

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.2397/98

In the matter between

C J B IMPORTS AND

EXPORTS (PTY) LIMITED      1st APPLICANT/DEFENDANT

COMPUTER LINK (PTY)

LIMITED                              2ND APPLICANT/DEFENDANT

MRS. ISABEL (DIAS DO CASAL) CARR

3rd APPLICANT/DEFENDANT

And

MUSTEK LIMITED

(FORMELY MUSTEK

ELECTRONICS (PTY) LIMITED RESPONDENT/PLAINTIFF

Coram                              S. B, MAPHALALA – J

For the Applicants              MR. HOWE

For the Respondent              MR. MAGAGULA

JUDGEMENT

(04/06/99)

Maphalala J:

The matter came with a certificate of urgency for an order in the following terms:

1. That the application for summary judgement dated the 29th April 1999 be set aside and summons dated the 2nd October, 1998 be dismissed. Alternatively, that the application for summary judgement dated the 29th April 1999 be stayed pending finalization of this application.
2. Costs of this application and the action,
3. Further and/or alternative relief.

The application is supported by the founding affidavit of one Isabel Carr (nee Do Casal) with various pertinent annexures. The respondents have not filed papers in

2

opposition, though when the matter was called on the contested roll of the 21st May, 1999 Mr. Magagula for the respondent/plaintiff made certain submissions from the bar.

Mr. Howe for the respondents/defendants argued that the matter was sufficiently urgent for the reason advanced by the deponent of the supporting affidavit to satisfy the requirements of Rule 6 (25) of the High Court Rules. Mr. Howe further directed the court to Rule 47 dealing with security for costs. He submitted that the plaintiff is a "peregrinus" of this court and that as such it has to file security for cost

and that in casu respondent/plaintiff has not contested the amount of security fixed by the Registrar in terms of Sub Rule 4 of the rule which states that the court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as it may seem meet. He contended that respondent/plaintiff after eight months of the issuance of summons and having failed to furnish security come to court and file a summary judgment application.

The applicants/defendant ask that the summary judgment be struck out and that the summons be dismissed as well. To support his stance Mr. Howe directed the court to the following authorities:

- Erasmus on Superior Court Practice at B1 - 346
- Excelsior Meubels Beperk vs Trans Unie Ontwikkeling Korporasie Beperk 1957 (1) S.A. page 74 (T).

On the other hand Mr. Magagula for the respondent/plaintiff took the view that a case for urgency has not been made by the applicant. The application for summary judgement dates back to the 3rd May, 1999 and the other side was well aware of this matter. They should have proceeded by way of Sub Rule 3 of Rule 47. He further, argued that his client was not given sufficient time and that this matter should not have been enrolled. The whole purpose of this application is to defeat the summary judgement. Mr. Magagula wondered whether if a party does not pay security that party is ipso facto barred to proceed. Mr. Magagula conceded that they have not furnished security but that is not a bar to proceed to apply for summary judgement. Sub Rule 3 of Rule 47 gives the court a discretion in the matter.

On the summary judgement itself the applicants have not even filed an affidavit resisting summary judgement. This according to Mr. Magagula is a ploy calculated to frustrate the application for summary judgement. Mr. Magagula further made a concession that the applicants be given a chance to oppose the summary judgment and respondent to be put to terms to find security in terms of the rules.

These are the issues for determination. The court in this matter has a discretion as is reflected in Sub Rule 4 of the Rule 47 that inter alia the court may make such other order as it may seem meet. I am inclined to accend to the concession made by Mr. Magagula in the interest of justice between the parties.

I thus order as follows:

3

1. The respondent/plaintiff is to furnish to the court in accordance with the Registrar's direction security for costs within a period of 14 (fourteen) days from the date of this order.
2. The applicants/defendants to file their opposition to the application for summary judgment within 14 (fourteen) days from the date of this order and thereafter the matter to take its normal course.
3. Costs to be the costs in the course.

S. B. MAPHALALA

JUDGE