SWAZILAND HIGH COURT

Held at Mbabane

Civil Case No. 58/2004

In the matter between

RUMDEL MTHUNZI JOINT VENTURE Plaintiff

Vs

MUSA MAGONGO 1st Respondent

MTHUNZI CONSTRUCTION 2nd Respondent

Coram Annandale, ACJ

For Plaintiff Adv. P. Flynn (Instructed by Robinson Bertram)

For Respondents Mr. L.R. Mamba

JUDGMENT

7 October 2004

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In an application for summary judgment, which was set down for argument to be heard on the merits, the respondents raised as an objection in limine, their objections to the plaintiff's replying affidavit which was placed before the court on the grounds that it was filed without leave having been sought or granted; that it was filed without it having been served on the defendants; and that it was filed out of time.

The matter arises from an allegation that the defendants, acting in concert, unlawfully and intentionally stole from the plaintiff an amount close to E790 000 or alternatively, that a duty of care to plaintiff was breached in the course of a joint venture whereby monies owed to the plaintiff for work performed by it was collected on its behalf by the defendants but not paid over to it, resulting in damages to the extent of the collected amount.

Notice of intention to defend the claim was filed, followed by a special plea that the plaintiff is not a company registered in terms of the laws of Swaziland as alleged and accordingly has no locus standi to bring the proceedings. Subsequently notice was given to amend the citation and description of the plaintiff, to vary it from being termed an "Associated" (sic) duly constituted, to an "Association" duly constituted, with its same

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given address. An amended summons was then filed, following on the heels of an objection to the proposed notice to amend, on the stated ground that ".. .the proposed amendment introduces a new party to the action."

There is no indication on the court file that this frivolous objection was ruled upon by the court.
Thereafter, notice was given that summary judgment would be applied for, which was supported by an affidavit of a Mr. Martin, who states himself to be chairman of plaintiff's management board. He made the usual averments about the verification of the cause of action and amounts claimed, as well as his opinion (not belief) that there is no bona fide defence to the action and that a delay is the only purpose

of filing an intention to defend the action.

To this, the first defendant, stating himself also to be the managing Director of the second defendant, filed his affidavit to resist summary judgment. Therein, he takes the position in limine that the plaintiff lacks locus standi pointing out that its constitution was not filed as proof of its existence and capacity to litigate, that the action is thus mala fide, that it should be dismissed, and that costs de bonis propriis should be awarded

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against the deponent Martin, on the attorney and own client scale. Further problems are stated, varying between allegations of two mutually destructive causes of action, that summary judgment proceedings are not competent, that the summons itself is vague and embarrassing, etcetera. On the merits, exception is taken against alleged defamatory allegations and stating the "true position", as according to the defendant, ending with the proposition that the second defendant will pay the claimed amount on condition that Rumdel construction pays close to 3 million Emalangeni into a joint account to be operated by their respective attorneys. He concludes by stating that ".. .an order for costs against the present plaintiff would be meaningless as it does not have assets and that costs on an attorney and own client scale should therefore be awarded against him."

None of the above issues have yet been argued or considered. This is due to an effort by Martin to file a replying affidavit, to respond to the allegations made by the first defendant in his affidavit resisting summary judgment. The affidavit further seeks to bring in a "joint venture agreement" between Rumdel Construction (Swaziland) (Pty) Ltd and Mthunzi Construction (Pty) Ltd., pertaining to remediation of unstable slopes on the MR3 road between Ka-Khoza and Manzini, an aspect raised by the

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defendant in his resisting affidavit. It also has as further annexures copies of what is termed as a resolution of the management board of the Rumdel Mthunzi Joint Venture, as well as a bank statement and a fax from the bank concerning authorised signatories.

It is this intended replying affidavit by Martin that forms the subject matter of the present ruling. The issue to decide is whether the replying affidavit should be allowed to form part of the papers, or not.

The basis of the argument by Mr. Mamba, acting for the defendants, is that no leave has been obtained to file a replying affidavit, as stated above.

Rule 32 which governs applications for summary judgment provides for the filing of a replying affidavit. Rule 32(5)(a) reads that:

"A defendant may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and, with leave of the court, the plaintiff may deliver an affidavit in reply.(my underlining);"

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The gist of the objection is that the application for summary judgment has been set down for hearing, with the plaintiff taking the liberty to enclose its replying affidavit in its book of pleadings, to be considered as part of the proceedings, without it first having obtained leave of court to do so. The

plaintiff's counsel has argued that it has become established procedure to do as it did, i.e. to file a replying affidavit as a matter of course if it wishes to, then to seek leave of court to file or deliver it on the date of the hearing, from the bar, and not to first seek and obtain leave to do it prior to filing of same.

I deviate here to record that at the time of the hearing it became clear that perhaps the wording of the subrule is not as clear as it should be and that consideration of an appropriate amendment might be a solution to future sound practise. Since neither of the counsel or attorney at the bar had prepared written heads of argument, it was agreed that this is an appropriate matter to file written heads afterwards, in which the possible amendment of the rule may be canvassed, and also to refer the court to relevant authorities. These undertakings were made well over one month ago. To date, nothing has been received and the court cannot benefit from the inputs that was to have come forth. It does not only cause a delay in having this matter dealt

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with as well as it could but also places the burden on the court to fulfil the role of members of the bar in developing the practise to be followed in Swaziland. Not one of the unreported judgments that I have been referred to in court as authority in so called long standing practise' has been filed, nor any heads nor an explanation as to why not. I am constrained not to pass any adverse remarks, save the above-stated facts.

As the rule stands, in summary judgment proceedings, it allows the delivery of an affidavit in reply, with leave of court and not as a matter of course. In the ordinary course of events, it would not have been possible to file a replying affidavit but for sound reason, the rules make it possible to do so, provided that leave of court be obtained.

Presently, the replying affidavit has been delivered and filed as part of the matter which requires to be decided, but no leave of court has been obtained to do so. Nor has it been applied for. The argument of advocate Flynn that a party which wishes to deliver a replying affidavit in a summary judgment application can go ahead and file, thereafter, once the matter is to be argued, there and then seek leave to do as it has already done, requires some scrutiny.

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Such a practise effectively presumes that leave of court is to be sought ex post facto, after the event that has already occurred. This begs the question why leave should be sought at all, if a replying affidavit may be delivered and filed without prior leave, which then only needs to be informally asked from the bar, afterwards.

In applications for summary judgment, the usual practise in other jurisdictions is that the plaintiff must stand or fall by his verifying affidavit. See Wright v McGuiness 1956(3) SA 104(C); Trust Bank of Africa Ltd v Hansa 1988(4) SA 102(W). In this jurisdiction, where the rules permit further evidence to be adduced by way of a replying affidavit, which is in itself an extraordinary modification but which has much merit, as it enables the court to be in a better position to properly and fairly evaluate the issues to decide whether summary judgment should be granted or whether there is a bona fide defence, it is my view that a stricter rather than a liassez faire approach should be followed. If leave of court is to be sought and obtained, it is a discretionary matter which has to be exercised judicially. The granting of such leave must not be presumed.

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In order for the discretion to be judicially exercised, the applicant that seeks leave to deliver a replying affidavit should at least furnish the court succinctly and fairly all the information necessary to enable the court to decide whether leave should be granted or not.

Summary judgment is and will remain a drastic and extraordinary measure. It is very stringent in that it permits a judgment to be given without a trial. It closes the doors to a defendant. See for instance Maharaj Barclays National Bank Ltd 1976(1) SA 418(A) at 423. In Dowson & Dobson Industrial Ltd v Van der werf 1981(4) SA 417(C) it is said at 419:

"An ever increasing reluctance to grant summary judgment in the face of opposition is evident from the more recent decisions in the South African courts."

Prejudice to the defendant is one of the factors to be considered when leave to file a supplementary affidavit in a summary judgment application is decided. It would be in the interests of fair adjudication if he is made aware that such leave is going to be sought, and to know the reasons why. He can then consider his own position and if need be, oppose it. It seems to me that

the procedure as contemplated by the plaintiff herein negates these considerations. It pre-empts the discretion yet to be exercised and presupposes that leave will be granted as a matter of course.

It is for the abovestated reasons that I hold the interpretation of the plaintiff concerning rale 32(5)(a) to be incorrect. In applications for summary judgment supplementary affidavits may be delivered, but only with leave of court, such leave to be sought and obtained before the supplementary affidavit is delivered and not afterwards. The court should be furnished succinctly and fairly with the information that is necessary to determine the issue in order to exercise its discretion judicially. The defendant must not be prejudiced therein, and therefore also requires to be notified and appraised that leave is to be sought.

Accordingly, delivery of plaintiff's replying affidavit is set aside, with costs. Leave may be sought to admit it, as set out above.

JACOBUS P. ANNANDALE ACTING

CHIEF JUSTICE