

IN THE HIGH COURT OF SWAZILAND

CASE NO. 4240/05

HELD AT MBABANE In the

matter between:

SIPHIWE HLOPHE

APPLICANT

and

DUDU CYNTHIA MTHETHWA

1st RESPONDENT

MASTER OF THE HIGH COURT

2nd RESPONDENT

CORAM : Q.M. MABUZA -AJ

FOR APPLICANT : MR. Z. MAGAGULA

FOR 1st RESPONDENT : MR. MAGONGO

RULING 24/02/06

This Matter was brought on application and on the 15th February 2006 I heard submission from respective counsel.

Mr. S. Magongo for the 1st respondent proceeded to argue the points *in limine* which he had raised on behalf of his client. These appear on his client's answering affidavit.

The first point raised is found in paragraph 2.1 of the 1st respondents answering affidavit. It is that the notice of motion dated 4th October 2005 is defective as it had no revenue stamp affixed to it as envisaged by Rule 66 of the High Court Rules (as amended) 1991.

Mr. Magongo went on to say that the stamps that appear on the court copy were only affixed after his client had raised the issue in the answering affidavits. The answering affidavits were served on Mr. Magagula or his correspondents on the 6th December 2005.

In response Mr. Magagula submitted that his offices usually print all the copies of the process and only affix revenue stamps on the original copy or court copy.- They do not photocopy the original copy for service.

The original notice of motion or court copy has revenue stamps affixed to it. There is no indication that these stamps were fixed after the 6th December 2005 as the document they are affixed on has the Registrar's official stamp of office dated 17th November 2005.

There is nothing in the Rules of court that says a copy of process for service should indicate that the original had stamps affixed to it. Rule 4 merely refers to service of copies.

There is no evidence before me indicating that indeed the original did not have any revenue stamps affixed on it. Rule 66 (3) provides that:

"Every such stamp shall be defaced by writing or impressing in ink on or across the stamp the name or initials of the public officer affixing it to the document together with the true date of defacement..."

The revenue stamps on the notice of motion have some kind of defacement but it is not clear whether these are initials nor is there a date thereon which

would give the court a clue as to when they were defaced.

In the circumstances the argument advanced by Mr. Magongo must fail.

Mr. Magongo also submitted that the founding affidavit was also defective as it did not have a revenue stamp affixed on its face. He argued that this anomaly was contrary to the provisions of Section 8 of the Stamp Duties Act as read with Section 13 of that Act.

Section 8 of the Stamp Duties Act provides:

*"The person respectively liable for duty and required to stamp an instrument are in the case of
(a) an affidavit ... the person making it."*

Section 13 of the Stamp Duties Act provides that:

"Save as is otherwise expressly provided in any law, no instrument which is required to be stamped under this Act shall be made available for any purpose whatever unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law ...

Provided that the court before which any such instrument is tendered may permit or direct that, subject to the payment of any penalty incurred in respect of such instrument under section 10 (1), it be stamped in accordance with this Act and upon the instrument being duly stamped may admit it in evidence."

It seems to me that in terms of the proviso this court has powers to rectify this anomaly. The absence of the revenue stamp does not make the application fatally defective. A further reading of sections 9 and 10 of the said Act indicate that corrective measures can be taken to cure this anomaly even by the revenue collectors.

The third point **in limine** that Mr. Magongo argued was that the notice of motion was also defective in that it had no case number when it was served on the 1st respondent which was contrary to the provisions of Rule 18 (2).

Rule 18 (2) provides that:

"The title of the action describing the parties thereto and the number assigned thereto by the Registrar shall appear at the head of each pleading..."

The court copy has a case number and as with regard to the revenue stamp the court has no way of knowing when this number was inscribed on the notice of motion.

I find it difficult to agree with Mr. Magongo on this point there being insufficient evidence before me to find otherwise. Mr. Magongo must therefore fail on this point.

Mr. Magagula referred the court to the case of **Protea Assurance Co. Ltd v Vinger 1970 (4) SA 663**. Wherein a summons was issued without the signature of the Registrar nor did it bear the Registrar's official stamp of office. The issues in that case and those in the present case are dissimilar.

In the present case the issue is compliance with the Stamp Duties Act and involves collection of revenue for the Government and protection of this source of revenue the breach whereof carries penalties under section 10 (1) (a) and (b) and section 31.

Mr. Magongo raised a 4th point that of there being a dispute of fact. There is substance with regard to this point.

The issue pertaining to ownership of the motor vehicle has to be cleared up. Neither party attached the bluebook to their papers which would have indicated ownership neither were there any deeds of sale attached to either party's papers.

It will be difficult for the court to make an appropriate order with regard to the motor vehicle without hearing evidence with regard thereto.

The 1st respondent has deposed to the fact that the household items claimed by the applicant belong to her. Neither party has attached ownership to the documents to the pleadings herein. There was also reference to a

partnership agreement although no formal document evidencing such an agreement was attached to the relevant papers.

The court has been requested by Mr. Magongo to dismiss the application on the ground that there is a dispute of fact. The court has a discretion to do one of the following:

- (i) dismiss the application with costs; or
- (ii) order that oral evidence be heard in terms of the rules of court; or
- (iii) order the parties to go to trial.

The issues with regard to the dispute of fact that I have mentioned above cannot be resolved by merely calling for oral evidence to be led. In my view the parties have to go to trial as it is not possible to know how wide a field of evidence the disputed issues will cover.

I accordingly order that the parties go to trial.

I also order that a revenue stamp for the amount of E2.00 be affixed on the face of the answering affidavit.

Costs will be costs in the cause.

**Q.M. MABUZA
ACTING JUDGE**