IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No. 268/2006

In the *ex parte* matter of:

JACQUELINE TAFT (born Gray) APPLICANT

AND

NIGEL ALFRED TAFT 1st RESPONDENT

DEPUTY SHERIFF, HHOHHO 2ND RESPONDENT
TEA ROAD VIEW (PTY) LTD 3rd RESPONDENT

CORAM: ANNANDALE ACJ

FOR THE APPLICANT: ADV. M VAN DER WALT
(instructed by Currie 8B Sibandze)

FOR THE 1st AND 3rd RESPONDENTS: MR. MAGAGULA (Robinson Bertram Attorneys, Mbabane)

JUDGMENT
(ON PRELIMINARY LEGAL POINTS)
22nd SEPTEMBER 2006

[1] During the course of a longstanding and ongoing course of litigation between the Applicant and 1st Respondent, an application was brought to court in April 2006 on an *ex parte* and urgent basis.

[2] Interim relief was then ordered as prayed, with a return date in May 2006. On this day, leave was granted by consent that the present 1st and 3rd Respondent may oppose the application, also that service on the 1st Respondent be affected through his attorney's offices and that the interim relief be

extended.

[3] The matter then came to be argued in June 2006, on the *caveat* that the reserved ruling would not be forthcoming anytime soon, due to numerous other obligations of this court. It was also the understanding that should circumstances so require, I be notified at which time the preparation of the judgment would be expedited, but to date it did not occur. Nevertheless, this ruling is long overdue and I cannot but apologise for the undue delay, caused by a host of factors that militated against expeditious settling of the ruling.

[4] It also requires mention that at the time of the hearing the Respondents' attorney undertook to prepare and file heads of argument and authorities referred to, but despite a few reminders, it has not yet happened and this court remains deprived of the benefit of having his heads and authorities at hand.

[5] No answering affidavits by any respondent were filed of record. The 1st and 3rd Respondents instead filed a Notice to raise points of law *in limine,* which Notice ends with a prayer for leave to file a substantial affidavit on the merits in due course, should the legal points not be upheld. Applicant's counsel objected to this prayer, indicating strong opposition thereto and insisted on a formal substantive application to seek leave for doing so.

[6] The identity of the 2nd Respondent in the present *ex parte* application is stated to be the Deputy Sheriff *nomine officio,* whereas the Respondent's attorney refers to the 2nd Respondent in his notice as being "M Rozwadowski" and the 3rd Respondent as "Smith Gcina". These two persons were cited in preceding litigation and not in the present matter. Also, leave was granted for the present 1st and 3rd Respondent to defend, on application by the same attorney, and for present purposes, I proceed from the basis that it is merely an inadvertent oversight and error by the attorney that resulted in an incorrect citation of Respondents. The Deputy Sheriff, as 2nd Respondent, did not file any response in the matter. Accuracy in the citation of parties in pleadings does not seem to be taken seriously enough by the 1st Respondent's attorney.

[7] The terms of the rule *nisi,* which remains in existence, are as follows :-

> "*1. Staying the execution of the writ of execution sued out by the first Respondent against the Applicant under High Court Case Number 268/2006.*
>
> *2. Interdicting the 1st and 3rd Respondents of disposing of the proceeds of the sale of the remaining extent of portion 96 of Farm 2, Mbabane, and directing the 1st and 3rd Respondents to ensure that same remains in the account of the conveyancers Messrs. M.J. Manzini & Associates.*

3. Directing the 2nd Respondent to attach the proceeds of the abovesaid sale.

4. Setting aside the writ referred to in 3.1 above.

5. Directing the 2nd Respondent to execute the writ of execution sued out by the Applicant against the 1st Respondent under High Court Case Number 370/2003, against the proceeds destined for the 1st Respondent, as attached in terms of 3.3 above.

6. Directing that the Applicant's share of the proceeds of the sale (E275 000.00) be paid directly to the Applicant, and directing the 1st and 3rd Respondents to take all necessary steps and sign all documentation to give effect thereto.

7. Interdicting the 1st *and 3rd Respondents from alienating or encumbering any other of the 3rd Respondent's immovable properties without the consent of the Applicant.*

8. That the orders in 1 and 2 above operate with immediate and interim effect.

9. That a copy of this application and the rule nisi *be served on the Respondents.*"

[8] As stated above, no answering affidavits are (yet) before the court for consideration of the merits as

such, but as a preliminary, the following legal points are raised in order to try and stifle the matter from further progression:

> "*1. The Applicant in her founding affidavit has failed to set out the particularity and sufficient facts to satisfy Rule 6(9) and Rule (25) a and b (sic)of the High Court Rules.*
>
> *2.*The *Applicant has failed to set out sufficient facts and to satisfy the requirements of an* ex parte *application, and there are no lawful reasons set out in the affidavit which justify that the application should not have been served on the affected parties.*
>
> *2.1. One of the prayers sought in the Applicant's notice of motion under prayer 3.1 is to stay the writ of execution sued out by the 1st Respondent against the Applicant under High Court Case Number 268/2006. Legally, there is no justification why an application to stay a writ should be* ex parte *and the Applicant has failed to set out sufficient in her affidavit to justifying (sic) such an abreachment of the Rules of Court.*
>
> *3. One of the prayers sought by the Applicant in her notice of motion is in a form of an interdict nature, yet the founding affidavit lacks the necessary averments required to satisfy the granting of an order for an interdict.*

Further, Applicant does not state whether the interdict prayed for is interim or final in nature."

[9] The objection in so far as it pertains to Rule 6(9) is ill-conceived. This sub-rule pertains to applications other than those brought *ex parte.* The present application was indeed brought *ex parte* for reasons stated in the application itself. The Respondent's attorney argued that Rule 6(9) was abused by the Applicant as the matter concerns a taxed bill of costs. I fail to comprehend the significance. In any event, as is provided for in Rule 6(7), the 1st and 3rd Applicants have indeed been granted leave to oppose the application.

[10] The second prong of attack against the application, *in limine,* is stated to be an absence of motivating Rule 6(25)(a). This sub-rule allows for a dispensing by the court, in urgent applications, with the forms and service provided for in the rules and disposal of the matter as the court or judge deems fit. It is an enabling rule to grant discretion to the court, not to the Applicant, as to how urgent applications shall be dealt with, such as dispensing with the time limits that would ordinarily apply. It is in sub-rule 6(25)(b) where the requirements are set out, as to what is expected of an Applicant who wishes to persuade the court to exercise its discretion under Rule 6(25)(a).

[11] Turning to the first applicable point, the respondents allege that Rule 6(25)(b) has not been complied with. This sub-rule enjoyns applicants to set forth explicitly the circumstances which would render a matter urgent and the reasons why substantial redress cannot be afforded in due course, in order to persuade the court to indeed dispense with time delaying inhibitors required by the rules, i.e. to "fast track" the matter and hear it forthwith.

[12] This aspect has been judicially considered in a phletora of case law in all jurisdictions with similar provisions. The absence of proper compliance has submerged countless "urgent applications" before given time to breathe and to be heard on the merits. Indeed, in the anteceding application under the same case number, the same applicant sought to bring a different application, against the same 1st Respondent and two others as one of urgency. That application was dismissed *in limine* by my learned brother, Maphalala J, in his judgment dated the 2nd February 2006 forming part of this court file, essentially on the absence of conformation with the requirements of Rule 6(25)(b).

[13] In his judgment, he referred to the case of HUMPHREY H. HENWOOD v MALOMA COLLIERY AND ANOTHER, Civil Case 1923/1995 (as yet unreported), wherein Masuku J carefully scrutinised the applicable principles and requirements of what is to be

understood by the peremptory requirement under the Rule 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."

[14] He also referred, again with approval, as does this court, to the by now equally well known dictum of Sapire CJ in H.P. ENTERPRISES (PTY) LTD V NEDBANK (SWAZILAND) LTD, unreported Civil Case No. 788/199:

> "*A litigant seeking to invoke the urgency procedures must make specific allegations of fact, which demonstrate that the observance of the normal procedures and time limits prescribed by the Rules 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, but must give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow.*"

[15] In my view, the Applicant fully complies with the requirements relating to a motivation of the aspect of urgency and why substantial redress in due course will remain a mere vision. In her affidavit, the Applicant sets out the background and perspective of the matter, relating events that give rise to her

application. All sorts of serious allegations are made, yet to be tested and sure to be challenged. She fears severe financial prejudice if certain transactions proceed unabated, she complains of non-compliance with maintenance obligations and a preponderance of inequity if a writ is to be executed against her, while she has a substantial counterclaim against the same creditor, the 1st Respondent. She does not challenge the validity of the writ, but sought to have the claims to be offset against each other, through the respective attorneys, without any measure of success. It is unclear why offsetting of mutual debts could not be settled. One authority of many in this regard is GRAPHIC LAMINATES CC v ALBAR DISTRIBUTORS CC 2005(5) SA 409(C) at 413 where it was held that:

> "*A further basis on which the Applicant seeks firstly, to have the sale of execution stayed and the first writ of execution set aside - to the extent that it relates to the application for leave to appeal -and secondly, to have the second writ set aside, is that the claims in respect of which those writs were issued have been extinguished by the operation of set-off Set-off operates automatically from the moment two parties are mutually indebted in respect of debts that are liquidated and are due. The effect thereof is that the one debt extinguished the other* pro tanto (my emphasis) *as effectually as if payment has*

been made (see WESTERN CAPE HOUSING DEVELOPMENT BOARD v PARKER 2005(1) SA 462(C) at 470D-E). It is trite that a claim for costs become liquidated as soon as it is taxed. The applicant claims that the claims for costs in respect whereof the first and second writs of execution have been issued have been set off against an amount ofR54 500 that the 1st Respondent is alleged to have admitted was due and owing by it to the Applicant."

The inability of the present litigants to set-off the writ against the maintenance payment may be due to a dispute as to liability of the latter. It may equally well be due to an unwillingness to understand reason or a desire to litigate. Whichever it is, the Applicant considers the consequences of a refusal to set-off to at least seek a stay in the execution of the writ against herself in the *interim,* until such time that the court either orders it to be done or decides otherwise. As said, all of this may well be given a very different angle of perspective once the other side of the coin is illuminated by the Respondents. However, it is with this abbreviated background in mind that she states why the court should exercise its discretion as is provided for under this Rule.
In paragraph 40 she states:-

"*40. I respectfully submit that the matter is urgent, and that I cannot be afforded substantial redress in due course,* inter alia *for the following reasons:*

40.5 *The First Respondent has consistently since August 2003, when the first judgment issued, failed to meet his maintenance and ancillary obligations towards me and our minor child.*

40.6 *The Deed of Sale was signed already in March 2006 and unless the* interim *relief sought is granted forthwith, there would be no control over the application of the proceeds of the sale, the First Respondent as sole director of the company owning the property, pulling all the strings.*

40.7 *The First Respondent has already divested himself of his significant assets in Swaziland, and I fear that he would dispose of the proceeds of the sale as well, thereby placing same beyond the reach of any court process, including writs of execution.*

40.8 *The First Respondent's attorney has emphatically refused to agree to my attorney's suggestion (annexure "JT3.2" dated 20th March 2006) that his writ be set off against the arrear maintenance, which I respectfully perceive as a gesture of bad faith on this part.*

40.9 *Execution of the First Respondent's writ against me is imminent and would cause me irreparable harm. It, with respect, would be iniquitous if the First Respondent, who fails to*

comply with his maintenance obligations, and is massively in arrears, should he be allowed to take what little I have without fulfilling his part of the bargain.

40.10 *Should the writ not be executed against his share of the proceeds of the sale, I and our child will suffer irreparable harm in that there would be nothing else to execute against.*"

[18] Mr. Magagula has argued that these considerations are irrelevant and that it should not be considered in favour of a finding of urgency. Maintenance payments allegedly not made should not render it urgent, it is said, if a writ is complained about. There is no order sought to have the writ set aside, and if proceeds of a sale is referred to, it has to be done by serving the other side, not *ex parte,* and therefore also cannot be considered, on that ground. Further, so the argument goes, if she alleges a fear of asset disposal, it is only based on bald allegations without any factual foundation, and that a refusal to offset mutual debts cannot render her matter urgent. Furthermore, that she cannot aver the 1st Respondent to be in contempt of court as she herself has failed to satisfy a taxed bill of costs and most importantly, that she does not address any issue of irreparable harm if she had to litigate in the ordinary course, as is

required under the Rules, especially so that it is the 1st Respondent that will have nothing to execute against, not that she herself will suffer such harm, as stated in paragraph 40.6 of her affidavit.

[19] What this contrived argument fails to take into account is the fuller picture of circumstances that runs as a refrain throughout the founding affidavit, *prima facie* and as yet untested, but it being the essence of her application.

[20] From the papers, it is alleged that the applicant had an expectation, at the time she deposed to her affidavit, that an amount of E109 608 was due to her by the 1st Respondent, by now probably more unless already settled. Also, that she is a 50% shareholder in a company which she saw being advertised, allegedly without her knowledge. When she came to court earlier this year, her application was dismissed on this very same point of urgency or the lack of it, without determination of the merits in her matter, resulting in a costs order against her of some E4 080, which the 1st Respondent now seeks to execute.

[21] The E109 608 is in respect of unpaid maintenance to herself and a minor child, due by the 1st Respondent, allegedly so. She in turn is indebted to him by E4 080, more than E100 000 less than what she claims to be due to her,

which did not result in an off-set of amounts, not only reducing her claim against him but also eliminating his claim against her, leaving a balance of disproportionate dimensions, such as to justify her apprehension of irreparable harm.

[22] When the applicant came to court in the manner she did, it was to seek interim relief, a rule *nisi,* in order to place everything on hold for a while, thereby to secure breathing space for herself and at the same time, to have the papers served on the Respondent, affording him an opportunity to properly ventilate the matter and to persuade the court not to make the *interim* relief final, by discharging the rule *nisi.* The only orders asked to have immediate *interim* effect are in respect of the execution of the writ against her by the 1st Respondent through the Deputy Sheriff, and to have proceeds of an anticipated sale in a company she claims to own one half of, to be deposited into a conveyaner's trust account. It is against this, under the cloak of alleged absence of averments as are dictated by the Rule and legal precedent, but which does not hold water, that the Respondent attacks the manner in which the Applicant came to court, obtaining a *rule nisi* to safeguard her *prima facie* expressed fear of the consequences that may befall her if she had to litigate under notoriously slow and cumbersome rules of procedure. The interests of the Respondents, in particular the 1st, yet remain to be considered. He, and the 3rd Respondent, are yet to state why the *rule nisi* should not be confirmed but discharged. When a balance is struck between the stated apprehensions and averred infringement of

rights of the Applicant and 1st as well as 3rd Respondents, the procedure and *interim* relief seem eminently suitable to meet the imminent demands of fair play and justice between the parties.

In this regard, the decision by Levinsohn J in TURQOISE RIVER INCORPORATED v McMENAMIN 1992(3) SA 653(D) at 657-D - 658-A is of useful and persuasive guidance. The Court stated:

> "*I hold that it was competent for the Applicant to have launched an application for a rule* nisi. *This form of procedure has been referred to by Corbett J A (as he then was) in Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport*

Commission 1982(3) SA 654 (A) at 674G as follows:

> *The Uniform Rules of Court do not provide substantively for the granting of a rule* nisi *by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law (see, generally, Van Zyl, The Judicial Practice in South Africa 2nd ed at 355ff 370-1; Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa 3rd ed at 89 90). This is recognised by implication in the Rules (see, e.g. Rule 6(8) and Rule 6(13)). The procedure of a rule* nisi *is usually resorted to in matters of urgency and*

where the ***applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show,*** prima facie, ***that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons.***

> (my emphasis). *The rule* nisi *procedure must be considered in conjunction with the provisions of Rule 6(12) which, in the case of urgent applications, permits the Court to "dispense with the forms and service provided for in these Rules and (to) 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 it seems meet". (And see in this connection Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972(1) SA 773(A) at 781H-782G.) In fact, the rule* nisi *procedure does make it possible for the application to come before the court for adjudication more speedily than the usual procedures for the set down of*

applications or trials, and it does, in a proper case, permit of the granting of interim relief"

The Appellate Division has thus given the seal of approval to the invocation of the rule nisi *procedure in appropriate cases where urgency exists.*"

With all respect to the Respondent's attorney, his argument with regard to not only urgency but also the bringing of the application *ex parte,* without prior notice to the Respondents, stands to fail. The Applicant explicitly states in the founding affidavit her apprehension that she has a fear that if made aware of the matter before obtaining some safeguard, assets in which she has a 50% interest may be liquidated and spirited away.

Of course the Respondents may well be able to allay such apprehension in some or other manner. This court does not yet know if her stated shareholding is a contentious issue or not, nor whether the 1st Respondent indeed is a sole director with the abilities attributed to him. What she did do, is to state that the potential sale of property owned by the 3rd Respondent has a factual basis.

A Notice was published in the local media that a certified copy of the transfer deed in favour of the 3rd Respondent was going to be applied for. It is the

same property that the Applicant states to have an interest in and alleges to not have participated or even have been acknowledged in the sale negotiations.

She also filed copies of Deeds of Sale relating to the property she claims to have a half share in, entered into between a potential purchaser and the 3rd Respondent, represented by the 1st Respondent.

[28] She continues to allege that he has already divested himself of significant local assets, placing it beyond reach of execution. This may be devoid of sufficient details to sustain opposition thereto, but at minimum it motivates her reason for coming to court *ex parte.*

[29] Moreover, she held forth a further reason for not notifying especially the 1st Respondent of her intended application. She states in paragraph 43 of her affidavit that "*the exact whereabouts of the 1st Respondent are unknown. If the Deputy Sheriff has been unable to find him, I have little prospect of doing so and cannot, for the reasons aforestated, afford a further delay in securing my rights.*"

[30] She also states her apprehension that if notice is to be given to the 1st Respondent, it may well defeat the purpose of the application and that if the others were served, it may well also come

to his notice. The purpose of the application, to a great extent, is to preserve assets for execution in the event that it becomes necessary to do so, were she to succeed in her efforts to recover stated arrears in maintenance payments, substantially more than what she owes in respect of taxed costs. Her apprehension is motivated as stated above, namely efforts to dispose of property in which she has a vested interest, without her acquiescence. Should there be any prejudice to the 1st Respondent, she states, it would be minimal as any proceeds so interdicted would be deposited into a conveyancer's trust account pending final pronouncement by the court and in any event, it is not only temporary but he would be able to anticipate the return date once the papers have been served. The Court agrees with this stated apprehension.

[31] The object of coming to court *ex parte* is to "prevent the horse from bolting", as it was put by Corbett JA in UNIVERSAL CITY STUDIOS INC v NETWORK VIDEO 1986(2) SA 734 (A) at 752H:

"*Lategan J granted what may be typified as an* Anton Piller *order in a typical kind of case, viz alleged copyright infringement and unlawful trading. The Full Court set aside the order principally on the ground that it was a fundamental principle of our law that a Court will not normally grant an order which may*

directly affect the rights of a person and involve far-reaching consequences to him without giving that person an opportunity of being heard, with the result that in ex parte *applications brought without notice the Court orders the issue of a rule* nisi *where the rights of other persons may be affected by the order; that in the instant case the order granted by Lategan J constituted a grave invasion of the rights of the Respondent; and that consequently notice of the application, in some form or another, should have been given to the Respondent (see judgment 1984(4) SA 379(C) at 381E - H). The Court referred to the* Anton Piller *practice, but concluded (at 383C-D):*

"*It is unnecessary in my opinion to consider the various cases quoted to us on the subject. It suffices to say that we have not been persuaded that a different practice has grown up and been accepted in the Anton Piller - type of case which would justify this Court to depart from the firmly established practice in this Division to insist on notice to a Respondent beforehand or to require that a rule* nisi *be issued where, as in this case, an order is sought which vitally affects the rights of the Respondent.*" ***It is, however, of the essence of the Anton Piller procedure that notice is not given to the other party; the reason being that it is apprehended that the giving of notice will defeat the purpose of the order: will cause the***

horse to bolt, as it has been put. *(My emphasis). If, therefore, the procedure is a proper one in our law, a point which the Full Court appeared to leave open, and the case under consideration justifies the granting of an Anton Piller order, then no prior notice of the application need be given.*"

[32] Applicant's counsel, with regard to the uncertainty as to where the 1st Respondent could be served, as stated in the founding affidavit, referred the Court to the affidavit filed by him in the Rule 6(7) application for leave to oppose the matter. Although he states the full physical address of the present Applicant, he fails to give any further particulars of his own, merely referring to himself as "residing in Ezulwini". For even the most diligent Deputy Sheriff to locate a person in the geographical area of "Ezulwini" is akin to search for the proverbial needle in a haystack. Yes, it may well be possible to find him, but not readily so at an address of any more definitive particularity.

[33] This aspect has now been overtaken by events and future process will be served at his attorney's offices, but the initial point of the applicant with regard to the uncertainty as to where he could be served, in support of bringing the application *ex parte,* remains valid.

[34] The 1st and 3rd Respondents furthermore take issue with the application in that they contend that

no basis has been laid by which an interdict may be applied for and also that she does not distinguish between interim and final interdicts.

[35] The latter aspect seems to me to be without merit as a reading of the prayers in the Notice clearly is indicative of the nature of the interdicts. Interim interdicts are sought and were granted in respect of prayers 3.1 and 3.2, to temporarily stay a writ and to have proceeds of a sale, or of a potential sale as it equally could be, to be kept in a trust account. Clearly, this is an *interim* measure, for the time being, until such time that the matter is decided. The remainder of interdicts prayed for are final interdicts, yet to be considered in due course, once the merits thereof are determined and pronounced upon.

[36] Concerning the aspect of the contention that the founding affidavit lacks the necessary averments required to satisfy the granting of an order for an interdict, Mr. Magagula undertook to file written heads in which he would have set out his argument. It did not materialise and the Court has only what he argued at the hearing, a minimalistic and bare-bone contention. This is that the 1st Respondent is a director and that the Applicant does not have an exclusive right, also that she did not say why no other form of relief in due course would not help, save to obtain an interdict. As authority for this, mention was made to the well-known case of

SETLOGELO v SETLOGELO (1914 AD 221) in its entirety, but that particular portions would be highlighted in the Heads of Argument.

[37] On the other hand, counsel for the Applicant meticulously set out in table-form the relevant requirements and corresponding paragraphs wherein it is said to have been met, in respect of the various prayers. For sake of brevity it is reproduced in its entirety.

(a) Prayers 3.1 and 3.4:
Staying execution and setting aside writ

REQUIREMENT	PARAGRAPH
Right	27 and 28
Irreparable Harm	33
Balance of Convenience	34
No other remedy	35

(b) Prayer 3.2, 3.3, 3.5 and 3.6: Interdicting disposal of proceeds of sale; ordering attachment of proceeds of sale; executing applicant's writ against proceeds of sale; and payment to applicant

REQUIREMENT	PARAGRAPH
Right	27 and 28
Irreparable Harm	33
Balance of convenience	34
No other remedy	35

(c) Prayer 3.7:

Interdicting alienation

of property

REQUIREMENT	PARAGRAPH
Right	36
Irreparable Harm	38
Balance of convenience	38
No other remedy	39

[38] In order not to further overburden this judgment, I shall not endeavour to set out a comparison between the various averments of the Applicant with the various requirements for interdicts as tabulated. Also, since preliminary legal objections are presently under consideration and the sufficiency of the Applicant's case to decide whether it should succeed on the merits or not, and knowing full well that the Respondents have not yet filed answering affidavits in which issue is clearly indicated to be taken to virtually each and every aspect, furthermore that it would be an inequity to now make a pronouncement, albeit preliminary, on a meeting of the requirements, thereby prejudging the case, I refrain from doing so. Suffice to say that the blanket statement that the founding affidavit "lacks the necessary averments to satisfy the granting of an order for an interdict" is not sustainable at the present stage of proceedings.

[39] Whether the averments are sufficient to carry the day will remain to be decided in due course.

[40] Finally, there remains the unresolved issue as to

whether or not the Respondents may file opposing affidavits. By the very nature of the acrimonious litigation thus far and presumably for some time yet to come, no holds are barred and no quarters are given. The Applicant objects to filing of a substantial opposing affidavit in answer to her case. She requires a substantive application to be made.

[41] It is my considered view that this may not be quite appropriate. The Applicant came to court, well within her rights as found above, without notice to the Respondents. Thereafter, the 1st and 3rd Respondents moved an application under Rule 6(7) and they were granted leave, by consent, to oppose the application.

[42] No order was made as to when opposing papers were to be filed. In the event, they came to court and argued only points *in limine* which stand to be dismissed. In the notice to raise legal points, they also prayed for leave to file answering affidavits should the outcome be the way it is, which is opposed by the Applicant.

[43] There are substantive issues of difference between the parties. This much is spelled out by the 1st Respondent in his Rule 6(7) affidavit. To now deprive the Respondents the opportunity to challenge the merits of the application without being heard and to ultimately grant the relief prayed for by the Applicant, is certain to cause an appeal with referral back to the High Court to hear the matter in

full on the merits and the resultant costs implications and attendant delays will not be in the best interests of fair justice.

[44] Also, to now refer and divert the matter to have a contested application heard in order to decide if answering affidavits may be filed or not would therefore be an exercise in futility, merely adding to legal costs which will serve no useful purpose.

[45] For the abovestated reasons, the points of law raised by the 1st and 3rd Respondents stand to be dismissed, with costs. Costs are to include costs of counsel, to be taxed under the provisions of Rule 68(2).

[46] The Respondents are given leave to file answering affidavits under the usual provisions of the Rules, with potential to reply thereto, whereafter the matter may be set down for hearing of the merits.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE