THE HIGH COURT OF SWAZILAND

SIPHO MATSE

Plaintiff

And

SWAZI SPA HOLDINGS Defendant

Civil Case No. 2805/2001

Coram S.B, MAPHALALA – J

For the Plaintiff MR. Z. MAGAGULA

For the Defendant ADVOCATE P. FLYNN

(Instructed by Robinson Bertram)

JUDGMENT (11/06/2004)

The Plaintiff in this case instituted action against the Defendant in which he claimed payment of the sum of E100, 000-00 for damages suffered as a result of Defendant's failure to exercise a duty of care and/or omission to ensure that the meals served in its restaurant were free from contamination, interest at the rate of 9% calculated from date of issue of summons and costs of suit. Notice of intention to defend was on 31st October 2001, given on behalf of the Defendant by attorneys Millin and Currie.

The Defendant excepted to the plaintiff's Particulars of Claim by notice dated 15th November 2001. The Plaintiff filed a notice of intention to amend on 30th November 2001. Thereafter on 19th March 2002 the Plaintiff filed its amended summons. The Defendant filed its plea on the 21st March 2002. Thereafter discovery of documents ensued.

On the 21st May 2003, Plaintiff made an application in terms of Rule 33 (4) for an order in the following terms:

1. That the issues raised in paragraph 2 and 4 of the plaintiff's Particulars of Claim, as read with paragraphs 2 and 4 of the Defendant's plea, be heard prior to and separately from the other issues in dispute
2. That only the issue as separated above be dealt with at the first trial hearing of this action.
3. That the Respondent to pay the costs of this application.

On the 6th June 2003, the court granted the order in terms of prayer 1 and 2 of the application in terms of Rule 33 (4) mentioned above. The said Rule provides that if it appears to the court mero motu that there is, in any pending action, a question of law or fact that may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of that question in whatever manner it may deem fit, and may order that all further proceedings be stayed until that question has been disposed of. The court is obliged, on application by any party, to make such an order unless it appears that the question cannot conveniently be decided separately (see Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ED at page 1044 and the cases cited thereat)

The essence of all this is that the Defendant has in its plea denied that it operates in Ezulwini Valley within the district of Hhohho, owning and running a restaurant in any premises at Ezulwini Valley, where the Defendant as sued does not operate or own

any restaurant at any premises at Ezulwini Valley, then no claim correctly lies by the Plaintiff as

alleged against the cited Defendant.

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The crisp issue therefore is whether the correct Defendant is before the court.

On the 2nd June 2004, the first trial commenced as directed by the court on the 6th June 2003. The enquiry was to establish whether the correct Defendant is before the court. The Defendant who bore the onus of proof led the evidence of its Regional Financial Manager one Mr. Jacobus Richter. His evidence was that the Defendant does not own or operate a restaurant in any premises at Ezulwini Valley but the said restaurant is operated by a company called Manzana Estate. The witness described in some length the relationship between Manzana Estate and Swazi Spa Holdings Limited and the other companies in the group. The essence of his evidence was that Swazispa Holdings Limited does not own or operate a restaurant as alleged by the Plaintiff but such a restaurant is operated by Manzana Estate which is also a separate legal entity in its own right.

There was no evidence adduced by the Plaintiff in this enquiry.

When the matter was argued Mr. Magagula for the Plaintiff relied on what is said by the author Beck's Theory and Principles of Pleading in Civil Action 4th ED at page 54 to the proposition that a fact which has not been alleged cannot be proved in evidence. It was not for the Defendant to prove a fact it has not averred in its plea. All in all Mr. Magagula applied that the matter proceeds on the merit.

The fact of the matter as 1 see it is that the Defendant in casu was called upon to either admit or deny what is in paragraph 4 of the Particulars of Claim. The said paragraph reads as follows:

"4. The Defendant owns and runs a restaurant in its premises at the Ezulwini valley".

The Defendant responded to the above paragraph as follows:

"4. AD Paragraph 4

All the allegations contained in this paragraph are denied as if specifically transverse".

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In order for the Defendant to show that it does not own and ran a restaurant in the premise it led the evidence of Mr. Ritcher. His evidence clearly established that the Defendant did not run the said restaurant but Manzana Estates as per paragraph 4 of its plea. Therefore the attack by Mr. Magagula is without merit.

Further, it would appear to me that this matter cannot proceed on the merits for the simple reason that the Plaintiff has cited a wrong party in this case. The papers before court cite Swazispa Holdings Limited as the Defendant when the facts have shown beyond any doubt that Manzana Estates own and operate a restaurant in the premises at Ezulwini Valley.

In the result, the action is dismissed with costs including costs of Counsel to be certified in terms of Rule 68 of the High Court Rules.

S.B MAPHALALA

JUDGE