IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.2710/2006

In the matter between:

IMHHLWANA FARMING PROJECTS **PLAINTIFF**

VS

WAWA BUTCHERY **DEFENDANT**

CORAM: ANNANDALE J

FOR THE PLAINTIFF: Mr. NGCAMPHALALA

FOR THE DEFENDANT: MR. N. SHONGWE

JUDGMENT

29th OCTOBER 2008

[1] The Plaintiff company issued combined summons against the Defendant company in which the cause of action is pleaded to be based on an orally concluded contract to supply 1000 chickens, with a specific average weight, at a specified price per kilogram. It asserts that it groomed the chickens specifically for delivery to the Defendant and that it duly performed. However, the Defendant allegedly refused to comply with a term of their agreement in that it refused to have the chickens weighed in the presence of the Plaintiff in order to determine the purchase price. Instead, the Plaintiff was afterwards allegedly coerced to sign a delivery note, reflecting a lesser average weight of individual

chickens. Later on, the Plaintiff succeeded in having a single chicken weighed, which had a weight well above the average weight said to be asserted by the Defendant.

[2] Using the difference between the asserted average weight as stated by the Defendant, and the weight of the single chicken, the Plaintiff calculates it to the amount it now claims from the Defendant.

[3] From a reading of the particulars of claim, it is immediately apparent that a good number of issues might have to be decided in due course, such as the law of averages when the quantum has to be determined, over and above various other assertions. The matter is not now due for consideration of the merits as the trial is yet to commence in the future.

[4] Presently, the litigation has been derailed by a *concursus* of technical problems. The rules of court have been drawn in by way of diverse interlocutory pleadings and seemingly the matter has already been before court on two occasions prior to the present issue. Attorneys have been appointed and substituted. Also, it is noted that by now, some two years have passed since summons was issued and that it is quite likely that legal costs alone could already be in excess of the claimed amount of E8 100.00.

[5] An application for judgment by default of filing a plea was made under the provisions of Rule 33(3), an exception was noted, two Rule 30 notices have been filed, and a special plea as well as a plea has also been added to the mixture. It is because of the combined effect of all the different pleadings, objections, notices and applications that it is easy to miss the real point of the issues at hand and to get entangled into a web of disputes that do not really take the matter any further. If the trees cannot be seen because for the forest, less than perfect technicalities and imperfect pleadings may readily lead to an obstruction of effective objective justice.

[6] The bigger issue in this matter is whether or not the Plaintiff has placed the Defendant in a position where judgment is to be entered summarily so and by default, without giving regard to position of the Defendant. Apart from all sorts of delays, objections and legalese, the real issue taken by the Defendant company is that the Plaintiff is barking up the wrong tree, or that a different butchery is involved in the matter. It says that instead of suing WAWA Butchery, it should have sued Central Butchery and to bolster this assertion, the Defendant filed a "tax invoice" which seems to have a rubber stamp that reads "Central Butchery". The amount of E14 850 on the invoice corresponds with the amount that the Plaintiff says it has already been paid.

[7] The photocopied invoice has a handwritten inscription of "WA

WA Butchery" (sic) above the rubberstamp and a cell phone number. Whatever the connection or absence thereof may be between "WAWA" and "Central" butcheries, if a judgment is entered against a wrong entity, it will be an injustice that is done to it. On the other hand, if the Plaintiff indeed had a deal with "WAWA", and if there actually is an outstanding amount still due, it must then be held accountable.

[8] The bottom line remains - when judgment is prayed for in the absence of filing a plea, while at the same time a plea and special plea has indeed been filed, it will not too readily be ordered that the rules of court are to be so applied as to disregard a serious contest against the claim and enter judgment by default, potentially against an incorrect entity. The term "potentially" has to be emphasised. It is quite premature to draw any sort of conclusion in the matter either on the identity of the Defendant, or on any other contentious issue. In my view, it would be equally hazardous to now enter judgment.

[9] The main issue that the Plaintiff relies upon can be summarized thus:

Plaintiff served summons on the 8th August 2006. A notice to defend was filed a few days afterwards by the Defendant's erstwhile attorneys, on the 14th August 2006. The summons reminded the Defendant to file its plea within 21 days thereafter. Not having done so, a Notice of Bar was then filed on the 20th

September 2006, calling for a plea within the following three days. Instead of doing so, on the 26th September the Defendant notified that it excepts to the particulars of claim as not disclosing a cause of action in that it never had a contractual relationship with the Plaintiff, instead the Plaintiff contracted with Central Butchery.

[10] It seems that the Plaintiff considered the notice under Rule 23 to suspend the period stated in its own Notice of Bar as it set down the matter for hearing of the exception. This exercise was repeatedly done, probably due to it not being heard, but the Defendant's attorneys state that on the 2nd May 2008, this was eventually done.

[11] The court file availed to myself bear no testament to that. Also, there is no indication whatsoever what the outcome of the matter was, as no Order or Ruling is filed of record. It seems to me that the exception might have been dismissed since thereafter, the Defendant filed its plea on an unknown date, but the plea itself is dated by the attorneys to be the 8th May 2008, served on the Plaintiffs attorneys on the 2nd June 2008. Whatever the correct date may be is not really material, save that it is argued to have been within 21 days from the date when the exception was determined.

[12] Hot on the heels of the plea having been filed by the

Defendants new attorneys of record, following withdrawal of its initial attorneys in November 2007, prior to the apparent hearing of the exception, the Plaintiff then proceeded to seek judgment by default. This notice was filed with the Registrar on the 20th May 2008, for hearing on the 30th May 2009 (sic). The Notice does not state under which rule judgment is sought, whether by default of what, but it was clearly not sought in the usual manner since it was to be heard during the contested motion court rolls.

[13] It is this application for judgment by default that is subject to the present ruling, hand in hand with a further two notices under rule 30, filed by each litigant, with the one accusing the other of having taken an irregular step. It is therefore that the issues to be decided are firstly, whether any of the rule 30 notices indeed warrants the finding that the other side has taken an irregular step, and further whether judgment "by default" should be entered against the defendant.

[14] I reiterate that in order to decide these aspects, it would be improper to merely look at the technicalities of the pleadings by adopting a myopic view, without also having regard to the bigger picture, the claim itself. It has often been said that the rules of court exist to facilitate, expedite and simplify litigation, also that they exist to serve the court instead of the court being overly obedient to the rules.

[15] It has further been held over and again that "*... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible, inexpensive decision of cases on their merits*" (per SCHREINER JA IN TRANS-AFRICAN INSURANCE COMPANY LIMITED VS MALULEKA 1956(2) SA 237). There exists no good reason to hold otherwise in this jurisdiction too.

[16] The Defendant's new attorneys of record filed the first notice of an irregular step under Rule 30 on the 30th May 2008. It is fraught with typographical errors which seem to indicate a confusion between who is who - references to "*plaintiff* and "*defendant*" are obviously incorrect, for instance that the plaintiff (sic) shall apply for a order to set aside the application for default judgment made by the plaintiff, and that the "*plaintiff* (sic) shall rely on the "*defendants*" (sic) application being premature in that the *dies* for filing of a plea had not expired, further that the defendant has not been barred under Rule 26.

[17] Rule 30 reads thus:

> "*1. A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming*

aware of the irregularity, apply to court to set aside the step or proceeding:

Provided that no party who has taken any further step in the cause with knowledge of irregularity shall be entitled to make such application.

2.

For some reason, possibly out of ignorance, the Defendant filed its Rule 30 notice three weeks after it filed its plea and special plea, combined in the same pleading. The fact that a further step in the cause had been taken by filing the special plea and plea disallows the same part to act retroactively as well, such as noting an objection to an irregular step taken by the opposition. With the plea and special plea being such a further step in the cause, as is explicitly provided for in the rules, the same party cannot now also be heard to complain that the application for judgment by default (of filing a timely plea) is an irregular step. To allow that to happen would result in endless procrastination of litigation and is a mischief prevented under the auspices of Rule 30 itself.

[19] At the hearing of this matter the Defendant's attorney correctly conceded this to be so. It is therefore not necessary to deal with this in any more detail and the result is that the Rule 30 notice filed by the Defendant on the 30th

May 2008 is considered to be a nullity and expunged from the pleadings.

[20] Although the Defendant cannot be heard to say that the application for judgment by default is an irregular proceeding or step, it still is not the end of the matter.

[21] On behalf of the Defendant, convincing argument was advanced to the effect that the application for judgment by default could not yet have been sought since there was a different obstacle in the form of an exception to the particulars of claim, which pleading caused a halt of the bar to filing its plea, otherwise put, the Defendant argues that for as long as the noted exception had not been adjudicated upon, the notice of bar was placed in limbo at minimum, if it did not result in removal of the bar filed by the Plaintiff.

[22] As is inevitably the case, the Plaintiff has quite a different perspective. Its attorney says that the exception that the Defendant noted against the particulars of claim never came to be decided at all. Instead, the Defendant merely withdrew it on the 2nd May 2008.

[23] The record filed as a "*book of pleadings*" by the Plaintiffs attorneys is devoid of such notice of withdrawal and I have no record of that being the case. The defendant in turn

argued that the exception was "*determined*" on the said date. Mr. Ngcamphalala argues that since exception to the particulars of claim was withdrawn by the excepient, without the court deciding the issue, the Notice of Bar automatically came to be resuscitated.

[24] The Defendant had 21 days to file a plea, after its notice to defend. The exception was noted on the 26th September 2006, following the Notice of Bar of the 21st September that year. Three days were required to file the plea, which had already lapsed when the exception was noted, but which pleading suspended the bar if it did not cause it to be removed or to be set aside. Hence, the argument goes on, when the exception was withdrawn in May 2008, unless a plea had already been filed by then, the Notice of Bar still stood and the Plaintiff was therefore automatically entitled to a judgment in its favour by default of a plea having been filed within the time limit imposed upon the Defendant

[25] The position is thus held out to be by the Plaintiffs attorney that at the time judgment was applied for, no plea had been filed, and that no plea could by that time still be filed as the Defendant was barred from doing so and in the result, judgment by default was to be entered.

Also, its application for judgment could not be attacked as an irregular step, as already mentioned above.

[26] Rather than the Court adversely considering its application for default judgment, the Plaintiff seeks to have the plea of the Defendant to be set aside as an irregular step on the basis that it was *ipso facto* barred from doing so. The Notice under Rule 30 therefore seeks to negate the plea dated the 8th May 2008, served on the Plaintiff on the 2d June and filed on an unknown date.

[27] From the dates referred to above, one aspect that is abundantly clear is that the Defendant took exceptionally long to file its plea. Also, it well may well be said that Mr. Ngcamphalala is correct to argue that in light of the time limits imposed by the Rules of Court, with no application by the Defendant to set aside the bar and seek condonation for late filing of the plea and special plea, the plea could well be negated and overlooked by the court.

[28] Strict application of the Rules favours the Plaintiff. If strict literalism is to determine litigation, the Plaintiff could have its day in court and exit with a judgment by default of the timely filing of a plea, but it would be due to a blindfolded misapprehension of the intervening pleadings and procedures that have characterised this matter. It would not be drinking from the untainted fountains of justice if the Plaintiff has its way but rather that an obfuscation of legalese enabled it to snatch the cup form a vigorous but shackled opponent.

[29] In this jurisdiction there exist a good handful of precedents where technical and precise obedience to the Rules have been demanded and enforced. I can have no quarrel with those judgments, since mandatory compliance with the Rules of Court oftentimes is necessary, but it is not universal. In a matter like the present, as previously pointed out, justice may well be denied through undue literalism. From the onset, the

Defendant has made its position well known and sought to avoid protracted litigation through more expeditious avenues. It might not have succeeded in its objective and in retrospect, a huge amount of paperwork, legal fees and delay has been the result. Still, only square one has been traversed and a long journey lies ahead instead of the matter having been decided on the simple merits long ago.

[30] With the inordinately and exceptionally low levels of civil jurisdiction in the magistrate's courts of a mere E2 000, the quantum of the claim by undue necessity causes the matter to be dealt with in the High Court. As said, legal costs by now quite possibly exceed the claimed amount. Still, no finality has yet been reached.

[31] This aspect also favours the Plaintiffs application for judgment at the present state of proceedings. Initially at least, it would bring finality to the matter, but it would not result in

proper justice according to the tenets of fair adjudication.

[32] The Defendant denies that it ever contracted with the Plaintiff. It is not a bare denial either. Instead, it states the identity of another firm with which the Plaintiff would have contracted. The names of representatives of legal entities who concluded the deal is said to be unknown to the Defendant.

[33] At present, it is premature to speculate on the veracity of that but it is not a new issue that has suddenly cropped up, it is longstanding but undetermined. In my judgment, these issues need to be ventilated and decided by the court instead of simply closing the gates upon the Defendant and granting judgment against it, knowing of its objections to the claim, its defence and about the other entity it refers to, as being the possible liable party. It is not yet known if the two butcheries have anything in common over and above both dealing in meat products. Maybe the Plaintiff is mistaken, maybe not, but in my view the matter has to be decided at a more advanced state of pleadings and material than to fall under the more myopic and unilateral procedure of entering judgment by default.

[34] By so saying, I remain mindful of potential prejudice to both parties in these proceedings, which have been ongoing for two years by now. Both parties have been losing out thus far and no

finality has yet been reached. It is therefore that a further order to expedite the future of the matter is made. Due to the as yet unresolved determination of the claim and the diversity of legal processes already embarked upon, with attendant differentiations of interpretation of the Rules, it would only be fair to order the costs of the present issues to not yet be decided in favour of either party.

]35] In the event and for the above stated reasons, it is ordered that:

1) The application for judgment by default of timely filing of a plea is dismissed.

2) The application to set aside the plea and special plea filed by the Defendant as an alleged irregular step is also dismissed, as is the application by the Defendant to declare the application for judgment by default an irregular step.

3) Costs of the present proceedings are ordered to be costs in the cause, which remains to be decided in due course.

4) As soon as the matter is ready for hearing of either the merits in the action, or for the special plea to be decided, as the case may be, a pre-trial conference between the parties is to be followed up by a further pre-trial conference before a Judge of the High Court in order to determine the issues to be decided and to give directives as to the expeditious way forward

5) Thereafter, (a) date (-s) of hearing is to be allocated as soon as the Registrar can do so.

J.P. ANNANDALE

Judge of the High Court