

HIGH COURT OF SWAZILAND

civil case no.710/2004

In the matter between:

Jerry Pollen Dlamini Plaintiff

vs

Swaziland Brewers (Pty) Ltd Respondent

Coram:Matsebula J

for plaintiff

For the defendant: Mr Perry

Ruling

13th march 2005

This ruling is in terms of Rule 36(11) of the Rules of Court. Plaintiff issued a combined summons against the defendant for the following:

- (a) Payment of a sum of E1 600 000 00;
- (b) Interest thereon at the rate of 9% per annum calculated from date of issue of summons;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

The cause of action arises out of an alleged discovery by the plaintiff of an alleged condom in one of the beer bottles sold by the defendant to the plaintiff. Defendant entered the notice of intention to defend and in terms of Rule 21 of the Rules of Court requested further particulars to be furnished. These were duly furnished. Defendant further requested the plaintiff to make available the alleged bottle and its contents and that the bottle and the contents remain available for inspection and examination by defendant for a period of 10 days from date of receipt of notice. This was in terms of Rule 36(9), the request by defendant was complied with by plaintiff however, plaintiff accompanied the tender of the bottle by a letter annexure "B". I will read the letter for completeness.

"We refer to the above letter and we hereby tender the beer bottle in terms of your notice however, we would like to advise that client object to scientific examination of the bottle in his absence. We therefore advise that an examination conducted on the bottle be not scientific."

Thereupon the defendant responded to plaintiff's quest by letter annexure 'Gi' whose contents are as follows;

"I am in receipt of your letter dated the 18th August 2004 and I acknowledge receipt of a Carling Black Label bottle which you delivered in my office on the 1st December 2004. In our opinion you have not proceeded in terms of Rule 36(10) and not requested defendant to specify the nature of the examination as provided for in the Rules. The plaintiff cannot therefore contend that he is materially prejudiced by examination defendant intends to carry-out. The defendant intends to carry-out the examination on the bottle itself and the Rule does not require either party to be present.

In the circumstances, does plaintiff persist in his objection to the examination of the bottle and if so, in what respect does your client contend that he would be materially prejudiced by reason of, the effect of the bottle."

The matter was then set down because there was no response from the plaintiffs attorney. The matter was then set down for the 22nd February 2005 as plaintiff did not respond to the contents of annexure "C.

When the matter was called on the 22nd February 2005, Mr. Perry appeared for the defendant and at 10am the office of the plaintiffs attorney's and the name of the plaintiff was called out but there was no response. Mr. Perry advised the court that he had duly served its notice on plaintiffs attorney and asked that he be allowed to proceed with the matter with the notice in terms of Rule 36(9) and the court allowed him to proceed.

Rule 39(9) provides:

"If it appears that the state or the condition of any property of any nature whatsoever whether movable or immovable may be relevant with regard to the decision of any matter at issue at any action, any party may, at any stage, give notice requiring the party relying upon the existence of such state or condition of such property or having such property in his possession or under his control to make it available for inspection or examination in terms of this sub-rule and may in such notice require that such property or first sample thereof remain available for inspection or examination for a period not more than 10 days from date of receipt of notice. This was done by defendant as per request by plaintiff as contained in annexure "B". On the 1st September 2004, defendant wrote and directed annexure "C" for reasons

unknown to this court. Contents on annexure "C" were not acted upon until the 22nd February 2005 when the matter served before this court. Mr. Perry on behalf of the defendant has now asked the court to make an order that the property be submitted for examination and that the examination includes a scientific examination on the condition of the bottle. In support of his request, Mr. Perry on behalf of the defendant has referred me to a decided case caltex oil rhodesia (pty) ltd vs perfecto drycleaners (pty) ltd 1970(2) sa rhodesia solsbury."

In terms of this decision, a Rule 2 deals with inspection and it further provides that such inspection is not limited to oiquilla inspection meaning it is not limited to looking at it but will infact allow scientific examination to be taken. The court, it seems to me in terms of this judgment has the power under the Rule to make the order and that in the interest of justice the court can exercise discretion and grant such an order.

I have found the above case to be highly persuasive even though not binding. In the interest of justice the court grants the order prayed for. The court orders that the bottle be submitted for examination and that the examination includes scientific examination on the condition of the bottle.

J.M. MATSEBULA

JUDGE