Furniture Manufactures 1977 (4) SA 135 (W)** where the court made these remarks which I find to be opposite in this case.

> *"Some Applicants who abused the court process should be punished and matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the Respondents to file affidavits should in my view be similarly removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing with costs"*

[26] The view expressed in the Luna Mearbel case (Supra) seems to me more appropriate to the present case.

1. The order sought in prayer 1 of the Notice of Motion is refused with cost.
2. This matter is removed from the roll, to take its normal course.

.....
Z.Magagula
Judge of the High Court

Appearances:

For the Applicants – Mr N.D Jele with E.Shabangu

For the 1st, 3rd , 4th and 5th Respondents – Mr M.E Simelane

For the 2nd Respondents – Mr Z Shabangu