THE HIGH COURT OF SWAZILAND

JAPAN COM (PTY) LTD

Applicant

And

STANDFORD THEMBA

1st Respondent

VINCENT DLAMINI

2nd Respondent

In Re:

JAPAN COM (PTY) LTD

Plaintiff

And

STANDFORD THEMBA

Defendant Civil Case No. 2746/2003

Coram: S.B. MAPHALALA - J

For the Applicant: MR. MAGONGO

For the Respondents: MR. MDLULI

RULING

(On points of law in limine)

(30th May 2005)

The relief sought

[1] The Applicant has filed an urgent application on the 13th May 2005, seeking amongst other things, removal of bar dated 7th February 2005 and thereafter granting Applicant leave to file and serve its plea to the counterclaim; rescinding and/or setting aside the judgment by default granted by this court on Friday 22nd April 2005; directing the 2nd Respondent to return the thirteen (13) motor vehicles attached pursuant to the judgment by default; and further that a rule nisi issue with immediate effect as an interim order in terms of prayers 2, 3 and 4 thereof calling the Respondents to show cause why on a date to be determined by this court why an order in terms of prayers 2, 3 and 4 should not be made final; and costs of this application.

[2] The Founding affidavit of the Director of the Applicant is filed in support thereto. Various annexures are also filed of record.

[3] The Respondents oppose the granting of the said orders and the Answering affidavit of the 1st Respondent is filed thereto. A number of supporting affidavits are also filed.

[4] The Applicant has in turn filed a replying affidavit of its Director Hirokazu Maeda.

The points of law in limine.

[5] The Respondents have raised points in limine in their Answering affidavit and has also answered on the merits of the matter. These points are the subject-matter of this ruling. They may be paraphrased as follows:

i) The application for rescission of judgment is fatally defective for the reason that Applicant has not complied with Rule 31 (3) (b) of the Rules of court in that security for costs as per the said rule has not been paid to the Registrar;

ii) If the application has been brought in terms of Rule 42 of the Rules of court it is fatally defective because there are no allegations or grounds shown by the Applicant ex facie that the judgment or order was entered in error, or whether there is any ambiguity, patent error or omission and/or a mistake common to both parties and if it is based on common law there are allegations of fraud alleged or whatever; and iii) That the alleged sister company to Applicant called Duet Safe Freight (Pty) Ltd which is alleged by Applicant to be the owner of all the motor vehicles attached pursuant to an order of this court is not incorporated in terms of the Laws of Swaziland.

The facts.

[6] When the matter came for arguments Mr. Mdluli who appeared for the Respondent abandoned the last point in limine and therefore no further mention will be made in this regard. Before dealing with the above point of

law in limine I find it imperative to sketch a brief history of this matter. The facts of the matter are that the Applicant launched action proceedings against the 1st Respondent in terms of which the Applicant claimed from the 1st Respondent a sum of El, 232,000-00 being loss of business for a period of sixteen (16) months.

[7] Pursuant to the service of summons, the 1st Respondent filed his Notice of Intention to Defend through his attorney and thereafter requested for further particulars. Thereafter, 1st Respondent served his plea and counterclaim on the 22nd July 2004 at Applicant's correspondence address. According to the Applicant the said plea and counterclaim never reached its attorneys. On the 7th February 2005, the 1st Respondent filed a Notice of Bar advising the Applicant that it would be barred from filing a plea if it fails to do so within three days. Applicant's attorneys then wrote a letter dated the 8th February 2005, to 1st Respondent's attorney advising them that they had received their Notice of Bar but unfortunately their records reflect that they did not have 1st Respondent's plea as well as counterclaim. Thereafter, 1st Respondent applied for judgment by default and was subsequently granted on the 22nd April 2005.

[8] Pursuant to the judgment by default the 2 Respondent attached thirteen (13) motor vehicles belonging to Duet Safe Freight (Pty) Ltd. It is a bone of contention that this company owns the motor vehicles.

[9] The above therefore are the fact giving rise to the present application. I now turn to the points of law in limine.

The arguments for and against the objections.

[10] To recap the arguments in limine are simply that firstly, the Applicant has not complied with Rule 13 (3) (b) in that security for costs as required by the Rule has not been furnished. Secondly, the Applicant has not alleged or averred whether it was applying for rescission either under Rule 42 (1) or the common law. That in the event it was proceeding in terms of Rule 42 (1) the relevant averments have not been made on the affidavits. In case of the latter Applicant has not averred fraud on the part of the 1st Respondent. It was further contended that Applicant has not shown good cause for the removal of a bar and further that he has a bona fide defence.

[11] The 1st Respondent answers to these challenges in its Replying affidavit as follows at paragraph 3 thereof:

"3.1 The gist of my application is in respect of the lifting of the Notice of Bar and same does not attract security for costs. The reason why I applied for the rescission is that once that Notice of Bar is lifted prayer 3 automatically comes into effect.

3.2 I have never at nay stage suggested that my application is in terms of Rule 42 and reference to it is unknown to me and irrelevant, hence I ask the court to dismiss it.

3.3 Duet Safe Freight (Pty) Ltd is duly registered and incorporated and as such it has right and duties. I beg leave to refer to a certificate of incorporation annexed herewith marked "DSFB". Due to the foregoing reasons, I ask this Honourable Court to dismiss the points in limine with costs.

The court's analysis and conclusions thereon.

[12] As it was mentioned earlier on the judgment the third point in limine was abandoned by the 1st Respondent that Duet Safe Freight (Pty) Limited was not an incorporated entity within the ambit of the Companies Act. Further, it appears from the Applicant's response above at paragraph 3.2 that it has not filed the application for rescission under Rule 42.

[13] It appears to me that the application by the Applicant in casu is brought in terms of Rule 31 (3) (b) read with

Rule 27 of the High Court Rules. According to I. Isaac, Beck Pleading in Civil Actions, 3rd Edition at page 147 paragraph 81 thereof, indeed in the case of the Defendant the bar may be removed even after default judgment is granted against him, if he follows the procedure laid down in Rule 31(1) (b).

[14] Rule 31 (b) thereof provides as follows:

"A Defendant may, within twenty-one days after he has knowledge of such judgment, apply to court upon notice to the Plaintiff to set aside such judgment and the court may upon good cause shown and upon the Defendant furnishing to the Plaintiff security for the payment of the costs of the default judgment and such application to a maximum of e200-00 set aside the default judgment on such terms as to it seem fit".

[15] According to the writer Erasmus, Superior Court Practice, Juta at Bl - 201 an application for rescission may be brought under this sub-rule where the Defendant had been in default of delivery of Notice of Intention to Defend or of a plea (see also folio 2 thereof).

[16] According to the writers Nathan, Barnett and Brink, Uniform Rules of Court, 3rd Edition at page 184 normally the security should be furnished at the outset of the application for rescission. But see Adjoodha vs Mario Transport 1976 (3) S.A. 394 (T) in which it was held sufficient that the security had been tendered during the court of argument and before judgment on the application was given.

[17] It would appear to me that on the basis of the clear provisions of Rule 31 (3) (b) and the legal authorities cited above the point of law in limine taken in this regard is good in law and ought to be upheld. The Applicant has not lodged security for costs as required by the Rule. Neither has it tendered the said security as enunciated in the case of Adjoodha vs Mario Transport (supra). It would also appear to me that the Applicant has not shown good cause as required by the said Rule. I agree in toto with the submissions made by Mr. Mdluli in this regard.

[18] Having disposed of this aspect of the matter it now behoves me to consider the remaining issue that of the removal of bar.

Removal of bar.

[19] The relevant rule in an application for the removal of bar is Rule 27. The said Rule reads as follows:

"27(1) In the absence of agreement between the parties, the court may upon applications on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit.

(2) Any such extension may be ordered although the application therefore is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may on good cause shown, condone any non-compliance with these rules.

(4) After a rule nisi has been discharged by default of appearance by the Applicant, the court or a Judge may revive the rule and direct that the rule so revived need not be served again".

[20] It is trite law that a party who applies for the removal of a bar should set out in his affidavit the following:

a) What his defence is?

b) The facts on which he relies for his defence, so that the court can form some opinion on the merits of his defence (see Markides and another vs Lovendale 1954 (4) S.A. 181); and

c) It is not sufficient for the Applicant to state that he believes that he has a good defence, that his intention to defend is bona fide. His affidavit must disclose facts constituting a defence that is good at law (see P£J Van Rensburg En Vennote vs Den Dulk 1971 (1) S.A. 112 and Van Aswegen vs Kruger 1974 (3) S.A. 204).

[21] In the case of Smith NO vs Brummer NO and another 1954 (3) S.A. 352 the court defined good cause and stated that the courts were inclined to grant the removal where the following exists:

a) A reasonable explanation for the Applicant's delay is forthcoming.

b) The application is bona fide and not made with intent to delay the other party's claim.

c) It appears that there has not been a reckless or intentional disregard of the rules of court

d) The Applicant's case is not obviously without foundation.

[22] See also the discussion in Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 540 - 541 and the cases thereat.

[23] It remains to be seen in casu whether the Applicant has satisfied the requirements enunciated above. To satisfy what is said in Smith NO vs Brummer (supra) under (a) the Applicant proffered the following explanation at paragraph 5.4 in fin 6 of his Founding affidavit as follows:

5.4 On the 7th February 2005, the 1st Respondent filed a Notice of Bar advising the Applicant that it would be barred from filing a plea if it fails to do so within three days.

5.5 Applicant's attorney then wrote a letter to the following day erroneously dated 8th February 2004 instead of 2005 advising 1st Respondent's attorneys that there was neither a plea nor a counter claim in Applicant's attorneys possession. I beg leave to refer this court to the letter annexed herewith marked "JCB".

5.6 I am advised by my attorney that a follow up telephonically was made requesting the 1st Respondent to fax both the plea and counterclaim and he spoke with the receptionist at the 1st Respondent's attorneys. Unfortunately, there was no response from the 1st Respondent's attorneys.

5.7 Thereafter the Is' Respondent's attorneys applied for judgment by default and was subsequently granted on the 22nd April 2005.

5.8 Pursuant to the judgment by default the 2nd Respondent attached thirteen (13) motor vehicles belonging to Duet safe Freight (Pty) Ltd.

5.9 Pursuant to the attachment, I then approached my attorney to establish how the Warrant of Attachment came into existence and I was advised that it was as a result of the Applicant's failure to file a plea to 1st Respondent's counterclaim.

5.10 I am advised by my attorneys that they first had sight of the plea and counterclaim on the 12th May 2005 after the execution of the Warrant of Attachment. It is against this background that this application is moved.

6. I humbly submit that the Applicant's failure to file and serve the plea to the counterclaim was not occasioned by flagrant or naked disregard of the rules but due to the non- receipt of the plea which incorporated the counterclaim.

[24] The Respondent has answered to the above averments at paragraph 11,12 and 13 of his Answering affidavit paragraph by paragraph and what emerges therein is that Applicant ought to have approached the Registrar of this court and requested the file. Applicant ought to have photocopied all what he wanted inside but elected to neglect the Notice of bar up until judgment was granted on the 22nd April 2005, some two and half months after the Notice of Bar was filed.

[25] In this regard I agree with the Respondent that in the circumstances the Applicant has not advanced a reasonable explanation for the delay. It appears to me that the Applicant sat on its rights. I agree in toto with Mr. Mdluli in this regard. Having disposed of this aspect of the matter a further enquiry is whether has advanced a bona fide defence.

Has Applicant shown a bona fide defence?

[26] The Applicant has traversed its defence at paragraphs 12, 12.1, 12.2 and 12.3 of the Founding affidavit as follows:

"12. I humbly submit that the applicant has a good and bona fide defence to the 1st Respondent in that:

12.1. The Applicant does not owe the 1st Respondent any sum of

money whatsoever in as much as he used Applicant's premises to sell his own cars without the knowledge and consent of the Applicant.

12.2. The 1st Respondent's claim is off set or extinguished by the Applicant as there was no agreement that the 1st Respondent should sell
private motor vehicles on Applicant's premises which would be a direct conflict of interest.

12.3 The agent was terminated following the unlawful conduct of the 1st Respondent and subsequently forfeited any claim he might have against the Applicant".

[27] The 1st Respondent has answered to these averments at paragraphs 23 to 25 of his Answering affidavit stating simply that Applicant has failed to advance a good and bona fide defence but a bold allegation that it does not owe him that such a bare denial is bad in law and does not constitute a bona fide defence. In this regard I agree with the submissions made by Mr. Mdluli for the 1st Respondent that the defence advanced falls short and it cannot be described as a bona fide defence. The Applicant has not set out averments w which if established at the trial would entitle it to the relief sought (see Herbstein (supra) at page 540 - 541 and the cases cited thereat). The Applicant has merely advanced a bare denial.

[28] A further issue arose regarding the ownership of the attached motor vehicles. The Applicant is maintaining that these vehicles belong to a company called Duet Safe freight (Pty) Ltd relying on certain annexures in its Founding affidavits being bills of entry. The au contraire by the 1st Respondent these documents do not prove ownership but are merely used for administrative purposes at the points of entry to Swaziland by the Department of Customs and Excise. It appears to me that clearly this is the position. A bill of entry is merely to record that whosoever imports the vehicles complied with the requirements of customs and are not proof of ownership.

Therefore, in casu there is no proof whatsoever that the attached motor vehicles do not belong to Applicant but Duet Safe Freight (Pty) Ltd.

[29] To sum up, therefore:

a) Applicant has not complied with Rule 31 (3) (b) requiring that security for costs be furnished with the Registrar of the High Court;

b) The Applicant on its own admission has not applied for rescission in terms of Rule 41 (1) neither has it applied under the common law;

c) Applicant has failed to show good cause for the removal of bar.

d) Applicant has not advanced a bona fide defence for purposes of rescission and/or setting aside of default judgment;

e) There is no proof that the attached motor vehicles do not belong to Applicant but to Duet Safe Freight (Pty) Ltd.

[30] In the result, the points in limine are upheld with costs.

S.B. MAPHALALA

JUDGE