THE HIGH COURT OF SWAZILAND

MPININDVUNA MICHAEL MANGWE

Applicant

And

GILBERT MABILA
Respondent

Civil Case No. 2316/2005

Coram**: S.B. MAPHALALA - J**

For the Applicant: **MR. E. MAZIYA**

For the Respondent: **MR. P. SHILUBANE**

RULING

(On points of law in limine) (29th July 2005)

[1] On the Friday afternoon of the 24th June 2005, an urgent application appeared before me for an order, inter alia, interdicting the Respondent who is the deceased's father from continuing with the burial of Applicant's dead wife Alethea Khululekile Mabila on Sunday the 26th June 2005 as advertised in the Times of Swaziland pending finalization of this application. Further relief was sought in terms of prayers 3, 4, 5, 6, 7 and 8 thereof. After hearing arguments on points of law raised by Mr. Shilubane for the Respondent I dismissed the application with costs on the basis, inter alia, that the court lacked jurisdiction to hear the matter. I intimated to Counsel that I will furnish full reasons in due course. Following therefore are those reasons.

[2] The background of the matter is that the application was set down for 9.30am on the 24 June 2005 on an ex parte basis. I directed that the other party be served with the papers in view of the relief being sought by the

Applicant. Indeed, the Respondent was then served and his attorney Mr. Shilubane moved the points in objection at 4.00pm of the same day. The points of law in limine may be paraphrased as follows:

i) Short service.

ii) The court lacks jurisdiction.

iii) No urgency in terms of Rule 6 (25) (a) and (b) of the High Court Rules

- Applicant sat on his rights above.

[3] Points (i) and (iii) go together and I shall commence this ruling with them. In this regard it was contended by Mr. Shilubane for the Respondent that his client was given less than 2 hours in which to put his defence in this matter. Further, in the application itself there are no sufficient averments to satisfy the peremptory requirements of Rule 6 (25) (a) and (b). Indeed, Applicant approached the court on an extremely urgent basis and it was incumbent on him to make out a case justifying the urpiftVwith which it was brought (See Luna Mauber Vervaarmiger's (EDMS) BPK vs Makin and another t/a Makins Furniture Manufactures 1972 (4) S.A. 1366 and Patcor Quarries CC vs Issrof 1998 (4) S.A. 1069 (E) at 1075 and Humphrey H. Henwood vs Maloma Colliery Ltd and others - Civil Case No. 1623/94). The paragraph in the Applicant's Founding affidavit which sought to prove urgency states the following:

"This matter is urgent by reason that the burial of my late wife's body has been advertised for the 26lh June 2005 which is about two days from date of this application and my interest and rights in law will be prejudiced if burial is carried out in particular because I have been prevented (sic) to see the body of my late wife since she met her death to-date hereof and in fact makes me suspicious about the circumstances surrounding her death".

[4] Clearly, in the present ease the Applieant has not addressed the peremptory requirements of Rule 6 (25) (a) and (b) of the Rules of court.

Rule 6 (25) thereof reads as follows:

a) In urgent applications, the court of 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 fit.

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 court.

[5] Counsel's emotional utterances from the bar cannot be a substitute for the clear provisions of this rule. In casu I find that Applicant had failed to prove the peremptory provisions of Rule 6 (25) (a) and (b) as outlined above and therefore the application ought to have been dismissed on this ground alone. In Megalith Holdings vs RMS Tibiyo (Pty) Limited and another, Civil case No. 199/2000 (unreported) Masuku J expressed the following sentiments; and I quote:

"The provisions of Rule 6 (25) (b) exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in affidavit or petition set forth explicitly the circumstances which he avers render 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 ex facie the papers and may not be gleaned from the surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's Counsel", (my emphasis)

In the H.P. Enterprises matter (supra), Sap ire CJ held at pages 2 - 3 that:

"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 or fanciful but must give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow".

[6] On the remaining issue of lack of jurisdiction of the court to entertain the matter I found that the provisions of Section 11 (a) of the Swazi Court Act No. 80 of 1950 operate in the present case. The issues in this case involved Swazi Law and Custom where the parties were married in terms of Swazi Law and Custom. In the main, I was persuaded by the submissions made by Mr. Shilubane for the Respondent.

[7] In the result, the afore-going reasons constitute the reasons for the dismissal of the application on the 24th June 2005.

S.B. MAPHALALA

JUDGE