

THE HIGH COURT OF SWAZILAND

WANDILE NDZINISA

Plaintiff

And

STEERS FAST FOODS AND RESTAURANTS

Defendant

Civil Case No. 1457/2004

Coram: S.B. MAPHALALA - J

For the Plaintiff:MR. M. SIMELANE

For the Defendant:MR. L. MAMBA

JUDGMENT

(14<sup>th</sup> September 2005)

[1] The issues before court presently are whether the exception filed of record should be entertained or alternatively default judgment be granted in favour of Plaintiff regard to be had to the fact that Defendant has

been barred to file any pleadings. Furthermore the court has to decide whether there is an exception at all, due to the fact that the notice affording the Plaintiff to remove a cause of complaint was filed on the 19<sup>th</sup> August 2004, yet the bar was extended from the 19<sup>th</sup> July 2004 to the 9<sup>th</sup> August 2004 by mutual agreement as per the attached letter marked "A".

[2] Plaintiff [a customer] issued a combined summons on the 23<sup>r</sup> February 2004, for payment of the sum of E150, 310-00 from the Defendant as a result of an alleged negligent act of the Defendant in serving Plaintiff with a "Special 8" Take Away food which had live snails on the salad. On the 18<sup>th</sup> August 2004, Defendant excepted to the Plaintiffs summons in terms of Rule 23 (1) alleging same to be vague and embarrassing on the grounds that the Plaintiff has failed to give sufficient particularity regarding the damages suffered to enable the Defendant to reasonably assess the quantum thereof. Prior to that the Plaintiff had filed a Notice of Bar dated the 14<sup>th</sup> July 2004, whereupon the Defendant was notified that it shall ipso facto be barred if it failed to file a plea within three (3) days after service and judgment by default will be entered against it.

[3] On the 30<sup>th</sup> September 2004, Plaintiff filed a Notice in terms of Rule 30 (5) requiring the Defendant to remove and/or withdraw the Notice of Exception dated 29<sup>th</sup> September 2004 because same constitutes an irregular step due to the following:

- a) The Defendant has failed within 14 days after filing its Notice of Intention to Defend to file an exception.
- b) Furthermore the Defendant has of the 10<sup>th</sup> of August 2004 served the Plaintiff with a 3<sup>rd</sup> Party Notice.
- c) The Defendant has by letter dated 13<sup>th</sup> August 2004 attached hereto marked "A" applied for further particulars which were given over by Plaintiffs letter dated 16<sup>th</sup> August 2004 attached hereto marked "B".
- d) Alternatively despite Defendant serving the Plaintiff with a Notice in terms of Rule 23 (1) on the 19<sup>th</sup> of August 2004 giving the latter

up until the 9<sup>th</sup> of September 2004 to remove a cause of complaint, the former failed to deliver its exception on or before the 20<sup>th</sup> of September 2004 opting to deliver the same on the 29<sup>th</sup> of September 2004 without leave of court.

e) The Exception does not contain grounds upon which same is founded upon in direct contravention of Rule 23 (3).

[4] In argument Mr. Simelane who appeared for the Plaintiff contended that when the Notice in terms of Rule 23 (1) was filed the Defendant was out of time. Even if the court were to accept the notice in terms of Rule 23 (1) the Defendant failed to except in time as they were supposed to file their exception on or before the 20<sup>th</sup>

September 2004, as Plaintiff was given up until the 9<sup>th</sup> September 2004, to remove the cause of complaint per the time limits in Rule 23 (1). In this regard he relied on what was held in the case of George Hotel Properties (Pty) Ltd vs Swaziland Development & Savings Bank - Civil Case No. 2932/2002 (unreported) that provisions of Rule 23 (1) are peremptory and if one fails to comply with them he is deemed to have abandoned the intended exception. Leave has not been sought to extend the peremptory time limits. The court was further referred to the Court of Appeal judgment in the case D.Z. Civils and Building (Pty) Ltd vs David Zietsman and Standard Bank of Swaziland Limited - Appeal Case No. 56/1999.

[5] In sum, the Plaintiff contends that the Defendant having failed to plead in terms of the Notice of Bar despite same having been mutually extended, judgment by default should be granted against the Defendant but Plaintiff is to prove his damages by leading oral evidence on a date to be arranged with the Registrar.

[6] Mr. Mamba who appeared for the Defendant advanced arguments *au contraire* to effect that the said exception is within the time stipulated by the rules of this court. He contended that even if the court were to rule that the exception was out of time, the court cannot grant judgment based on the Plaintiffs Particulars of Claim as they clearly cannot found a cause of action. He further relied on what is provided for by Rule 18 (10) of the High Court Rules that, *inter alia*, a Plaintiff suing for damages shall set them out in such a manner as will enable

the Defendant reasonably to assess the quantum thereof. The argument advanced in this regard is that the Particulars of Claim lacks such particularity as required by this Rule.

[7] These are the issues for determination in this dispute. It appears to me that the concern raised by Mr. Mamba that Plaintiff has not complied with Rule 18 (10) is answered by the fact that Defendant requested for further particulars to the Plaintiffs Particulars of Claim by letter dated 13<sup>th</sup> August 2004. The Plaintiff furnished these particulars by letter dated 16<sup>th</sup> August 2004. On the substantive argument it appears to me that Mr. Simelane for the Plaintiff is correct in his submission that when the notice in terms of Rule 23 (1) was filed the Defendant was way out of time. Even if I had accepted the notice in terms of Rule 23 (1) the Defendant failed to except in time as they were supposed to file their exception on or before the 20<sup>th</sup> September 2004, to remove the cause of complaint per the time limits in Rule 23 (1). I further agree that the dictum in the cases of George Hotel Properties (supra) and D.Z. Civils and Building (supra) apply to the facts of the present case.

[8] In the result, the Defendant having failed to plead in terms of the Notice of Bar despite same having been mutually extended, judgment by default is granted against the Defendant but Plaintiff is to prove his damages by leading viva voce evidence on a date to be arranged with the Registrar of this court.

S.B. MAPHALALA

JUDGE