

1273



**THE HIGH COURT OF SWAZILAND**

**DUMISANI MKHONTA**

Applicant

And

**SWAZILAND BREWERS (PTY) LTD**

Respondent

In re:

**SWAZILAND BREWERS (PTY) LTD**

Plaintiff

And

**DUMISANI MKHONTAT/A PHUMELELA INVESTMENTS**

Defendant

Civil Case No. 870/2002

Coram

For the Applicant

For the Respondent

S.B. MAPHALALA – J

MR. NDZIMA

MR. HLOPHE

## JUDGMENT

(06/06/2003)

An application under a Certificate of Urgency served before this court on the 17<sup>th</sup> April 2003, for an order *inter alia* that a) a writ of execution dated 11<sup>th</sup> March 2003, be stayed pending finalization of this application; b) setting aside and/or rescinding the judgment entered against the Applicant on the 7<sup>th</sup> March 2003; (d) that prayers (b) and (c) operate with immediate effect as an interim relief pending the return date to be determined by this court; and (e) granting costs of suit in the event the application is opposed.

*Mr. Hlophe* for the Respondent raised a number of points of law *in limine*. The first point raised is that the Applicant has not proved irreparable harm on the papers. Secondly, that the Applicant has not alleged and proved the balance of convenience. Thirdly, that the Applicant has not reflected under which head the application for rescission is sought, that in any event, if the Applicant had moved the application for rescission in terms of the common law he has not advanced a *bona fide* defence as required under this head. Lastly, that the Applicant has submitted to the judgment granted by the court by paying certain sums to liquidate the debt. *Mr. Hlophe* applied that the application be dismissed with costs.

*Per contra Mr. Ndzima* argued that at paragraph 20 of the Applicant's founding affidavit the following appears:

"It is my submission further that the Respondent will suffer prejudice if the matter is heard and judgement rescinded yet on the other hand I will suffer irreparably if the door is closed on me at this stage".

According to *Mr. Ndzima* the above answers *Mr. Hlophe's* opening salvo that the Applicant has not proved irreparable harm. I agree with *Mr. Ndzima* that this aspect of the matter has been adequately canvassed on the founding affidavit. However, it remains to be seen if the other questions raised have been answered. It would appear to me that the second question has also been answered by the said paragraph viz the balance of

convenience. The convenience in *casu* favours the Applicant for the rescission of the judgment.

Coming to the third leg as to whether the Applicant has a *bona fide* defence. Initially the matter came through combined summons and proceeded to the summary judgment stage. The Applicant then instructed the offices of Maphalala & Co. who duly filed an affidavit resisting summary judgment. After that the offices of Maphalala & Co. withdrew from the matter. The Applicant avers that he did not receive the said notice of withdrawal because if he had received it he would have instructed other attorneys to defend him in this matter. The defence traversed by the Applicant at paragraph 15.1 and 15.2 appears to me to be *bona fide* and I have no reason to disbelieve it

All in all I agree with the submissions made by *Mr. Ndzima* for the Applicant and grant an order in terms of prayers (a), (b), (c), (d) and (e) of the notice of motion.



**S.B. MAPHALALA**  
**JUDGE**