IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Appeal Case No. 84/2018
In the matter between:

MATATA RETAIL (PTY) LIMITED **Appellant**

and

VIVA BEVERAGES (PTY) LIMITED **Respondent**

Neutral Citation : *Matata Retail (PTY) Limited vs VIVA Beverages (PTY) Limited* (84/2018) [2019] *SZSC* 2 (01/03/2019)

Coram : M.C.B. MAPHALALA CJ, R.J. CLOETE JA AND J.P. ANNANDALE JA

Heard : 12 FEBRUARY 2019

Delivered : 01 MARCH 2019

SUMMARY : *Notice of withdrawal of action – Under normal circumstances end of that specific litigation and not capable of reinstatement – Summary judgment application after reinstatement – Appellant relied solely on fact that no lis existed – But Appellant unequivocally admitted being indebted to the Respondent in the amount claimed – The ratio in Shell Oil matter confirmed – Courts are urged to decide matters on their merits and eschew technical objections and inflexible formalism – Appeal dismissed.*

JUDGMENT

CLOETE – JA

[1] The Appellant brought an Application in terms of Rule 17 for the condonation of the late filing of its Heads of Argument. The Application conforming with the Rules and the Law, condonation was granted with no Order as to costs.

[2] The Appellant (the Defendant in the Court *a quo*) and the Respondent (the Plaintiff in the Court *a quo*) entered into a business arrangement during 2017 as described at Page 9 of the Record and Paragraph 4 of the Declaration of the Respondent which provides:

"4.1 That the Plaintiff would sell to the Defendant at its usual price and the Defendant would purchase from the Plaintiff purified water, hereinafter referred to as the product, on credit;

4.2 That the Defendant would place an Order to the Plaintiff for the requested supply of the product;

4.3 That the Plaintiff would deliver the product at such place as the Defendant has directed;

4.4 That the Plaintiff would issue an invoice to the Defendant for the delivered product; and

4.5 That Defendant would attend to the payment of the invoiced amount within thirty (30) days of the issue of the invoice."

[3] The Respondent alleges delivery of product to the Appellant and the failure to pay by the Appellant of a debt in a sum of E324,614.14 (Three Hundred and Twenty Four Thousand Six Hundred and Fourteen Emalangeni Fourteen Cents) ("The Debt").

[4] On 15 March 2018, the Appellant caused the following mail to be sent to the Respondent as at Page 18 of the Record;

"Good day Lynette

I spoke to one of your directors on Tuesday and promised that I will look into the matter and get back to you with a proposal.

Our purchases over the last few months averages between R36 000 and R45 000 per month. We have been under cash flow strain to the extent that we had to sell our Nkonyeni store. We also experience loss of revenue at Moneni due to the opening of the new SuperSpar in Manzini.

We want to thank you for your patience with us in this regard and want to make the following <u>proposal to get your account normalised over time while we continue to do business:</u>

1. **<u>We will pay our outstanding amounts due relating to the Nkonyeni store in full within the next few days</u>** (my underlining).
2. **<u>We will pay a minimum of R70 000 per month on the balance of our account, to bring our account back into line over the next few months</u>** (my underlining).

We trust that this proposal is workable solution for you to be able to keep trading with us.

Kind Regards

Willie Snyman

Financial Director

Matata Retail (Pty) Limited"

[5] On 17 May 2018 the Appellant sent a mail to the Respondent attaching a proposed settlement agreement drawn by itself, as appears at Pages 19, 20, 21 and 22 of the Record; the mail reads;

"Dear Lynette

Please find attached the proposed settlement agreement and interest calculation attached. Please confirm the company name of the legal entity for Viva Beverages as well for me to insert in the document, which I will update and sign of (sic) you agree and scan through for your signature.

Regards

Willie Snyman

Executive Director"

The document headed **DEBT SETTLEMENT AGREEMENT**, drawn by the Appellant and in fact only signed by the Appellant *inter alia* reads as follows;

PREAMBLE

WHEREAS the Debtor is indebted to the Creditor in the amount of E324,614.14, which includes interest of E5,037.48 (my underlining).

AND WHEREAS the Debtor has experienced some financial difficulties which has led to its franchisor taking over its stores in order to avoid liquidation proceedings.

AND WHEREAS the Debtor has advised the Creditor of the sale of its stores to the franchisor to avoid liquidation proceedings and in order to settle its Creditors. The present Creditor has agreed to accept a compromised amount towards its debt.

NOW THEREFORE, in consideration of the discussions between the Debtor and the Creditor, an agreement is recorded as follows;

1. **ACKNOWLEDGEMENT OF DEBT – the Debtor agrees and acknowledges that it is indebted to the Creditor in the compromised amount of E263,721.30.**

2. **SETTLEMENT AMOUNT – the Creditor agrees to accept from the Debtor payment of E263,721.30 as full and final repayment of the debt outstanding to the Creditor by the 1st of July 2018. …"**

[6] On 27 June 2018, the Respondent instituted proceedings against the Appellant for the full Debt, the Appellant entered an appearance to defend and on 10 July 2018 the Respondent filed a Declaration setting out its claim and referring to the Agreement of Settlement.

[7] For reasons unknown and not set out in the Record, the Respondent on 13 July 2018 withdrew the action and tendered costs. On 31 July 2018, the Respondent reinstated the same matter and on 14 August 2018, brought an Application for Summary Judgment accompanied by the standard required Affidavit in support thereof.

[8] The Appellant opposed the Application for Summary Judgment and filed an Affidavit in which it raises only a legal point in that since the matter had

been withdrawn by the Respondent it could not be reinstated without leave of the Court and as such there was no *lis* between the parties. The Appellant chose not to deal with the actual merits of the matter in any way and relied solely on the legal technicality.

[9] The matter was argued in the Court *a quo* before Mlangeni J., who granted Summary Judgment for the full Debt together with interest and on 03 October 2018 gave his reasons.

[10] It is pertinent to note that the Appellant also chose not to bring an Application in terms of Rule 30 in that the reinstatement was an irregular proceeding.

[11] After hearing argument in the matter, the Learned Judge in the Court *a quo*, in the summary at Page 49 of the Record, stated as follows;

"In opposition to the summary judgment application the Defendant argued that the effect of the withdrawal of the action was that there was no *lis* between the parties, hence judgment could not be granted. There was no opposition based on the merits. To the contrary, the debt was admitted.

Held: The effect of withdrawal of court proceedings is to bring the litigation to an end, and such *lis* cannot competently be revived through a mere notice of reinstatement.

Held further: On the peculiar facts of the matter, especially the unequivocal admission of the debt, it would be pedantic and costly to dismiss the application for summary judgment.

Summary judgment granted as prayed"

[12] Indeed the Learned Judge in fact found, correctly so, that *prima facie*, the withdrawal of an action has the effect of bringing *finis* to the litigation between the parties and that as such the proceedings do not become dormant so as to enable the Plaintiff to revive the proceedings at any time in the future and he referred to **Ellies Electronic (Pty) Limited v Commission For Conciliation, Mediation and Arbitration and Two Others, Case No. J. R. 848/15 Labour Court of S. A. Johannesburg**.

[13] However, having found that the Application for Summary Judgment could possibly be dismissed on that ground the Learned Judge, correctly in my view, went on to say;

"The other aspect, however, is that summary judgment is about the existence or non-existence of a defence <u>on the merits of the matter.</u> See, for instance, my observations at paragraph 12 of the judgment in MBULUZI GAME RESERVE (PTY) LTD v IRON WOOD (PTY) LTD AND ANOTHER (64 & 65/17 [1918] 19. Where a Defendant has no defence to the merits, and relies solely on a technicality that relates to non-compliance with a rule of court or some other aspect that has nothing to do with the merits, does it serve the interests of justice to hold in favour of such Defendant?"

[14] At Paragraph 13 on Page 53 of the Record, the Learned Judge further says;

"If the Application for summary judgment is dismissed and the Plaintiff re-instates the action in future, the Defendant will still have no defence on the merits. In the meantime legal costs will have escalated for both parties, and precious time will have been lost. To dismiss the application on the basis as argued for by the Defendant would have the effect of going against the celebrated position espoused in the case of SHELL OIL SWAZILAND (PTY) LIMITED v MOTOR WORLD LIMITED t/a SIR MOTORS COURT OF APPEAL CASE NO. 23/2006. This is exactly what summary judgment seeks to avoid delay

of justice in circumstances where the Defendant has no *bona fide* defence on the merits."

[15] The Learned Judge correctly points out that the Defendant, in its Heads of Argument before him under the subheading **"Common Facts"** (as referred to at Page 53 of the Record) stated;

" It is common cause that the parties herein are party to an agreement of sale with each party bearing certain duties in terms of the agreement. It is further common cause that there was a breach of the agreement occasioned by the Defendant, and that the Defendant <u>has accepted liability for the amount claimed"</u> (my underlining).

[16] Counsel for the Appellant conceded that the Appellant was indebted to the Respondent but persisted in his sole argument that the Court *a quo* had correctly found that there is no *lis* between the parties but took issue with the further finding of the Court relating to a *bona fide* defence being absent.

[17] Counsel for the Respondent countered that the Appellant simply had no defence to the claim in respect of the full Debt, which it admitted, and that this was merely a time wasting exercise and referred the Court to the Shell Oil matter *supra* and the Du Plessis matter *infra*.

[18] I agree fully with the reasoning of the Learned Judge in the Court *a quo* that strictly speaking the Respondent should have sought leave of the Court to reinstate the matter and that such withdrawal had the effect of bringing the litigation to an end.

[19] However, it is uncontroverted the Appellant admitted in the Settlement Agreement drawn by itself and in its own Heads of Argument that it was indebted to the Respondent for the full Debt. Additionally, it chose not to deal with the merits at Summary Judgment level and merely sought to prolong making payment of an admitted amount to the Respondent. The Judge in the Court *a quo* was accordingly completely justified in finding that on the peculiar facts of the matter, especially the unequivocal admission of the Debt, that it would be pedantic and costly not to grant Summary Judgment.

[20] It would be apposite as well to again refer to the decision in the Shell Oil matter, *supra*, to the effect that the recent trend is not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decisions of cases on their real

merits. The Courts are urged to decide matters on their merits and *"eschew technical objections"*. The Court further held that;

"The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."

[21] Furthermore in **Andries Stephanus Du Plessis v Robert Lobi Zwane and Others, High Court Case No. 1082/2009**, the High Court held in line with the recent trend as follows:

"The rules of Court are not an end in themselves. Consequently the rules should be interpreted and applied in the spirit which will facilitate the work of the Courts and enables litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Thus it has been held that the rules exist for the Court, not the Court for rules. Formalism in the application of the rules is not encouraged by the Courts".

[22] This matter falls directly within those Judgments which I agree with, and I commend the Learned Judge in the Court *a quo* for dealing with the matter

in the way that he did. The Appellant admits owing the Debt to the Respondent and cannot take refuge behind technicalities. Accordingly this appeal cannot succeed.

[23] On the issue of costs, the Appellant was invited to address the Court on why an Order for costs on the punitive scale as between Attorney and Client *de boniis propriis* should not be awarded. The Respondent sought only a punitive Order for costs.

[24] In my view the behaviour of the Appellant in admitting being indebted to the Respondent and then deliberately setting out to delay the inevitable obligation to make payment on the grounds of frivolous and spurious delaying tactics, borders on a serious abuse of the Rules and spirit of the Courts of Eswatini. Let this be a message to Practitioners to desist from such practices lest in future such punitive costs Orders are in fact imposed.

[25] In the current matter the Appellant is given the benefit of doubt and as such only costs on the ordinary scale will be awarded against it.

ORDER

1. The appeal is dismissed with costs on the ordinary scale.

2. The Judgment of the Court *a quo* is herewith confirmed.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

J.P. ANNANDALE
JUSTICE OF APPEAL

For the Appellant : M. MTUNGU
For the Respondent : M. NTAMBANKULU