IN THE COURT OF APPEAL OF SWAZILAND

CIVIL CASE NO.7/2005

In the matter between:

NHLAVANA MASEKO 1st APPELLANT

KHOKHELA TFUMBATSA 2nd APPELLANT

AARON SLOMBO 3rd APPELLANT

AND

GEORGE MBATHA 1st RESPONDENT

TERRENCE REILLY 2nd RESPONDENT

CORAM:

BROWDE JA

STEYN JA

ZIETSMAN JA

JUDGMENT

[1] I have read the judgment of my brother Zietsman and I concur both with his reasoning and with his conclusion. I would however add a few comments concerning the issues of bringing matters to court as matters of urgency as well as the non-compliance with Court Rules and Practice Directives.

[2] There has been a tendency to bring matters to court as being so urgent as to justify a departure from the time constraints imposed by the Rules of Court. There can be no doubt that the need exists to cater for the facilitated and speedy access to the court where the delays of the law might cause harm to a litigant and effectively frustrate his chances of obtaining a just resolution of his dispute. Such cases are however, clearly exceptional and our courts must be on their guard to protect parties against the abuse of these special powers. Our Rules of Court have been framed in order to ensure that the legal processes will be orderly and that parties are given a fair opportunity to prepare and present their case. Rule 6 has been designed to achieve this objective and a departure from its provisions will only be sanctioned in cases which fall within the purview of sub-rule 6(11). This Rule reads as follows:

"6 (ll)(a) In urgent applications the court or a 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 to the Court or Judge, as the case may be, seems meet.

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, 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."

[3] In several cases before us and in this current matter also, the High Court has allowed applications to proceed as matters of urgency where the facts do not justify such a departure from the Rules. Moreover, the certificates of urgency submitted by counsel - as in this case - are bland and do not comply with the

requirements of sub-rule 6(ll)(b). In casu the certificate reads as follows:

"CERTIFICATE OF URGENCY

1, the undersigned

SIPHO GAMEDZE Do hereby make oath and state that I am an Attorney of the above Honourable Court and duly practicing as such with the law firm of Vilakati, Dlamini & Partners opposite Mandlenkosi Building based in Manzini.

I have perused the Notice of Motion together with the Founding Affidavit and certify that the allegations made therein justify the dispensing with the time limits provided by the Rules of Court and hear this matter as a matter of urgency."

[4] As is evident from the contents of this affidavit no attempt has been made by the deponent to "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." I make bold to say that had the deponent attempted to comply with these provisions he would have found it difficult on the facts of this case to make out a credible case for a departure from the Rules governing due process.

[5.] Concerning the late filing of heads of argument I regret to record the view of all of us that there has been a serious departure from an observance of the practice directive issued by the Judge President on the 21st of April 2005 (see the copy attached)

Practitioners will note the clear warning that non-compliance may be met with appeals being struck off

or punitive orders for costs being made. These sanctions may also be invoked where there is a late filing of the record, a late filing of a notice of appeal or where there has been non-compliance with the Rules and no application for condonation has been made by way of affidavit.

These comments are made with the approval and support of the President of this Court. The Registrar is requested to circulate these comments amongst all relevant stakeholders.

J. H. STEYN

JUDGE OF APPEAL

I AGREE

J. BROWDE

JUDGE OF APPEAL

I AGREE

N.W. ZIETSMAN

JUDGE OF APPEAL

Delivered on this 24th June 2005

PRACTICE DIRECTIVE

(Amendment of Rule 31 of the Court of Appeal Rules)

1. The attention of practitioners Is drawn to Legal Notice No. 77 of 1989, which amends Rule 31 of the Court of Appeal Rules by increasing the period for filling heads of argument before hearing from 21days to 28 days in the case of the Appellant and from 10 days to 18 days in the case of the Respondent.

2. The purpose of the amendment is to allow sufficient time for the Registrar to forward heads of argument to the Judges of the Court of Appeal and to enable those Judges to give adequate prior consideration to them. The amendment is, therefore, designed to assist not only the Court but also the parties to an appeal who will obviously wish that the fittest consideration is given to their heads of argument.

3. Parties to an Appeal will usually know well in advance of each session of the Court of Appeal whether or not their Appeal has been listed for that session. It should, therefore, pose no difficulty to them to prepare and file their heads of argument within the new time limits. In exceptional cases where short notice of hearing is given the amended Rule providers for the time limits to be abridged with leave of a single judge of the Court of Appeal. Applications for such leave should be made timeously.

Practitioners are asked to give their fullest co-operation in ensuring that the new time limits are met. Failure to do so win be regarded with extreme disapproval by the Court of Appeal may be met with Appeals being struck, off or punitive orders for costs being made.

D. A. MELAMET

2005 JUDGE PRESIDENT

RE: ISSUED 21ST APRIL

T. S. MAZIYA

REGISTRAR OF THE APPEAL