IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3142//2007

CLETTAS UNIFORM (PTY) LTD Plaintiff

And

BIG BEND HIGH SCHOOL 1st Defendant

HEADTEACHER (BIG BEND HIGH SCHOOL) 2nd Defendant

Coram: S.B. MAPHALALA – J

For the Plaintiff: MR. S. MAMBA

For the Defendant: MR. DLAMINI

JUDGMENT

13th June 2008

[1] The Applicant seeks an order, *inter alia*, rescinding or varying the order granted by Mamba J on the 30th November 2007. The application was moved under a Certificate of Urgency on 1st February 2008.

[2] The application is founded on the affidavit of one Peregrine Ngcamphalala who is the Chairman of the Committee of the Applicant herein. The Applicant is Big Bend High School an institution of higher learning situate at Big Bend in the Lubombo District. The 1st Respondent is

Clettas Uniforms (Pty) Ltd, a company duly registered and incorporated in terms of the Laws of Swaziland, with its principal place of business in Mbabane, Hhohho District. The 2nd Respondent is Sandile Myeni, cited in his capacity as Deputy Sheriff for the District of Lubombo.

[3] According to the Applicant, on or about the 28th January 2008, the 2nd Respondent came to the Headmaster of Applicant and showed him what purported to be a writ of execution and proceeded to attach certain property listed in annexure "B1" belonging to the Applicant. When the Headmaster enquired why the property was being attached, the 2nd Respondent responded that the attachment was pursuant to a judgment entered against the Applicant in favour of the 1st Respondent.

[4] The Applicant contends that it has a *bona fide* defence to the merits of the action in that Applicant has no business dealings of any nature or sort with the 1st Respondent hence there is no cause of action. Students of the Applicant procure their own uniforms, hence there is no indebtedness arising between the Applicant and the 1st Respondent.

[5] Respondent opposes the application and has filed the opposing affidavit of one Sandile Zwane who is the Managing Director of the 1st Respondent. The case for the

Respondent briefly put is that it had had business dealings with the Applicant dating from 2003 and has all the records of every transaction that took place. That the Applicant purchased school uniforms from the 1st Respondent between the period February 2004 and September 2004 amounting to E20, 745-00 and further made payments between the period July 2004 and November 2006 in the total sum of E8, 850-00 leaving the balance of E1 1, 895-00. Respondent

further averred that on several occasions, the Applicant used cheques when paying the 1st Respondent. On all these occasions the co-signatories of these cheques were Headteacher Mr. Marcus Gwebu and Chairperson of the School Committee, Mr. Peregrine Ngcamphalala.

[6] The Applicant contends that an application to rescind a court order or judgment may be found in the Uniform Rules of Court being 31 (b) and Rule 42 (1) or (c) the common law. The court was further referred to the case of *De Wet and others Western Bank Limited 1979 (2) S.A. 1031 (A)* at page *1038 A.*

[7] The main argument on behalf of the Applicant is that Respondent issued summons with a cause of action for monies loaned and advanced and which Applicant has since failed and/or ignored to pay. The Respondent went on to issue an amendment to the cause of action which now claimed for goods sold and delivered on credit and which Applicant has since failed and /or ignored to pay despite demand. The said amendment was never served upon the Applicant notwithstanding the fact that it now was introducing a new cause of action. Further the Respondent went on to set the matter down for default judgment in seven days after the purported amendment.

[8] The Applicant contends that once the court finds that the order was granted erroneously, it is obliged, without further enquiry, to rescind or vary the order. The Applicant need not show good cause in order to succeed. In this regard the court was referred to the cases of *Mthebwa vs Mthebwa 2001 (2) S.A. 193 TK* at *199* and that of *Bakoven Ltd vs G.T Houres (Pty) Ltd S.A. 467 (E)* at *71 H.* Further, that an order is erroneously granted if it was not legally competent for the court to have made such an order. In this regard the court was referred to the case of *Promedia Drukkers's Unit Gewers (EDMS) BPK vs Kaimovitz 1996 (4) S.A. 411 (C)* at *421*.

[9] Furthermore, it is contended for the Applicant that an order is erroneously granted, if there existed at the time of its issue a fact or facts of which the Judge granting the order was unaware, and which would have precluded the granting of the order and which would have induced the Judge if he/she had been aware of, not to grant the order. In this regard the court was referred to the case of *Nyingura vs Moon man NO 1993 (2) S.A. 508 (TK)* at *510* and that of *Smith vs Van Heerden 2002 4 ALL S.A. 451 (C).*

[10] The Applicant contends that the order granted by Mamba J was erroneously granted for the reason that the Respondent issued summons and later issued an amendment to summons with a new cause of action without serving same to the Applicant. The Applicant was legally entitled to defend the new cause of action although he may have not entered an appearance to defend the cause of action claimed in the summons.

[11] The Respondent in arguments filed Heads of Arguments which do not answer the case raised by the Applicant being a rescission and setting aside the order by Mamba J under Rule 42 (1) of the Rules of Court.

[12] In my assessment of the arguments of the parties I am inclined to agree with the submission by the Applicant on the facts of the present case. The order by Mamba J was erroneously granted for the reason that the Respondent issued summons and later issued an amendment to summons with a new cause of action without serving same to the Applicant.

[13] In the result, an order is granted in terms of prayer 1, 2, 3 and 4 of the Notice of Motion.

S.B. MAPHALALA

JUDGE