

IN THE HIGH COURT OF SWAZILAND

Price Waterhouse

Plaintiff

V

Joseph Ndallahwa

Defendant

Civ. Case No. 629/97

Coram

S.B. MAPHALALA – J

For the Plaintiff

MR. P. Flynn (Instructed

by Millin & Currie) For the Defendant MR. P. SHILUBANE

JUDGEMENT

(10/09/99)

Maphalala J:

This application is brought in terms of Rule 31 (2) of the High Court rules for an order in the following terms:

1. Entering judgement in favour of the above applicant against the defendant herein, in the terms stipulated in defendant's consent of judgement dated 1st January 1999, a copy of which is annexed hereto and marked "A".
2. Further and/or alternative relief.

The application is supported by the founding affidavit of one John Bennett who is a partner of the applicant. The respondent is a Chartered Accountant and a former partner of the applicant, currently practising under the name and style Ndlallahwa, Motsa and Company at 1st Floor, Diesel Electric Building, Louw Street, Manzini. The respondent is indebted to the applicant in the sum of E70, 855-14 and is further liable to the applicant for interest thereon calculated at the rate of 9% per annum from the 30th April 1999, and costs to date of payment. The respondent's indebtedness is in

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respect of money owed by the respondent to the applicant in respect of his motor vehicle which was purchased by the applicant for the use of the respondent and which was paid for the use of the respondent and which was paid for by the applicant and which is now in the possession of the respondent. The defendant acknowledges and admits his liability to the applicant for the sum in question and further consents to judgement being entered against him. To this effect the court was directed to the defendant's consent to judgement dated 18th January 1999, annexed and marked "A" and the verifying affidavit annexed thereto marked "B".

The defendant's verifying affidavit in terms of Rule 31 (1) is attached to the plaintiff's papers. In this affidavit defendant confirms that he was served with a copy of the plaintiff's summons in terms whereof an amount of E154, 403 - 07 and interest claimed from him. He states in this affidavit that he knew and understood the full meaning and effect of the consent to judgement which he had signed. Further that he verifies that the signature on page 3 of the consent to judgement is his. It appears from the "acknowledgement of debt" that the amount of E154, 403 - 07 is made out of amount owing from defendant in various cases before this court, viz Case No 629/97; Case No 628/97 and Case No. 3286/97.

The defendant filed an opposing affidavit where at paragraph 4 in response to paragraph 5-6 of the plaintiff's founding affidavit he denies that he owes the amount alleged and put the applicant to the proof thereof. Further at paragraph 5 he deposes that he was coerced by the applicant and its attorneys to sign the acknowledgement of debt. The acknowledgement of debt, the consent to judgement and the verifying affidavit was in fact drawn on behalf by and in the offices of applicant attorneys and therefore it is invalid. He accordingly prays that the application be dismissed with costs.

The defendant filed a notice to raise a point of law on the 27th May 1999, alleging that the plaintiff is not entitled to judgement because the so-called acknowledgement of debt was altered unilaterally by plaintiff after same had been furnished by the defendant to plaintiff. In turn plaintiff filed replying affidavit addressing the point of law raised. The gravamen of the plaintiff's reply is that the alteration was at the express request of the defendant, and the plaintiff is surprised that the defendant has now elected to raise this point, and the defendant has failed to disclose to this court that the said alteration was at his express request.

The matter came for arguments in the contested motion of the 2nd July 1999.

Mr. Flynn for the plaintiff submitted that the defendant's opposing affidavit at paragraph 4 defendant denies owing the plaintiff this amount and places the plaintiff to strict proof thereof. Such statement is unattainable. A bald statement of denial is not accepted. Defendant does not lay grounds why he denies liability. Full facts are not set out to support the denial. Paragraph 5 makes another bald allegation. As to the point of law raised by the defendant it is submitted on behalf of the plaintiff that there is no merit to this objection.

Per contra Mr. Shilubane for the defendant submitted that the application is defective. The plaintiff has not complied with the peremptory provisions of Rule 31. Further

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that the defendant was coerced in signing the document. The document was drawn by the other side and thus invalid on the basis of the authority cited in *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa (4th ED)* at page 543 where the learned authors state that where the defendant has admitted liability and consented to judgement, he may be deemed to have waived his right to rely upon a defence that he could otherwise have relied upon. A submission to judgement contained in a plea signed by the defendant's counsel and attorney is not a consent to judgement contemplated by the rules, and the plaintiff cannot apply for judgement on it in terms of Rule 31 (1) (see *Bolus & Co, Ltd vs Crosby (1909) 26 S. C 431*). Mr. Shilubane applied for the dismissal of the application with costs.

It appears to me that Mr. Flynn is correct that in the present case that the "consent to judgement" was not altered but the "acknowledgement of debt". There is nothing in the former judgement which has been altered at all. The entire argument by Mr. Shilubane based on the *Bolus & Co. Ltd* case is not relevant. Further on the point of whether Rule 31 has been complied with my view is it has been followed. The rule reads as follows:

"31 (1) save in actions for divorce, restitution of conjugal rights, judicial separation or nullity of marriage, a defendant may at any time confess in whole or in part the claim contained in the summons. Such confession shall be signed by the defendant personally and his signature shall either be witnessed by an attorney acting for him, not being the attorney acting for the plaintiff, or be verified by affidavit (my emphasis), and furnished to the plaintiff, whereupon the plaintiff may apply in writing through the Registrar to a judge for judgement according to such confession"

A consent to judgement may be set aside where it is drawn up for a defendant by or in the offices of the plaintiff's attorneys, unless the consent is verified by affidavit. In the instant case the defendant's consents to judgement were verified by affidavit, sworn by another attorney, there is nothing irregular which attaches to this and thus renders defendant's defence without merit but fanciful and frivolous.

As an aside the application of the dictum in the case of *Bolus & Co. Ltd (supra)* which was decided in 1909 has been rendered obsolete with the introduction of the new rules of court which provides in-

built safeguards to protect the defendant's interests in such cases.

In the result, I grant the order in terms of Rule 31 (2) prayer (1) with costs.

S. B. maphalala

JUDGE