IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 488/2005**

In the matter between:

IMPERIAL GROUP (PROPRIETARY) LIMITED
T/A IMPERIAL LOGISTICS **APPLICANT**

and

TIMOTHY DLAMINI **1ST RESPONDENT**
MARTIN AKKER N.O. **2ND RESPONDENT**
MPHUMELELO FOREST SERVICES (PROPRIETARY) LIMITED **3RD RESPONDENT**

IN RE:

TIMOTHY DLAMINI **APPLICANT**

and

MPHUMELELO FOREST SERVICES (PROPRIETARY) LIMITED **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE : ACTING JUDGE
DAN MANGO : MEMBER
GILBERT NDZINISA : MEMBER

FOR APPLICANT : ADV. M. VAN DER WALT (INSTRUCTED BY CURRIE &

SIBANDZE ATTORNEYS)

FOR 1ST RESPONDENT : SABELA DLAMINI (MAGAGULA & HLOPHE ATTORNEYS)

FOR 2ND RESPONDENT : NO APPEARANCE

FOR 3RD RESPONDENT : NO APPEARANCE

R U L I N G – 09/03/06

[1] This is urgent application brought by the Applicant against the Respondents on the 2nd March 2006.

[2] The Applicant is seeking an order interdicting the 1st and 2nd Respondents from proceeding a sale in execution that was scheduled to take place on the 3rd March 2006.

[3] The Applicant also wants the court to make an order directing the 1st and 2nd Respondents to return the motor vehicles attached by the 2nd Respondent to it.

[4] There was no appearance on behalf of the 2nd and 3rd Respondents. The Applicant stated that no order was being sought against the 3rd Respondent. On behalf of the Respondents some points in limine were raised. The court must now therefore address those points and make a ruling thereon.

[5] Firstly, it was argued on behalf of the 1st Respondent that the Applicant has failed to establish urgency, and that therefore the application should be dismissed with costs. It was argued that if there was urgency such was self created and the Applicant therefore cannot rely on it. It was argued that as the attachment was effected on the 8th December 2005, the Applicant cannot come to the court on the 2nd March 2006 and claim that the matter is urgent.

[6] It was argued to the contrary on behalf of the Applicant. The Applicant's counsel told the court that the Applicant is a South African based company. It was argued that the Applicant was not aware that the attachment was effected on the 8th December 2005. It was argued that the Applicant had the impression that the attachment was effected on the 15th February 2006.

[7] There was no evidence of the returns of service in the court file. The date of the attachment is therefore in dispute. Sikelela Vilakati in his Supporting Affidavit said that the trucks were attached from Chrisildas Transport (Pty) Ltd premises on the 15th February 2006 whatever the exact date was, it was not in dispute that the advertisement of the sale appeared in

the newspaper on the 22nd February 2006. The court was told that representatives of the Applicant had to travel to Swaziland to give instructions to their attorneys. That was done on the 27th February 2006.

[8] In the light of the submissions that the Applicant is a foreign based company, and its officers had to travel to Swaziland to brief their attorney, it cannot be said that the urgency was self created.

[9] Secondly, it was argued on behalf of the 1st Respondent that the Applicant has failed to establish a prima facie right to be heard by the court as the agreement annexed as 'IG1' was defective and the Applicant cannot rely on it. It was further argued that the agreement was defective as the 1st Respondent did not affix his initials on the annexures thereto. It was also argued that the agreement referred to fixed assets, and that trucks cannot be fixed assets. It was argued that the annexures were prepared in the absence of the 1st Respondent.

[10] The arguments on behalf of the 1st Respondent will be dismissed for the following reasons:

a) Fixed assets in ordinary parlance a truck cannot properly be referred to as a fixed asset. In the agreement however the meaning given to that word as given under article 2.8. It was stated there that: "the MFS Fixed Assets" means all the fixed assets of MFS as detailed in annexure 2

hereto." It is clear therefore that for the purposes of the agreement fixed assets are the items listed in annexure 2. The parties gave their own meaning to the word.

b) No appearance of the 1st Respondent's signature on page 8 of the agreement; it was clear from the agreement why the 1st Respondent could not sign on behalf of the MFS on page 8 of the agreement. In terms of articles 6, the appointees of Chrisildas were appointed as directors of Mphumelelo Forest Services ("MFS"). There was no way therefore hat the 1st Respondent could have signed on behalf of MFS as he had no mandate to do so as the directorship of MFS was given to the appointees of Chrisildas. That article states:

" 6 Directors:

With effect from the effective date, the appointee/s of Chrisildas are appointed as directors of MFS and the appointee of ISF and MRB resign as directors."

c) Failure of the 1st Respondent to sign or put his initials on the annexures, it is not known to the court why the 1st Respondent did not do that. What is clear however is that the 1st Respondent was or will be presumed to have known about

the annexures as he did put his initials in the body of the agreement where the annexures are referred to. The court cannot know why he did not put his initials thereon, but he cannot say that he was not aware of them. The rule of *'caveat subscriptor'* clearly prevents him from denying that the annexures were not present when he signed the agreement.

[11] Taking into account all the above observations therefore, the court will make an order that the point raise in limine are dismissed.

[12] No order for costs is made.

The members agree.

NKOSINATHI NKONYANE A-J
INDUSTRILA COURT