

IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 150/2023

HELD AT MBABANE

In the matter between:

BPG SWAZILAND (PTY) LTD t/a BROLL

Applicant

And

COLISANI IZINHLIZIYO INVESTMENTS (PTY) LTD

Respondent

In re:

COLISANI IZINHLIZIYO INVESTMENTS (PTY) LTD

Plaintiff

And

BPG SWAZILAND (PTY) LTD t/a BROLL

Defendant

Neutral Citation:

*BPG Swaziland (Pty) Ltd t/a BROLL vs Colisani
Izinhliziyo Investments (Pty) Ltd In re: Colisani Izinhliziyo
Investments (Pty) Ltd vs BPG Swaziland (Pty) Ltd t/a
BROLL (150/2023) [2023] SZHC 277 (05/10/2023)*

Coram:

J. M. MAVUSO J

Heard:

8th June, 2023

Delivered:

5th October, 2023

SUMMARY:

Summary Judgment – Plaintiff in the summary Judgment application, seeks payment of the sum of E223 952.40 (Two Hundred and Twenty Three Thousand, Nine Hundred and Fifty Two Emalangi and Forty Cents) interest thereon at the rate of 9% a temporae morae and costs of suit – On the date of argument (8/6/2023), defendant consented to Judgment being entered by the Court in the tendered amount of E136 163. 50 (One Hundred and Thirty Six Thousand, One Hundred and Sixty Three Emalangi and Fifty Cents) and that on the outstanding balance of E87 788.90 (Eighty Seven Thousand, Seven Hundred and Eighty Eight Emalangi and Ninety Cents) Defendant be granted leave to defend same, as the latter amount pertained to unliquidated penalties – Defendant applies for deferment of payment, of the sum of E136 163. 50 (One Hundred and Thirty Six Thousand, One Hundred and Sixty Three Emalangi and Fifty Cents) for a period of thirty (30) days calculated, from the date of hearing – Parties did not reach agreement on the requested period and on the 26th June 2023 Defendant now Applicant filed an application have, its consent to Judgment in the sum of E136 163. 50 (One Hundred and Thirty Six Thousand,

One Hundred and Sixty Three Emalangeneni and Fifty Cents) rescinded and/or set aside and that it be granted leave to defend the sum of E136 163. 50 it consented to pay Plaintiff – Application for rescission refused, Defendant ordered to pay Plaintiff the sum of E136 163. 50 (One Hundred and Thirty Six Thousand, One Hundred and Sixty Three Emalangeneni and Fifty Cents) and granted leave to defend the outstanding balance.

JUDGMENT

M.J. MAVUSO J:

[1] This is an application for summary judgment wherein Plaintiff seeks summary judgment entered against Defendant for payment of:

1.1 the sum of E223 952.40 (Two Hundred and Twenty Three Thousand, Nine Hundred and Fifty Two Emalangeneni and Forty Cents)

1.2 interest on the above amount at the rate of 9% per annum *a tempore morae*.

1.3 costs of suit.

1.4 further and/or alternative relief.

[2] The basis of the summary judgment application, is said to be an oral agreement entered into on or about the 26th February 2018 at Matsapha between Plaintiff and Defendant, in terms of which the Plaintiff was to provide transport services to the Defendant, at the specific instance and request of the Defendant. When the agreement was entered into, Plaintiff was represented by Thembi Tsabedze whilst Defendant was represented by its duly authorised employee.

[3] The terms of the oral agreement are as set out hereunder:

“5.1 The Chapelat Swaziland t/a Mondelez International has assigned to the Defendant the responsibility of engaging a third party to provide transport services for the employees of Chapelat Swaziland t/a Mondelez International to and from work;

- 5.2 *That the Defendant would issue an order to the Plaintiff for transport service for the employees of Chapelat Swaziland t/a Mondelez International;*
- 5.3 *That the Plaintiff would provide transport services to the employees of Chapelat Swaziland t/a Mondelez International upon receipt of orders from the Defendant;*
- 5.4 *The Plaintiff would then charge a reasonable fee and issue an invoice to the Defendant; and*
- 5.5 *That the Defendant would make payment to Plaintiff within a period of thirty days after receipt of the invoice from the Plaintiff for the transport services.”*

[4] Pursuant to the above agreement, after providing transport services to the Defendant in July 2019, Plaintiff, issued two invoices, for Defendant's attention and settlement. Invoice No. 07/02 was for the sum of E76 422.40 (Seventy Six Thousand, Four Hundred and Twenty Two Emalangeni and Forty Cents) whilst Invoice No. 07/01 was for the amount of E147 510.00 (One Hundred and Forty Seven Thousand, Five Hundred and Ten Emalangeni). The sum total of the invoices is E223 952.40 (Two Hundred

and Twenty Three Thousand, Nine Hundred and Fifty Two Emalangeni and Forty Cents) which is the amount claimed by the Plaintiff *in casu*.

[5] When the matter came before Court for argument Defendant confirmed that the Court could enter Judgment for the sum of E136 163. 50 (One Hundred and Thirty Six Thousand, One Hundred and Sixty Three Emalangeni and Fifty Cents) and that it be granted leave to defend the outstanding balance which is the difference between the sum total of the two invoices totalling E223 952.40 (Two Hundred and Twenty Three Thousand, Nine Hundred and Fifty Two Emalangeni and Forty Cents) and the amount tendered. The difference between the two amounts is E87 788.90 (Eighty Seven Thousand, Seven Hundred and Eighty Eight Emalangeni and Ninety Cents). This is the amount Defendant sought leave to defend.

[6] With the Court, having been advised as above, Defendant then sought a thirty (30) day moratorium, to raise the funds covering the amount tendered and to pay the Plaintiff. With no legal basis to support the moratorium, the Court implored the parties to reach an agreement if any, on same. Whilst waiting for the parties resolution of the moratorium issue, on the 26th June 2023,

Defendant now as Applicant filed an application praying for the following orders, that:

- “1. The Applicant’s Attorneys concession for the Applicant to pay the sum of E136 163. 50 (One Hundred and Thirty Six Thousand, One Hundred and Sixty Three Emalangeni and Fifty Cents) recorded by Judge Mavuso on the 8th June 2023 is hereby rescinded and/or set aside.*
- 2. The Applicant is granted leave to defend the payment of the tendered amount which was rejected and then subsequently fell away.*
- 3. Granting the Applicant further and/or alternative relief.”*

[7] Applicant purports to institute the rescission application under Rule 42(1) (b) and (c) of the High Court Rules. The said Rule reads as follows:

“42(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(b) an order or judgment in which there is an ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.”

[8] The basis of Applicant’s application for rescission is set out in paragraph 5, 8 and 9 of its founding affidavit. In short, Applicant is now before Court seeking a rescission of the tendered amount because during negotiations Respondent/Plaintiff rejected the offer. At paragraph 9, Applicant states that:

“There was clearly a mistake common to both parties and the Court in the interpretation of paragraph 11 of the affidavit resisting summary Judgment.”

At paragraph 10 Applicant goes on to aver as follows:

“I therefore wish to rescind the concession I made on the 8th June 2023. I made the concession without having taken instructions from my client. What compounds the matter is that the concession is not in the interest of my client. I had no authority and/or mandate to make that concession. The concession also is against our client’s instructions to now defend the entire claim as the Respondent did not accept the tendered amount. The concession I made was clearly in conflict with our client’s instructions and cannot stand.”

[9] In recording the concession made by Applicant, as part of its judgment, the Court did not have to interpret anything but merely recorded same. There was no ambiguity or patent error in the recording of the concession nor did the Court erroneously enter the aforesaid Judgment.

[10] As the summary Judgment application was heard by this Court, the recession application being centered on the Court’s recording of the concession, this Court is thus able to make a finding, on the rescission application.

[11] The Court, finds the application for rescission unmeritorious and an abuse of Court. It is unheard of, for an attorney, to submit that he had no instructions to act, when he acted. As an officer of the Court, the taking of full and proper instructions, should be paramount. To allege or insinuate that a Court, as is the position in this case, erroneously recorded a consent order, based on a concession (made by Applicant herein) is outright abuse, not only of the Court process but also of the Court itself.

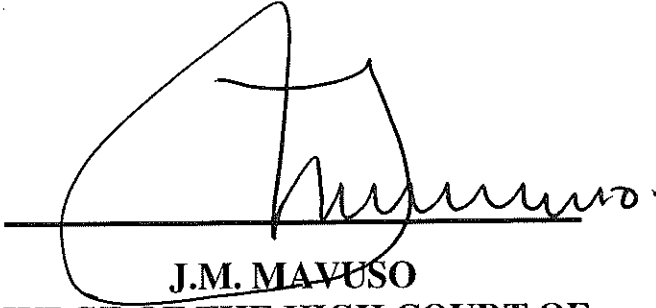
[12] (i) In the circumstances of this case, the Court cannot afford to be complicit. Accordingly the application for rescission is dismissed with no order as to costs.

(ii) Applicant/Defendant, as per the concession, is ordered to pay;

(a) Plaintiff the sum of E136 163. 50 (One Hundred and Thirty Six Thousand, One Hundred and Sixty Three Emalangi and Fifty Cents);

(b) Interest thereon at the rate of 9% per annum *a temporae morae*.

- (iii) Defendant/Applicant is granted leave to defend the outstanding balance of the claim.



J.M. MAVUSO
JUDGE OF THE HIGH COURT OF
THE KINGDOM OF ESWATINI

For the Applicant:

ROBINSON BERTRAM ATTORNEYS

For the Respondent:

MASEKO TSAMBOKHULU ATTORNEYS