IN THE HIGH COURT OF SWAZILAND

SWAZILAND DAIRY BOARD

Applicant

And

N.W. DLAMINI ATTORNEYS

Respondent

Civil Case No. 328/2007

Coram S.B. MAPHALALA - J

For the Applicant For MR. M. XABA MR. N.

the Respondent

JUDGMENT 27th

July 2007

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[1] The Applicant has moved an urgent application *ex parte* against the Respondent, seeking to perfect its hypothec as a landlord over the movable items belonging to Respondent, who is the tenant. An interim order was obtained on the 2nd February 2007 stamped by the Registrar of this court on that date and served the same day upon the Respondent. The return date was set as the 9th February 2007. On the 6th February 2007, the Respondent

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served the Applicant with a Notice of Intention to Oppose dated 6 February 2007.

[2] On the 9th February 2007, that is the return date, the matter was postponed to the contested roll of the 23rd February 2007, and on this date, the respondent served the Applicant with a Notice to raise points of law and the matter was postponed to the 2nd March 2007 for arguments on the points of law.

[3] The point of law by the Respondent is brought in terms of Rule 6(12) (c) of the High Court Rules and reads *in extenso* as follows:

1.That the matter is not urgent in that:

(a) The Applicant is aware that there has not been a regular payment of rentals by the Respondent since July 2006 which defeats the urgency of its application.

(b) (i)The present application is a pending matter under case number 2338/2006 where an amount of E4, 264-45 (Four Thousand Two Hundred and Sixty-Four Emalangeni Forty- Five Cents) is owing, as more fully appears in paragraph 14 of the Applicant's Founding affidavit.

(ii) The present application raises issues which are a continuation of the ones in case number 2338/2006, whereas it has neither been withdrawn nor abandoned, but removed from the roll.

(c) The Respondent is ware that the matter of arrear rentals is subjudice and there is no way that he can vacate the Applicant's premises with the movable goods as there already is a rule *nisi* under case number 2338/2006 which can be revived at the Applicant's will.

2. The wrong parties have been cited in the present application, as annexure "SDB1" being the lease agreement refers to certain Bhembhe, Dlamini Attorneys at the tenant, which goes against the dictates of Rule 18 (6) of this Honourable Court.

[4] In arguments before me it was contended for the Respondents that the present application is pending under case number 2338/2006 where an amount of E4, 264-45 is owing, according to paragraph 14 of the Applicant's Founding affidavit; involving the same parties and the same cause of action. In this regard the court was referred to the legal authority in *Isaacs, Becks Theory and Principles of Pleadings in Civil Actions, 1982* at pages *159 - 160.* The court was further referred to the *dictum* by Innes CJ in the Appellate Division case of *Brown vs Vlok 1925 A.D.* at *58* where the following was said by the learned Chief Justice:

"Now a plea in Bar is one which, apart from the merits, raises some special defence, not apparent *ex facie* the declaration for in that case it would be taken by way of exception which either destroys or postpones the operation of the cause of action".

[5] The Respondent contends that the present application raises issues which are a

neither been withdrawn nor abandoned, but removed from the roll as apparent in paragraph 14 of the Applicant's Founding affidavit. It is contended in this regard that Applicant has not followed what is provided in the Rules of court being Rule 41 (1) (a), Rule 41 (2), and Rule 41 (5).

[6] A further point raised by the Respondent is that the wrong parties have been cited by the Applicant as in annexure "SDB1" Bhembhe, Dlamini Attorneys accompanies the application. Rule 18 (b) of the Rules of court provides that a party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the **contract is written a true copy thereof** or the party relied on in the pleading shall be annexed to the pleading. That *in casu* no such true copy of the lease contract bearing the name of Respondent has been annexed, despite the Applicant's having been giving the Respondent's correspondence bearing **N.W. Dlamini Attorneys.**

[7] Another point which Respondent sought the court's indulgence to advance from the bar is the fact that this matter is riddled with a lot of disputes of fact considering the amount owed by Respondents. In this regard the court was referred to the High Court case in the matter of *Phillip Lobengula Nsibandze vs P.R. Holdings (Pty) Ltd - Civil case No. 3045/2005* and the South African case of *Adbro Investment Co. Ltd vs Min. of Interior 1956 (3) S.A. 345.*

[8] On costs Respondent applied for costs of this Notice to raise points of law at a rate of attorney and own client scale. That the reason for such an application for costs is that the Applicant through their attorney have made

the Respondent to undergo a serious strain and loss of time to expend to other client's work to prepare the application on the points of law. In this regard the court was referred to the case of *Levben Producers (Pty) Ltd vs Alexander Films (SA) (Pty) Ltd 1957 (4) S.A. 225* and the textbook by *Herbstein et al, The Civil Practice of the Superior Courts in South Africa, 2nd Edition,* page *432.*

[9] I shall proceed to determine the points of law *in limine* sequentially as they appear in the Notice cited in paragraph [2] of this judgment, thusly:

(a) Urgency.

[10] In this regard the point of law *in limine* is founded on paragraphs 1 (a), (b) and (c) as cited in paragraph [2] of this judgment. It appears to me after I have assessed the arguments advanced by the parties that the Applicant has proved urgency in the matter. I have read paragraphs 18 and 19 of the Founding affidavit and I have come to the considered view that urgency has been proved in these paragraphs and I hold that the point of law *in limine* in this regard cannot succeed.

(b) Whether the present application is *lis pendens.*

[11] The argument for the Respondents in this regard is that the present application is a pending matter under Case No. 2338/2006 where an amount of E4, 264-45 is owing, as fully appears in paragraph 14 of the Applicant's Founding affidavit. That the present application raises issues which are a continuation of the ones in case No. 2338/2006, whereas it has neither been

withdrawn nor abandoned, but removed from the roll. Further that the Respondent is aware that the matter of arrear rental is *subjudice* and there is no way that he can vacate the Applicant's premises with the movable goods as there already is a rule *nisi* under case number 2338/2006, which can be revived at the Applicant's will.

[12] In support of the above argument the Respondents have cited the legal authority in *Isaacs, Becks Theory and Principles of Pleading in Civil Action* at pages *159- 160* and the South African case in the matter of *Brown vs Vlok 1925 A.D. 58 per* Innes CJ. In the former authority the following is stated:

> **"The validity or otherwise of this dilatory plea depends on whether the same suit is in fact pending elsewhere. It must be pending elsewhere between the same parties concerning the same things, and founded on the same cause of action ...".**

[13] It is further argued for the Respondents that the present application raises issues which are a continuation of the ones in case no. 2338/2006, whereas it has neither been withdrawn nor abandoned, but removed from the roll. The Respondents further cited Rules 41 (1) (a), 41 (2) and 41 (5) of the High Court Rules to buttress its argument.

[14] The Applicant has answered to above argument in its Heads of Arguments in paragraph B (i), (ii), (iii), (iv), (v), (vi), (ix) where in paragraph (vi) it is stated:

> **"After receiving new instructions from Applicant on the 30th January 2007, we approached the Acting Registrar of the High Court, Mrs T. Maziya with the hope of**

reconstructing another file under Case No. 2338/2006. The whole events behind the missing court file were explained to her and she advised that reconstruction of a new file (sic) is logically impossible in that there would be no proof that an interim order was indeed granted because it was never prepared and/or stamped by her office".

[15] In paragraph (vii) the Applicant states that it was the Acting Registrar's final advice that Applicant should start afresh, hence the present application.

[16] After considering the parties arguments in this regard I am inclined to agree with the Applicant that the point of law *in limine* by the Respondent that of *lis pendens* cannot succeed. I say so for the reasons advanced by the Applicant in paragraph (vi) as stated above in paragraph [13] of this judgment. For this reason I have come to the considered view that this point of law *in limine* cannot succeed.

(c)A wrong party cited.

[17] The argument under this point is that a wrong party has been cited in the present application as annexure "SDB1" being the lease agreement refers to certain Bhembhe, Dlamini Attorneys, as the tenants, which goes against the dictates of Rule 18 (g) of the High Court Rules.

[18] The said Rule of court provides that **"a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and it the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".** Not such true copy of the lease contract

bearing the name of Respondent has been given. This shows that they have always been aware of Respondent's true identity.

[19] In answer to the above claims the Applicant replied in its Heads of Argument in paragraph 2 (i), (ii), (iii), and (iv) and cited the case of *Administrator, Orange Free State vs Mokopanele 1990 (3) S.A. 780 (A).* The general argument advanced is that the Respondent's attorney duly signed the lease agreement and he even stood as surety thereof. If there was a partnership at all, then he was a partner at the time he signed the lease.

[20] It would appear to me that the Applicant is correct in its submissions as stated above and therefore the point of law *in limine* ought to fail.

[21] A further point of law *in limine* was raised by the Respondent from the bar to the general proposition that this matter is riddled with a lot of disputes of fact. In this regard the court was referred to a decision by this court in the matter of *Phillip Lobengula Nsibandze vs P.R. Holdings (Pty) Ltd - Civil case No. 3045/2004* where the following was stated:

> **"It is trite law that the court may dismiss the application where Applicant should have realized when launching his application that a serious dispute of fact was about to develop".**

[22] The Applicant argued *per contra* to the general argument that there are no serious disputes of fact.

[23] I have considered the pros and cons of these arguments and again I agree with the Applicant's contention that these disputes of fact are not material. I do not think that the disputes of fact in this matter are the ones described above in the matter of *Phillip Lobengula Nsibandze (supra).*

[24] In the result, for the afore-going reasons the points of law *in limine* **are dismissed and costs to be costs on the merits of the case.**

S.B.MAPHALALA

JUDGE