IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2016/2006

In the matter between:

ELVIS BHEMBE Applicant

versus

ANGLO OFFICE SUPPLIERS (PTY) LTD Respondent

In re:

ANGLO OFFICE SUPPLIERS (PTY) LTD Plaintiff

versus

ELVIS BHEMBE Defendant

Coram: J.P. ANNANDALE ACJ

For Applicant: Mr. M.C. Simelane

For Respondent: Mr. Rodrigues

JUDGMENT
1st December 2006

[1] Summary judgment was entered against the Defendant on the 4th August 2006, to order payment of close to E8 000.00

plus costs and *mora* interest. It is against this that the Applicant returned to court to seek a rescission thereof, plus ancilliary relief. On the 11th August a consent order was noted to hold execution of the writ of execution in abeyance until such time that the rescission application has been determined, which is done herewith.

[2] The brief history of the matter is that the Plaintiff (presently the Respondent) issued summons against the then Defendant, to claim payment of "*E7 919.21, being the balance outstanding to Plaintiff by Defendant in respect of goods sold and delivered to Defendant on credit, at its own special instance and request. Notwithstanding lawful demand, Defendant neglects and/or refuses to pay Plaintiff the aforesaid amount which is now due, owing and payable*". In addition, 9% *mora* interest from date of *issue* (not service) of summons was claimed, as well as costs of suit.

[3] Following personal service on the Defendant, on the 12th June, a notice of intention to defend was filed the very next day, despite the date of the notice stated to be a month earlier, the 12th May 2006.

[4] Quite within its rights, the Plaintiff then filed an application for summary judgment, in order to avoid protracted and costly legal proceedings.

[5] In support of that application, the Plaintiffs director/accountant attached an affidavit in support of the summary judgment application. It contained the essential and usual averments that he verified the cause of action, amount

of claim and cited parties, as well as his submission that notice of intention to defend was filed solely for purposes of delay. He also stated that the Defendant could have no *bona fide* defence to the claim.

[6] Rule 32 (3) (a) has it that:

> "*An application under sub-rule (1)* (for summary judgment - my insert) *shall be made on notice to the Defendant accompanied by an affidavit verifying the facts on which the claim, or part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may he, and such affidavit may in addition set out any evidence material to the claim.*"

[7] Therefore, the matter was deemed fit for an application to seek summary judgment and having properly served the notice and affidavit on the Defendant, it was set down for the 4th August 2006 to seek summary judgment.

[8] It also requires to be recorded that prior to seeking summary judgment, the Plaintiff preceded it by delivering a declaration on the Defendant wherein closer details of the cause of action were spelled out.

[9] It was therein stated that the Defendant traded as D.K. Publishers and that the parties entered into a verbal agreement in terms of which the Plaintiff agreed to sell goods on credit. Pursuant thereto, on different occasions between August 2004 and the 16th February 2005, Plaintiff would have

sold and delivered goods to the Defendant on credit, at the latter's own special instance and request, in the total amount of the claimed sum of money.

[10] A statement of account was attached, which reflects various transactions during the stated period, wherein the Plaintiff company invoiced D.K. Publishers in a total amount of E7 919.21, the claimed amount. It also attached a letter of demand in the usual terms.

[11] Further, the declaration stated that the implied terms of agreement were that the goods would be paid within 30 days from date of invoice, hence the claim repeated as per the summons.

[12] The declaration is as per the dictates of Rule 20 which reads :-

> "*Declaration.*
>
> 20.1) *In all actions in which the Plaintiff's claim is for a debt or liquidated demand and the Defendant has delivered notice of intention to defend, the Plaintiff shall except in the case of a combined summons, within fourteen days of receipt thereof, deliver a declaration.*
>
> 20.2)
>
> *(2)The declaration shall set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed.*"

[13] Notice of the application for summary judgment was

delivered on the 19th July, stating that judgment would be sought on the 4th day of August 2006. Ten coOurt days before the hearing are required as period of notice, under sub rule 32 (3) (c), and the *dies* were thus sufficient.

[14] However, the Defendant sought to persuade the court to refuse the application by way of filing an affidavit to resist summary judgment, as it is entitled to do under subrule 32(4) (a) which holds that:-

> "*Uriless on the hearing of an application under Sub-rule (1) either the court dismisses the application or the Defendant satisfies the court with respect to the claim, or the part of the claim to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the Plaintiff against that Defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*"

[15] It is precisely this which the Applicant *qua* Defendant sought to do, i.e. to persuade the court to refuse summary judgment and order the matter to go to trial on a triable issue.

[16] On the 1st August 2006, shortly before the application was to be heard, the Defendant filed an affidavit resisting summary judgment. On the same day, a copy thereof was served on the Plaintiffs attorneys, Rodrigues

and Associates, under signature of receipt by an unknown person and without a date stamp or other endorsing instrument of the attorneys.

[17] I pause to deviate and comment adversely on the semi-universal practice of legal practitioners in Swaziland who still fail, in this day and age, to endorse receipt of served papers in an appropriate and uncontrovertable manner. A suitable adjustable endorsing stamp, reflecting the date, time and name of the firm should be a *sine qua non* in each and every attorney's office, until our practise and procedure move into the modern world where electronic filing and receipting of documents become common practice, for which provision is to be made in the Rules. The Law Society, perhaps with encouragement and assistance from the International Bar Association, the Commonwealth Law Office and the offices of the Registrar and Chief Justice may well achieve this objective.

[18] In the resisting affidavit, the Defendant took a point of law pertaining to the commissioning of the affidavit in support of the application for summary judgment. It is based on alleged deficiency as envisaged by the Authentication of Documents Act, 1965 (Act 20 of 1965) read together with the Commissioners of Oaths Act. This point was abandoned at the hearing of the matter.

[19] For present purposes, it is not necessary to entertain this aspect, which was not canvassed before me, suffice to say that the commissioning certificate reads that the deponent swore to its contents at Manzini, which is in Swaziland,

whereas the "Commissioner of Oaths" affixed a rubber stamp endorsement which reads "South African Police Service, area Noord-Rand, Sebenza Community Service Centre", with the implied connotations inherent thereto.

[20] More importantly, the Defendant swears positively to a *bona fide* defence, which is set out as follows:-

> "*It is my belief that the action is misdirected at myself as I never as Elvis Bhembe, either personally or trading as D.K. Publishers, entered into any agreement of sale with the plaintiff Annexure "A"of the particulars of claim indicate that such goods were sold to D.K. Publishers. D.K. Publishers (Pty) Ltd is an artificial person having the necessary capacity to sue or to be sued in its own name and citing me Elvis Bhembe renders the summons defective* ab initio.
>
> *That I never entered an agreement of sale with the Plaintiff is a triable fact, which cannot be decided in the affidavit in the absence of supporting document and grant me a leave to file my plea wherein I will raise a special plea.*"

[21] Again, it is not now or yet opportune to consider the validity or otherwise of these contentions, as it is not the issue to decide. It is also not now to decide if Elvis Bhembe is properly suited, for instance if he held himself out as the representing agent of the legal entity he refers to.

[22] The present issue to decide is whether the summary

judgment that was entered against the Defendant should be rescinded or not, but not on the basis of abovequoted extract of the Defendant's contentions.

[23] As stated above, it *prima facie* was in order to grant the application for summary judgment, *ex facie* the papers as they were held out to be.

[24] However, there is a further aspect to this and it is crucial to the outcome of the matter.

[25] According to the papers filed of record, and to which regard is ordinarily given to the Registrar's receipting date stamp endorsed at the head of each set of papers, it is common cause that the affidavit resisting the application for summary judgment was filed on the 1st August 2006, a few days before the application was to be heard on the 4th August. In the ordinary course of events, it must be accepted that this was the case, i.e. that the resisting affidavit was placed in the court file at the time the court came to consider the application on that day.

[26] The position seems to have been otherwise, contrary to the expected norms of practise and proper administrative procedure. I say this because of the following reasons:-

[27] The affidavit to resist summary judgment was delivered to the Plaintiff's attorneys on the 1st August 2006, long after the Plaintiff notified that such an application would be made on the 4th August, which notice was received by the Defendant's attorneys on the 19th July. At the time the Notice was issued, it could possibly have been presumed to be an

uncontested application.

[28] However, before the 4th August when the application was set down for hearing thereof, it either became known or should have been known to the Plaintiffs attorney that a challenge to the application was raised by the Defendant and that it had thus become a contested matter, as to whether summary judgment could summarily be granted on strength of the Plaintiffs version alone.

[29] After hearing of argument in the contested application to rescind the judgment of the 4th August, this judgment was held in abeyance in order to ascertain what actually transpired in court on that date. This took some time as the cassette recording of that date was not filed with the Registrar but kept in a locked office allocated to the clerk/interpreter of the Judge who granted the application, with the clerk/interpreter absent from work for some weeks in order to attend some training course. The cassette tape was located today (the 22nd November 2006) and a transcript of the proceedings in open court was availed. It reads:-

> "*Matter 20 on the roll* **-**
>
> *This is an unopposed* (my emphasis) *summary judgment application.*
>
> *Yes, you say you are entitled to 9% interest, what does the Act say? You are only entitled to 8% interest.*
>
> *I do not have a problem with that. I accordingly pray for an order in terms of prayer 1.1, 1.2, 1.3.. 1.2 is amended to 8%. 1.3 is already costs, and*

costs".

[30] This transcript of the record confirms the suspicion that all was not as it should have been. There is no indication that the Court was aware that an affidavit to resist the application had been filed some days earlier. Bearing in mind that it was filed with the Registrar on the 1st August, by all counts it should have been in the court file when the matter was dealt with on the 4th August. The Plaintiffs attorney must be deemed to have been aware of the affidavit, having received it on the 1st August with the papers filed at the correspondent's office in Mbabane, their own offices situate in Manzini, but was the learned Judge also aware of it? The answer is a clear negative.

[31] Had the court been aware of the resisting affidavit, it would have been enjoyned to consider it. It would not be necessary to accept the contents at face value, but at minimum, as mentioned in Rule 32(4)(a) quoted above, the court would have had regard to its contents and if it rejected its tenor and import, it would have made such a ruling. As is clear from the record of proceedings, this was not the position.

[32] To the contrary, the court was informed that it was an unopposed application and the only issue that was debated in court was the rate of *mora* interest, following which the application was summarily granted.

[33] Accordingly, it is clear that the court was unaware of the filed resisting affidavit, which it either did not see among the various papers in the file, or which affidavit was not physically

inside the file at the time the court dealt with the matter. Tellingly so, the court was actually informed from the bar that in fact the matter was not opposed at all.

[34] From this finding, it does not by necessity adversely impute impropriety on the Plaintiffs attorney. At best, it remains possible that he was in fact not yet aware that a resisting affidavit was delivered to his correspondent's offices in Mbabane, with Plaintiffs attorney having offices in Manzini. It also pre-supposes that the Registrar's clerk did not place the resisting affidavit in the court file before the matter was dealt with.

[35] Be that as it may, the contents of the resisting affidavit was not brought to the knowledge of the court at the time when summary judgment was granted. The court therefore did not have occasion to consider the defences raised by the Defendant in opposition or resistance to the application for summary judgment. It did not reject it. It did not accept it either. Simply, it was never considered and as the matter now stands, it is a judgment that was entered in error.

[36] Because of the conclusion above, it is not necessary to deal with the arguments raised at the hearing of the rescission application in any further detail and to consider the authorities cited, which deal with the other merits of a rescission application. Had the court been aware of the defences raised by the Defendant and pronounced on it, it only then would become more than academic, and to then decide it an appeal would be the appropriate remedy for the Applicant as matters now stand.

[37] Rule 42 provides for precisely this situation. It reads that:-

> "*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:*
>
> *(a) an order or judgment erroneously granted in the absence of any party affected thereby;*
>
> *(b)...*
>
> *(c) an order or judgment granted as the result of a mistake common to the parties*".

[38] It is for these reasons that the summary judgment entered on the 4th August 2006 against the Defendant/Applicant cannot be allowed to stand for the time being, at least until such time that the contents of the resisting affidavit has been judicially considered. The judgment has to be set aside. The Plaintiff may seek advice as to the way forward, which entails more than one option, and act accordingly.

[39] It is therefore ordered that the Judgment herein is set aside, with costs ordered to be costs in the cause. The writ of execution naturally follows suit.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE