

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 44/07

In the matter between:

MTHEMBU ATTORNEYS

PLAINTIFF

VS

KIL UNG PARK

DEFENDANT

CORAM: MAMBA J

FOR PLAINTIFF : MR. S. MADAU

FOR DEFENDANT: MISS X. HLATSHWAYO

JUDGEMENT

24th January, 2008

[1] The plaintiff, a firm of attorneys based in Manzini filed an action against the defendant who is described as an adult Chinese male, claiming *inter alia*, payment of a sum of E7735.00 in respect of fees for services rendered to defendant in November, 2005.

[2] A copy of the summons was served on the defendant on the 26th June, 2007. Defendant's notice of intention to defend was

then served on the plaintiff's attorneys on the 2nd July, 2007 and filed with the registrar of this court the following day. This was followed much later, on the 9th October, 2007 by a request for further and better particulars to the plaintiff's particulars of claim. It is not necessary for me to set out the contents of the request for further and better particulars in this judgement as such contents are not material to this judgement.

[3] The plaintiff did not respond at all to the defendant's request for further particulars but instead filed an application for summary judgement, supported by an affidavit verifying the cause of action, the relief sought and declaring that the defendant has no bona fide defense to the action and has only filed his notice of intention to defend to delay the plaintiff in its quest for payment of the sum due or claimed. This application was served on the defendant's attorneys on the 8th November, 2007 and set down for the 23rd of that month.

[4] The defendant objected to the filing of the summary judgement application, alleging that it was an irregular step as contemplated under rule 30 of the rules of this court. The defendant alleged that the plaintiff had to deal with the request for further particulars and could not just ignore such request.

[5] In response the plaintiff has argued that the request for

further particulars was filed well out of time and therefore itself a nullity or an irregular step which the plaintiff was entitled to ignore and forge ahead with its application for summary judgement.

[6] The plaintiff argued further that if it had responded to the request for further particulars, it would have lost or abandoned its rights to apply for summary judgement.

[7] The Plaintiff argued that supplying or in any way responding to a request for further or better particulars is a step in the proceedings that disentitles a plaintiff from applying for summary judgement.

[8] In support of her argument plaintiff's attorney referred me to the judgement of **Justice KLOPPER AJP** (as he then was) in the case of **JACOBS v F.P.J. FINANS (EDMS) BPK 1975 (3) SA 375 (O)** where the learned judge stated that: "a plaintiff cannot make use of the unusual practice of summary judgement and of the usual procedure simultaneously. When, therefore, he furnishes further particulars (to the summons) which from their nature indicate to the defendant that he has a right to defend the principal case, the plaintiff can not fall back on the summary

judgement procedure." The learned judge had expressed the same view in **ESSO SOUTH AFRICA V VIRGINIA OILS AND CHEMICALS CO 1972 (2) SA 81 AT 83.**

[9] I had my doubts or misgivings about this statement of the law and I consequently reserved my judgement in order for me to consider the point closer in a written judgement.

[10] With all due respect to the learned judge above and counsel for the plaintiff, the above proposition, seems to me to be based on a misconception of what further particulars are or serve. Further and better particulars to a plaintiff's particulars of claim or declaration are nothing more than an amplification of the plaintiff's initial particulars of claim or declaration. They do not constitute separate and distinct material outside the particulars of claim or declaration. They amplify, clarify and add detail to those particulars. They constitute or form a single statement of the plaintiff's declaration or particulars of claim, which in turn is a statement of the plaintiff's claim as contained in the summons.

[11] The judgement of KLOPPER AJP in JACOBS (supra) was considered but not followed by Solomon AJ (as he then was) in **HIRE PURCHASE DISCOUNT CO (Pty) LTD v RYAN SCHOLTZ AND CO (Pty) LTD AND ANOTHER 1979 (2) SA 305 (SE)** and

by **TEBBUTT J** in **B.W. KUTTLE AND ASSOCIATION INC V
OXONNELL MANTHE AND PARTNERS INC 1984 (2) SA 665
(CPD)**.

[12] In the latter case at 668 TEBBUTT J stated that "...I agree with Solomon AJ that where a declaration has been filed-or particulars of claim in a combined summons-the furnishing of further particulars, which, in amplifying either of those documents form part of the summons, can [NOT] amount to a waiver by the plaintiff of his right to claim summary judgement. Waiver is a form of contract and connotes a deliberate intention on the part of the person concerned to abandon a right which he may have (see *Roodepoort-maraisburg Town Council v Eastern Properties (Pty) LTD* 1933 WLD 224 at 226). It is never presumed but must be strictly proved. I fail to see why the furnishing of particulars by the plaintiff should constitute a clear intention by the plaintiff to waive his rights under rule 32....[AND at 669C-D the learned judge stated that]. It is also not without significance that it has been accepted without question in two cases that furnishing of further particulars does not debar an application for summary judgement succeeding (see **Northern Cape Scrap and Metals (EDMS) BPK v Upington RADIATORS AND MOTOR GRAVEYARD (EDMS) BPK 1974 (35 SA 788 (NC) at 793-794 A; CAPE BUSINESS BUREAU (Pty) LTD V VAN WYK AND ANOTHER 1981 (4) SA 433 (C) at 439D-E**. For all these reasons I am of the view that I should follow the decision of Solomon AJ in the RYAN SHOLTZ case and I hold that, by furnishing further particulars to the summons or particulars of claim, the plaintiff does not waive or abandon its right to claim

summary judgement."

[13] I, with due respect, agree with the above views. I should mention further that in the **Cape Business Bureau case** (supra), as in the present case, the application for summary judgement was filed after the request for further particulars had been made and the plaintiff had not responded thereto. In that case the application for summary judgement proceeded and was decided on a point taken in limine "that the summons was not susceptible to summary judgement." The issue of the request for further particulars and the plaintiffs want of response thereto was not an issue in the proceedings. It is in this context, I think, that TEBBUTT J said that it was "accepted without question."

[14] In view of the above authorities, the plaintiff's contention that it would have lost its right to apply for summary judgement if it had responded to the request for further particulars, is untenable and is hereby rejected. Likewise, I dismiss the defendant's rule 30 objection that the application for summary judgement is an irregular step.

[15] The defendant's affidavit resisting summary judgement was filed on the 5th December, 2007 and the application is to proceed on its merits. Costs of this preliminary objection shall be costs in

the cause.

MAMBA J