

THE HIGH COURT OF SWAZILAND

VUSIE DLAMINI

Applicant

And

MALUNGISA DLAMINI

Respondent

Civil Case No. 574/2004

Coram:S.B. MAPHALALA - J

For the Applicant :MISS N. MULELA

For the Respondent :MR. DLAMINI

RULING

(On points of law in limine) (12th August 2005)

[1] Presently before the court are two points of law in limine raised by the Respondent in his Answering affidavit. The first point raised therein is that the matter should be dismissed with costs since the Applicant omitted to state that what is set out in his Founding affidavit is within his knowledge and is true and correct. The second point was only raised from the bar to the effect that

there is a dispute of fact which should have been foreseen by the Applicant and therefore the matter ought to be dismissed forthwith.

[2] In argument before me, Miss Mulela who appeared for the Applicant readingly conceded and correctly so, in my view, both points of law raised but offered submissions that on the first point viz, that the defective affidavit can be condoned by the court. On the second point that of the dispute of fact the court ought to refer the matter to oral evidence instead of dismissing the application, outrightly.

[3] On the first point that of the defective affidavit she relied on what is said by the author Erasmus, Superior Court Practice, at B1 - 39 as follows:

"The source of the deponent's information must be given. In the case where the application is brought personally, there is an initial assumption in most cases that the facts are within the Applicant's knowledge, while the converse is true where it is brought in a representative capacity. In the latter case the affidavit usually contains a statement that the facts are within the deponent's knowledge, but such a statement is not essential nor is it conclusive", (my emphasis).

[4] The learned author cited, amongst other cases that of Master vs Slomowitz 1961 (1) S.A. 669 (T) at 672 C to support the above quoted legal proposition. She also relied on the dicta in this case. In view of these legal authorities I have come to the conclusion that the omission objected to is not fatal to the Applicant's case. I will therefore grant condonation in regard thereto.

[5] On the issue of the dispute of fact, Mr. Dlamini who appeared for the Respondent relied heavily on the dictum in the celebrated case of Room Co. (Pty) Ltd vs Jeppe Street Mansions 1949 (3) S.A. 1155

(T) at 1161 to the effect that because the dispute of fact in casu was foreseeable by the Applicant, the court ought without further ado, dismiss the application, forthwith.

[6] It is settled law that where, at the hearing of motion proceedings, a dispute of fact on the affidavits cannot be settled without hearing of oral evidence, the court may, in its discretion, (a) dismiss the application; (b) order oral evidence to be heard on specified issues in terms of the rules court; or (c) order the parties to trial (see Rule 6(17) and (18) and the commentary in Herbstein and Von Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 241 and the cases cited thereat).

[7] From the facts of the present case I exercise my discretion in favour of (b) cited above and order that oral evidence be led on specified issues in terms of the rules. In the present case the dispute of fact is crisp as to which motor vehicle was the subject-matter of the contract of sale between the Applicant and the Respondent. Was it the Toyota Hilux registration number SD 438 HC or the Mitsubishi 3.5 ton truck? This is the crux of the matter.

[8] For the afore-going reasons I find that both points of law in limine cannot succeed and I therefore order that viva voce evidence be led as indicated above. Costs to be costs in the course.

S.B. MAPHALALA

JUDGE