

THE HIGH COURT OF SWAZILAND

SWAZILAND BEVERAGES LTD (FORMELY
SWAZILAND BREWERS LTD)

Applicant

And

ELLAN MDLULI

Respondent

Civil Case No. 3899/2004

Coram: S.B. MAPHALALA – J

For Judgment Creditor: MR. S. DLAMINI

For Judgment Debtor: IN PERSON

RULING ON APPLICATION FOR AMENDMENT

(26th May 2006)

[1] On the 26 August 2005, in the Rule 45 roll the matter was argued before me wherein the dispute centred around the name of the judgment debtor.

[2] The judgment debtor argued that he is Elcan Mdluli and he is not liable in a judgment in which the Defendant is Elian Mdluli. The judgment creditor on the other hand argued that process has always been served on Elcan Mdluli albeit with documents in which **Elian**

Mdluli was listed as the Defendant and that the issue of citation does not alter the substance of the judgment against **Elcan Mdluli** who will suffer no prejudice if amendment is made in respect of his name.

[3] In support of the judgment creditor's position the court was referred to the case of *Dawson and Fraser (Pty) Ltd vs Havenga Construction (Pty) Ltd* 1993 B.G.D. page 397 where the Defendant had been cited in a summons as "**Dawson and Fraser (Pty) Ltd**" instead of "**Dawson and Fraser (Bophuthatswana) (Pty) Ltd**", the Plaintiff having intended the latter, citation, and the summons had been served at the registered address of **Dawson and Fraser (Bophuthatswana) Ltd** by affixing a copy to the door of such premises, the court held, in an application for the rescission of the default judgment granted against **Dawson and Fraser (Pty) Ltd**, that there would be no prejudice to the intended Defendant if the summons was amended to reflect the correct Defendant and that the amendment was merely a correction of the citation. The court held further, as to a contention by the Defendant, relying on the *dictum* in *Bekiven Ltd vs G.J. Howes (Pty) Ltd* 1992 (2) S.A. 466 *E a t* 471 *H*, that the mere error in the citation entitled it to the rescission of the judgment, that the court in that case had arisen in the present case within the compass of the *dictum*. The court accordingly refused the application for rescission of the default judgement and ordered that the summons be amended in terms of Rule 42 of the Bophuthatswana Rules of Court so as to reflect the correct Defendant.

[4] The granting or refusal of an application for amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. The tendency of our courts has been to allow amendments where this can be done without prejudice to the party. In *Molman vs Estate Molman and another* 1927 CPD 27 at 29 Watermeyer J reflected the widely held view of our courts when he remarked that:

"The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".

[5] In *Macduff & Co. (in liquidation) vs Johannesburg Consolidated Investment Co. Ltd* 1923 TPD 309 the court relied on certain passages quoted in *Rishton vs Rishton* 1912 TPD 718 at 720 from the English decisions to the same effect:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise".

And

"However, negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs".

[6] In the present case on the assessment of the arguments advanced by both parties and the legal authorities cited above I have come to the conclusion that the application for amendment be granted as sought by the Applicant. It is my considered view that **Elcan Mdluli** will suffer no prejudice if amendment is made in respect of his name; and it is so ordered.

S.B. MAPHALALA
JUDGE