IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE MO. 4236/2007

In the matter between:

MHP GEOMATICS SWAZILAND

(PTY) LTD T/A SWAZILAND SURVEYS PLAINTIFF

DEFENDANT

VERSUS

UMBANE (PTY) LIMITED

ANNANDALE J

CORAM:

MR. N.D. JELE OF ROBINSON BERTRAM ATTORNEYS

MR. T. MLANGENI OF
MLANGENI AND COMPANY

FOR THE PLAINTIFF: FOR THE DEFENDANT:

JUDGMENT 11™
AUGUST 2009

[1] In an opposed application for summary judgment, the applicant seeks judgment to be ordered in the sum of E 130 373.77 for professional services that it rendered to Umbane (Pty) Ltd, plus *mora* interest at 2% per month, compounded monthly from the 31st August 2007 and costs of suit.

[2] At the onset of the hearing, Mr. Jele correctly conceded that an effective interest rate of 24% per year, compounded monthly, is excessive. He asked from the bar that the prayer for *mora* interest be amended to the effect that it shall be 9% *per annum.* Despite protestations against it by Mr. Mlangeni who acts for the Respondent herein, the amendment was granted. I still fail to agree with the argument that an Applicant for summary judgment cannot seek a reduction in the claimed interest rate at the time the matter is heard. The same would apply to a reduction in the claimed amount of money.

[3] There is no prejudice whatsoever to the Respondent. On the contrary, it works in its favour to face the potential burden of a judgment against it which is less onerous than what it initially faced. It must be mentioned that the Defendant as Respondent took no issue with the claimed rate of interest in its pleadings, presumably because it was contractually agreed. It arose from a query raised by the court to which Mr. Jele replied and made the aforestated concession.

[4] In an application for summary judgment, the brief fact of the matter is that the applicant must have a "cut and dried" case, virtually unassailable, against which no *bona fide* defence has been raised, a defence which need not be finely detailed but at least having reasonable prospects of staving off the claim if properly

ventilated during a trial. The object of the exercise is to avoid a matter going on trial, with its attendant protraction and costs, unless it really is necessary.

[5] The underlying cause of the Plaintiffs action as pleaded is that it was engaged by Umbane to conduct a cadastral survey and frame a Surveyor-General plan of plots of Umbane Township in Malkerns, with access roads, place new beacons to separate a

canal and residential plots at the proposed Township. The contractual agreement is said to be partly oral and partly written.

This much is evidenced by a letter from the chairman of the board of Umbane "Limited" (not "Propriety Limited" as per its citation), dated the 11th November 2005. Its instructions to the Plaintiff were that it was to proceed with the property access issues and indication of such on the map. Meantime, Umbane would be "processing the consents issues for the property access with property Leasee" (sic).

The Plaintiff was to add Gul de Sac's where missing and to arrange for separation of the canal and residential plots to be "in accordance with H.S.A proposal/suggestion". Existing beacons would have to be moved to accommodate changes.

The Plaintiff was requested to submit a breakdown of its costing for approval, otherwise to go ahead with whatever could be done in the time being. These instructions are contained in a letter under the caption of: "Approval of Umbane Township".

The Plaintiff duly submitted its quotation dated the 2nd January 2006, under the heading of: "Umbane Township-amendments and access road". Under the description of "Cadastral survey", the following is itemised: Access servitude; pre-calculation of new beacons; placing new beacons, (80% changed); changes to general plan and cal (calculations); and submission.

The fee is stated to be based on *inter alia* that the Plaintiff"... require(s) a written instruction to commence with this work. Please remember that the consent from H.S.A [the Human Settlements Authority] will expire again and we do not want to leave this to the last minute" (emphasis added).

Thereafter the Plaintiff submitted the General Plan to the Surveyor-General for approval, seemingly in the form of a second edition, as reflected in its invoice. As underscored in the previous paragraph, it is reasonable to accept that this was not the first dealings between the parties. Apparently the Plaintiff had previously faced the problem of an expired Human Settlement Authority consent and emphasised that it should not recur. Also, its quotation refers to re-calculations and

placing of new beacons and changes to an existing general plan. The identity of the author of the original plan is not relevant at present.

[11] The crux of the dispute seems to be based on events which transpired at the Surveyor-General, and is more specifically focussed on the required consent certificate.

[12] The Defendant has it that payment became due once the Surveyor General approves the Township plan whereas the Plaintiff claims it to be due when submitted to the Surveyor General for examination.

[13] In order to decide whether this is a dispute which has to be ventilated in the course of a trial or whether the matter should be concluded at this stage by way of summary judgment, the focus of attention falls onto the defence which the Respondent raises. Sub-rule 32 (4) (a) states the position to be that a Defendant must "... Satisfy the court with respect to the claim that there is an issue or question which ought to be tried or that there ought for some other reason to be a trial of the claim...".

Mr Jele quite correctly referred this court to the commentary in Herbstein and van Winsen "The Civil Practise of the Superior Courts in South Africa", 3rd Edition at page 32, as to the aim and purpose of this remedy.

"Summary judgment procedure is designed to enable a Plaintiff whose claim falls within certain defined classes of claims to obtain judgment without the necessity of going to trial, in spite of the fact that the Defendant has intimated by delivering notice of intention to defend that he intends raising a defence. By means of this procedure a defence of no substance can be disposed of without putting the Plaintiff to the expense of a trial. The procedure is modelled upon the rules of the English

Supreme Court and on the magistrate's court rules, and now prevails throughout South Africa. This procedure formerly existed in the Cape Province and since 1957 in the Transvaal. The procedure provided by the rules has always been regarded as one with limited objective, viz to enable the Plaintiff with a clear case to obtain the swift enforcement of his claim against the Defendant who has no real defence to that claim."

[15] This passage accurately states the position, but whether the Plaintiff is also correct to say that it is faced with a defence of no substance is quite a different matter. Presently, it does not need to go as far as to say that undoubtedly, the Plaintiff has an unanswerable case. What really needs to be done is to look at the issue raised by the Defendant in its resisting affidavit and its relevance to the validity of the claim. Otherwise put, has a

triable issue been raised, or not.

[16] As was held in Mater Delarosa High School v RMJ Stationary (Pty) Ltd, unreported Appeal Case No. 3/2005:

> *"... it would be more accurate to say that a court will not merely "be slow" to close the door to a Defendant, but will in fact refuse to do so, if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the Defendant raises an issue that is relevant to the validity of the whole or part of the Plaintiff's claim, the court cannot deny him the opportunity to have such an issued tried."*

[17] It is not only a possible injustice and relevance to a claim which militate against *situ-situ* granting of summary judgement. What a Defendant is required to do, without having to meet the detailed exposition of setting out precisely what the defence is as would be required in a plea, is to persuade the court that if what he has set out in his affidavit is proved at a subsequent trial, it will constitute a valid defence. If he does not do that, he can hardly satisfy the court that he has a defence. See Breitenbach v Fiat SA 1976 (2) SA 226 (T) for a comprehensive exposition of the summary judgment procedure and requirements.

[18] At the present stage, the Defendant says that it is not yet liable to pay the Plaintiff for its professional services. It places this defence on the shoulders of a contention that approval by the Surveyor-General is the catalyst, the determinative issue at stake, as to when payment becomes due. If that is indeed the case, and I do not hold it to be so, then it may constitute a valid defence.

[19] In its replying affidavit, quite a different picture is painted insofar as the time for liability of payment is concerned. The Plaintiff has it that it was due to be paid once the Surveyor General was presented with acceptable plans and whether or not it was formally approved does not matter insofar as payment is concerned. I have reservations concerning the Defendant's version insofar as it is held out to be a defence to the claim.

The Plaintiff clearly endorsed its quotation to the effect that the Human Settlements Authority consent certificate should not again expire or delay/derail the process of approval. It also explicitly stated that the Defendant was to obtain the required consent. The Surveyor General says that belatedly, the consent was impugned. It seems to me that the Environmental Authority interceded at the eleventh hour, presumably with the Human Settlements Authority, with the result that the consent certificate was put on hold. Despite the fact that the Surveyor General apparently had no qualms with the work done by the Plaintiff and presented to him, he could not approve it in the

absence of the pre-requisite consent. The consent, it seems to me, had to be obtained and presented by the Defendant, but ultimately, it proved to be futile.

But there is more to this. The Human Settlements Authority has not been cited. Its reasons for withholding of consent, or withdrawal of it, have not been fathomed. The Environmental Authority has likewise not stated the reason for their intervention, if they indeed did so. Whether initial approval for a cadastral survey has been granted is equally unknown. What does seem to be suspect, at face value and according to the Plaintiff, is the accusation that its work was "unworkmanlike." Exception is taken against that opinion. Also, whether a further Town Planner in fact had to "redo" the work done by the Plaintiff and if so, to what extent and why.

As I write this ruling, the media has published ongoing reports about objections raised against the proposed township and the issue of a consent certificate still remains a moot point. It is also unsure whether the plans which the Defendant placed before court are indeed these which pertain to a cadastral survey, or whether it is a "proposed layout", as it is titled, with a superimposed plan of the layout, new canals, etcetera. At present, it is unknown what the reasons for non issue of a consent certificate are. Also, whether the Plaintiff could be blamed for non-approval of plans by the Surveyor-General, or whether the Defendant is the author of its own misfortunes. These are

issues that need to be decided in the course of a trial and not ignored by the granting of summary judgment.

When all things came to be considered into the equation, I am loathe to hold that indeed there is no defence, which it proven at a trial, cannot word off the claim. By so saying, there is no implication that indeed it is such a defence. However, it is my considered view that it would not only be premature to reject the intended defence but also that if may very well cause an injustice to the matter.

The Plaintiff took issue with the ability of the deponent to the resisting affidavit to not only oppose the application for summary judgment, based on alleged absence of *locus standi,* but also as to his qualifications to express the views contained in it. In considering the raised defence, I do not rely on his opinion so unqualifiedly as to blindly accept it. As stated above, some aspects might require a pinch of salt before being swallowed and some aspects might even be objectionable. What he does manage to do is to indicate on behalf of the Defendant that there is a triable issue, namely the stage at which payment becomes due — on presentation to the

> Surveyor- General, or upon approval by him, as well as why it was not approved.

[25] Insofar as his legal standing is concerned, the Plaintiff is correct to argue that he has not shown himself to be duly authorised to act on behalf of the Defendant by way of a company resolution

or suchlike manner. Nevertheless, a proper notice of intention to defend has been filed by the attorneys acting for the Defendant. The affidavit to resist the application for summary judgement was deposed to by a consultant of the Defendant, and by all probability, at its request and on its behalf. Despite the attack on his legal standing *in iudicio,* and without going into detailed reasons, it would be absurd to disregard the affidavit resisting summary judgment on this basis and to grant the application as if unopposed. To do so would most certainly prejudice the Defendant and result in an injustice.

[26] It is for these reasons, despite the impeccable and very well prepared argument of Mr. Jele on behalf of the Plaintiff, that by necessity the application for summary judgment stands to be dismissed, and it is so ordered. Costs of the application are ordered to be costs in the cause.

J.P. ANNANDALE
JUDGE OF THE HIGH COURT