THE HIGH COURT OF SWAZILAND

PIETER DE VILLIERS

Applicant

FEEDMASTER SWAZILAND (a division of Ngwane Mills)

Respondent

In re:

FEEDMASTER SWAZILAND (a division of Ngwane Mills)

Plaintiff

And

PRO-FEEDS

1st Defendant

PIETER DE VILLIERS

2nd Defendant

Civil Case No. 647/2005

Coram: S.B. MAPHALALA-J

For the Applicant: MR. N. HLOPHE

For the Respondent: ADVOCATE P. FLYNN (Instructed by Robinson Bertrams)

JUDGMENT

(9th February 2006)

[1] The application before court came under a Certificate of Urgency, for an order, *inter alia*, rescinding the default judgement granted by this court on the 5lh April 2005. The application is brought in terms of both the common law and Rule 42

(1) of the Rules of the court. The I[s] Defendant is a firm, of whom the 2" Defendant is the sole proprietor. The 1st Defendant is the 2nd Defendant's *alter ego* through which it conducts its business. The 1st and 2nd Defendants have for the past two years conducted business with the Plaintiff, wherein the 1st Defendant had ordered goods from the Plaintiff.

[2] This business relationship soured at some point when Plaintiff issued summons against the 2nd Defendant on the 16th March 2005, and thereafter obtained default judgment against the 1st and 2nd Defendant on 5th April 2005. The Founding affidavit of the 2nd Defendant filed of record outlined the sequence of events leading to granting of the default judgment and the defence to the summons. Further, an explanation of not filing their Notice of Intention to Defend is proffered therein. A number of annexures pertinent to these issues are also filed.

[3] The Respondent has filed an Answering affidavit opposing the granting of the said application for rescission. The Respondent further raised a point *in limine* to the effect that Applicant's Replying affidavit was filed out of time, when one has regard to Rule 6 (13) of the High Court Rules. However, when the matter came for arguments this issue was not pursued when *Advocate Flynn* for the Respondents conceded that this matter has been overtaken by events.

[4] On the merits it was argued for the Applicant relying on the *dictum* in the case of *Nyingwa vs Moolman No. 1993 (2) S.A. 508* that this matter is brought in terms of both the common law and Rule 42 (1) of the Rules of this court. On the common law it was contended for the Applicant that Applicant has advanced a reasonable and acceptance explanation for his default that he had always intended defending the matter and had instructed his attorneys to file a Notice of Intention to Defend. The judgment was granted solely as a result of Applicant's attorney's shortcomings/or inattentiveness and not because of his default. No blame therefore can be apportioned to Applicant for the resultant award of the judgment against him.

[5] It appears to me that the Applicant has proved this aspect of the matter as it appears on the facts that the Applicant is not to blame and that the blame is solely that of the Applicant's attorneys, (see the case *of Nyingwa vs Moolman (supra).*

[6] Now I come to the second requirement under rescission at common law that Applicant must prove a *bona fide* defence *prima facie* carrying good prospects of success.

[7] It is a trite principle under this requirement that the Applicant does not have to set out a *bona fide* defence that shall succeed at trial. All the Applicant needs to do is to set out a defence that *prima facie* carries prospects of success (see *Nyingwa vs Moolman (supra).* The Applicant's contention is that his defence is two-pronged as outlined in paragraphs 9.3.1, 9.3.2, 9.3.3, 9.3.4, 9.3.5 and 9.3.6 of the Applicant's Heads of Arguments. The gravamen thereof is that Applicant alleges to have as a result of an agreement between him and James Barry of the Respondent, taken over a debt of Bethlehem Mission. This arrangement was according to him aimed at clearing the said debt whilst at the same time opening business opportunities to himself. Whatever amounts due were to be recovered from his

supply of maize in line with the said arrangement. This arrangement was cancelled unilaterally by the Respondent thereby exposing Applicant to a debt. Were it not for this unilateral cancellation the debt would have been settled in terms of the arrangement.

[8] The second leg of Applicant's defence is that the figure allegedly owing is not correct as it does not take into account other payments made by him. Paragraphs 9.4.1, 9.4.2 of the Heads of Arguments support this position.

[9] The Respondent has advanced *au contraire* arguments against those of the Applicant, contending, *inter alia*, that the 2nd Defendant alleges that he entered into a maize selling arrangement, which had been proved to be devoid of all proof. Further that 2nd Defendant alleges that the amount as shown in the summons is not correct but he does not take the court into his confidence to which amounts are disputed and what the true outstanding amount, if any, should be.

[10] After due assessment of the facts and the arguments by Counsel, it appears to me that Applicant has advanced a *bona fide* defence in this case. Firstly, it appears to me that the arrangement between Applicant and James Barry of the Respondent concerning the supply of maize is such a *bona fide* defence. Secondly, it appears to me that the figure allegedly owing is not correct as it does not take into account other payments made to Respondents. Annexure "FS1" shows the balance outstanding as a sum of E25, 000-00 and not as a sum of the judgment debt. This discrepancy needs to be explained, and it can only be done through oral evidence.

[11] In the result, for the afore-going reason^ the Applicant is granted the order in terms of prayers 1, 2, 3, 4 and 5 of the Notice of Motion.

S.B MAPHALALA

JUDGE