IN THE HIGH COURT OF SWAZILAND

a: Nomine

CASE NO. 628/97

IN THE MATTER BETWEEN

JOHN BENNETT - NOMINE OFFICIO	PLAINTIFF
VS JOSEPH BUNDU KUSHOKA NDALLAHWA	DEFENDANT
CORAM	S.B. MAPHALALA - A J
FOR PLAINTIFF	MR P. FYNN
FOR DEFENDANT	MR H. FINE

JUDGEMENT

This is an application for summary judgement. The litigation has had a long history. As far back as the 7th March, 1997 the plaintiff issued combined summons. The same were served on the defendant on the 12th March, 1997 whereby the defendant issued a notice of intention to defend on the 16th March, 1997. Subsequent to that defendant on the 5th June, 1997 filed a plea in accordance with procedure. On the 26th June, 1997 the plaintiff filed his amended particulars of claim. On the 9th July, 1997 plaintiff made an application for summary judgement. On the 24th July, 1997 defendant files an affidavit raising points in limine and on the merits. On the 12th August 1997 plaintiff files a replying affidavit. Summary judgement is granted by Sapire A C J on the 19th September 1997 on claim one of the particulars of claim. On the 29th September, 1997 defendant files an urgent application for the rescission of the summary judgement granted on the 19th September, 1997. The judgement was rescinded and the defendant on the 31st October, 1997 filed an affidavit resisting summary judgement and raised points in limine and points on the merits. The matter was finally set down in the contested roll of the 4th November, 1997. The matter appeared before me on the 4th December, 1997 prior to that I had made a ruling on a point in limine raised by defendant in his affidavit resisting summary judgement on the point that there is no averment therein that John Bennett has read the amended particulars of claim upon which the application is founded. That this was not in conformity with rule 32 (3) © of the High Court Rules. However, I ruled in favour of the plaintiff. Again on the 14th November, 1997 Mr Fine opposed an application made by Mr Fynn to file from the bar a replying affidavit which has for some reason not filed in the court's file. Mr Fine contended then that the court can only exercise its discretion on special circumstances being shown by the party seeking the indulgence. (Per James Brown Hamer LTD V Simmons No. 1963 (4) S.A. 656 at 660) Again I ruled in favour of

a: Nomine

the plaintiff and allowed the filing of the replying affidavit from the bar.

The cause of action arise upon the following facts.

The plaintiff is suing herein in his capacity as the present liquidator of Swazican Holdings. The defendant was appointed as the liquidator of the said company in liquidation on the 10th May, 1995. On the 12th December 1996 the defendant was removed from his office as liquidator of the said company by order of the court in accordance with the provisions of the law. The plaintiff alleges that during the period that the

defendant held office as liquidator, he in the execution of his duties as liquidator received monies on behalf of the company in liquidation from time to time, while holding office aforesaid, the defendant deposited monies so received by him into the estate banking account. Thereafter the defendant proceeded to withdraw cheques thereon in his own favour or that of his company Ndallahwa (PTY) Ltd or payable to cash or to the credit card account, or in one instance, to "Mini Cafe". The total amount of the cheques so drawn was the sum of E83,204-35. Plaintiff provided a list in his amended particulars of claim of the cheques drawn.

All the said payments made by, or at the instance of the defendant, were unauthorised and were wrongful and unlawful. On the 12th September, 1996 a disciplinary hearing was held by Price Waterhouse regarding the conduct of the defendant, he admitted to having drawn the said cheques and removing the monies as afore said, although he admitted that such taking was wrongful. He undertook, however, to repay such monies into the said bank account without delay. To date he has failed notwithstanding demand to do so. Defendant is accordingly liable forthwith to repay such monies wrongfully taken by him, namely the sum of E83,204-35 on the alternative to claim 1 in terms of section 130 (1) of the Companies and Association Act No. 7 of 1912 a liquidator shall forthwith pay monies received by him to a bank named by the Master of the High Court. In terms of section 130 (2) of the Act a liquidator shall not pay any sums received by him as liquidator into his private banking account. During the period 30th April, 1996 to 31st January, 1997 the defendant failed and/or refused and/or neglected to pay monies received by him to a bank as aforesaid.

On claim 2 the plaintiff alleges that the facts set out in claim 1 are repeated in terms of section 72 of the Insolvency Act No. 81 of 1935 retention by a trustee of monies exceeding E40-00 give rise to the liability of such trustee, in addition to any other penalty of which he may be liable, to pay into the estate of the amount equal to double the amount so retained. In terms of the said section read with section 183 of the Companies Act the defendant is liable to the plaintiff in the sum of E166,648-70 being the amount equal to double the amount so retained.

When the matter came for arguments before me on the 14th November, 1997 in the contested roll Mr Flynn argued that his client was entitled to summary judgement in respect of claim 2. That the defendant cannot now argue that the matter was res judicata but judgement was rescinded and plaintiff relies on paragraphs 7, 7.1, 7.5 and 7.6 of his amended particulars of claim. In his

a: Nomine

answering affidavit the defendant does not deny that the money was taken and used by him. Factual allegation on which a defence may arise do not exist at all according to Mr Flynn contention. He does not deal with paragraph 7. He must address material facts to show that there is a triable case. The answering affidavit does not disclose a defence.

On the other hand Mr Fine argues that the matter is res judicata and to this effect he directed the courts attention to the South African Law of Evidence by Hoffmann and Zefferit (4th ED) at page 337 where the learned authors citing voet in his Commentarius Ad Pandectas, 44.2.3 (translation from Bertram V Wood (1893) 10 S.G. 177 of 181) thus:

"Under no circumstances is the exception allowed than where the concluded litigation is again commenced between the same persons, in regard to the same thing, and for the same cause of action, so much so, that if one of these requisites is wanting the exception fails".

The authors proceed to state that our courts have followed these writers and it is now trite that, to succeed in defence of res judicata, the defendant in civil judgement had been given in proceedings involving:

(a) The same subject matter;

(b) Based on the same res or thing;

© Between the same parties

Mr Fine's contention is that there are two affidavits made by the plaintiff John Bennett and these are the same in substance. The plaintiff has come to court on the same issues. He applied that the application for summary judgement be dismissed with costs.

These are the issues before me. It is trite law that the remedy for summary judgement is an extra ordinary remedy, and a very stringent one, in that it permits a judgement to be given without trial. It closes the doors of the court to the defendant. That can only be done if there is no doubt but that the plaintiff has an answerable case. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant. (See Mowschenson and Mowschenson vs Mercantile Acceptance Corporation of South Africa Ltd 1959 (3) S.A. 362). I have taken this into consideration in dertemining this matter.

I do not agree with Mr Fine that the matter is res judicata. The rescission of the summary judgement on the 29th September, 1997 was granted because the amended particulars were filed under a filing certificate which was signed by the plaintiff's attorneys but the particulars of claim themselves were unsigned and because judgement was granted in the absence of the defendant's attorney. It cannot therefore, be said that the court on the 29th September, 1997 had come to a

a:Nomine

decision on the merits of a question in issue, that question, at any rate as a causa petendi of the same thing between the same parties cannot be resuscitated in subsequent proceedings. I fully agree with Mr Flynn that defendant in his answering affidavit does not deny that the monies were taken and used by him. Factual allegation on which a defence may arise do not exist. I find as a matter of fact that the is no triable matter.

I thus grant summary judgement in terms of claim 2 of the application with costs.

S.B. MAPHALALA

ACTING JUDGE