

IN THE HIGH COURT OF SWAZILAND

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Case No 251/97

In the matter between:

GARDINI AND SONS PLAINTIFF

VS

SAXON (PTY) LIMITED DEFENDANT

CORAM: S.B. MAPHALALA - A J

FOR APPLICANT: P. FLYNN

FOR DEFENDANT: P. DUNSEITH

JUDGEMENT

(05/12/97)

This is an application in terms of rule 45(13)(1) which provides as follows:

"(i) whenever a return has been made to a writ of execution, that the officer charged with the execution has been unable to find sufficient property subject to attachment to satisfy the amount of the writ or whenever a judgement debt remains wholly or in part unsatisfied after the expiration of twenty-one days from the date of the judgement, the judgement creditor may by notice call upon the judgement debtor, where the judgement debtor is a body corporate, any Director, Manager, Secretary or other similar officer thereof or any person purporting to act in any such capacity, to appear before the court on day fixed by such notice, and to produce such documents as may reasonably been necessary, in order that the court may investigate the financial position of the judgement debtor".

The debt which is sought to be secured from the defendant is a sum of E383,262-71 plus interest at the rate of 9% per annum as from the 26th September, 1996. The history which brought about the said debt can be capsuled as follows: The plaintiff and the defendant entered into a contract on the 4th August 1995, in terms of which the plaintiff undertook to alter and add to the existing

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premises on stands 97,98 and 99, Mbabane for Saxon (PTY) LTD in accordance with drawings and specifications prepared by Portal Partnership Incorporated, architects. The defendant in consideration thereof, undertook to pay the plaintiff the sum of one million four hundred and twenty nine thousand, eight hundred and forty four emalangenani and fifty nine cents (E1,429,844-59). Certain disputes arose between the parties that were submitted to the architect for his decision in terms of the building contract. The architect gave his decisions on these disputes and these were not accepted by the plaintiff and subsequently the dispute was referred to arbitration in terms of clause 26 of the

conditions of contract. A certain John Resting was approached to act as the arbitrator and he duly filed his arbitrator' award (with Arithmetic Corrections) and this document was marked MM3 for these proceedings.

On the 16th October, 1997 the arbitrator's award (MM3) was made an order of this court. The arbitrator awarded a sum of E383,262-71 which is the subject matter of this enquiry.

On the 28th November, 1997 the matter came before me whereby Mrs Weissing who is a Co-Director with her husband Mr Weissing of the defendant was examined under oath by Mr Flynn for the plaintiff as to the financial position of the judgement debtor. She gave a lengthy account on the financial affairs of the defendant and provided the court with pertinent documents which I must say were very helpful to the court in the final determination of this matter. She told the court that the company owns lots 97, 98, and 99, Allister Miller Street, Mbabane. That this property was purchased for a sum of E1,200,000 which was largely financed by the Swaziland Building Society. The company then raised funds to make alterations to the buildings. The complex has 8 shops which are leased to other small business people for a variety of enterprises. She went further to outline to the court how much each of these shops pay as rentals per month. She gave a breakdown of the company's monthly income and expenses and it emerged from this exercise that the company's debt exceeds its income.

Mrs Weissing further told the court that an offer was made to the plaintiffs company for the liquidation of this debt, however, the offer was rejected. The company was offering to pay upfront a sum of E100,000 and thereafter a sum of E5,000 per month until the debt was finally paid up.

The court was to make an appropriate order in the circumstances. Firstly, I agree with Mr Dunseith for the defendant on perusal of the arbitrator's award which is now an order of this court that no award as to the interest of 9% sought by the plaintiff was made by the arbitrator. I am therefore not going to order for the payment of interest on the capital sum.

Now reverting to the merits of the matter, I have heard the evidence of the defendant, perused various documents tendered in evidence and considered the arguments by the parties.

It is clear to me that the defendant's expenses exceeds its income and it would be worthless to

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order defendant to pay more than it can afford. It is my considered view that the offer by the defendant is fair in the circumstances and thus make an order in the following terms:

The defendant is to pay forthwith a sum of E100,000 and thereafter a sum of E5,000 per month until the capital sum is finally liquidated.

S. B. MAPHALALA

ACTING JUDGE