



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 4070 (a)/07

In the matter between:

AVENG (AFRICA) LIMITED

APPLICANT

and

**MANDLENKOSI DLAMINI
DEPUTY SHERIFF FOR THE
DISTRICT OF LUBOMBO
THE GOVERNMENT OF SWAZILAND**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM

: Q.M. MABUZA –J

FOR THE APPLICANT

: Ms. M. Van der Walt
Instructed by Currie &
Sibandze

FOR THE 1ST RESPONDENT

: Mr. B. Zwane in
Association with
Rodrigues & Association

FOR THE 2ND RESPONDENT

: No appearance

FOR THE 3RD RESPONDENT

: No appearance

RULING 22/8/08

[1] This came as a matter of urgency for the following prayers:

1. **That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency.**
2. **That the Applicant's non-compliance with the Rules relating to the above-said forms and service be condoned.**
3. **That the default judgment obtained by the First Respondent against "GRIENAKER LTA CIVIL ENGINEERING (PTY) LTD" under case No. 4070/2007 be set aside.**
4. **That all and any process which issued as a consequence of the above judgment, be set aside.**
5. **That the First and Second Respondents be interdicted from attempting to attach any of the assets of the Applicant without an appropriate Court Order pertaining to the Applicant.**
6. **That Prayer (e) above operates with immediate and *interim* effect.**
7. **Costs *de bonis propriis* on the attorney-own client scale against the First Respondent's attorneys of record, including the certified costs of Counsel alternatively costs against the First and Second Respondents on the attorney-own client scale, including the certified costs of Counsel.**

8. Such further and/or alternative relief as this above Honourable Court may deem fit.”

- [2] The background to this matter is that Mandlenkosi Dlamini, the 1st Respondent issued summons against the Defendant Grienaker LTA Civil Engineering (Pty) Ltd. Summons were issued on the 9th November 2007 in the High Court under Case 4070/2007. In terms thereof damages amounting to E65,000.00 were claimed pursuant to alleged damages caused by employees of “Grienaker LTA Civil Engineering (Pty) Ltd” during the course of blasting commissioned by “Grienaker LTA Civil Engineering (Pty) Ltd.” He obtained judgment and issued a writ of execution.
- [3] On the 10th January 2008, the second Respondent attempted to attach the Applicant’s assets at the Applicant’s principal place of business. He also attempted to attach the private vehicle of Mr. Kevin Alan Skinner, the Applicant’s administration manager. The bone of contention is that no company called “Grienaker LTA Civil Engineering (Pty) Ltd” exists and that the assets sought to be attached were the property of the Applicant.

- [4] The Applicant states that there is no company by the name of Grienaker LTA Civil Engineering (Pty) Ltd. In the applicant's line up of name changes listed on paragraphs 3.1 – 3.1.5 of its founding affidavit the name Grinaker – LTA is included. In 2000 the applicant underwent a further name change to Grinaker-LTA, Ltd. This change of name was sanctioned by the Registrar of Companies. The Certificate of Change of Name of Company to Grinaker LTA (Ltd) attached to the Applicant's founding affidavit was issued in the Republic of South Africa. This is the name that was in the Swaziland Register of Companies. Had the 1st Respondents attorneys done a search they would have discovered the correct name.
- [5] The company referred to as Grinaker LTA (Ltd) conducted its business activities in Swaziland from 2000 to October 2006 when its name again changed to Aveng (Africa) Ltd. The cause of action in case 4070/07 arose during October 2005 during the residency of Grinaker LTA (Ltd). The summons were issued on the 9th November 2007 during the residency of the successor company known as Aveng (Africa) Limited, the applicant herein.
- [6] The Applicant states that an application for a change of name was made to the Registrar of Companies soon after the name change but the Registrar mislaid the

documents and a new application was made on the 23rd April 2007. The Registrar's endorsement of a name change was received on the 22 January 2008. Summons in case 4070/07 were served on the 15th November 2007 on Simeon Magagula, a human resources officer.

[7] The Applicant further states that on the 22 September 2004 it and Consolidated Contractors International Company S.A.L. (CCIC) a company based in Lebanon being partners in a joint venture entered into an agreement/contract with the Government of Swaziland (the 3rd Respondent) for the construction of the northern main road: MR5 & MR6). In terms of the contract the joint venture was the Contractor and the third Respondent the Employer. The contract document incorporates the terms and conditions of the contract.

[8] Clauses 22.1, 22.2 and 22.3 of the "Fidic" (Federation Internationale des Ingenieurs-Consells) embodies terms and conditions wherein **the Employer shall indemnify the Contractor against all claims, etc in respect of *inter alia*, the unavoidable result of the execution and completion of the works.** Mr. Simeon Magagula on whom the summons were served was human resources officer for the joint venture. He accepted service of the summons on the 15/11/2007.

- [9] During January 2008 the Applicants advised the first Respondent's attorneys that the company they had sued did not exist by supplying documentary proof in regard thereto. The 1st Respondent's attorneys armed with this correct information did not amend its summons or even check with the relevant Ministry the terms of engagement of the company which had been awarded the contract to construct the MR5 and MR6. Notwithstanding this advice, the 2nd Respondent attempted a second attachment on the 22nd January 2007.
- [10] Mr. Zwane for the 1st and 2nd Respondents submitted that summons in case 4070/07 was served on Grinaker LTA (Ltd). That there is someone carrying on business at the premises of Grinaker LTA (Ltd). That when summons were issued the defendant held itself out as Griemaker LTA Civil Engineering (Pty) Ltd in the Swaziland telephone directory from where the name was sourced. Mr. Zwane submitted that it was clear that summons were for Grinaker LTA, (Ltd) and was served on its business premises. He further submitted that this application was really correcting spelling mistakes but dealing with technical information known by the Applicant.

[11] Mr. Zwane sees no difference between the name Grinaker LTA (Ltd) and Grienaker LTA. Civil Engineering (Pty) Ltd. Mr. Zwane seems to have missed the point here. These are different names and the names signify different obligations. I agree with Miss van der Walt that 1st Respondent's attorney ought to have cited Grinaker LTA (Ltd), Aveng (Africa) Ltd (the successor) and the Swaziland Government (the indemnifier). The joint venture should have been joined as a party. Fortunately for the 1st Respondent he can still put his house in order and begin de novo and direct his claim inter alia to the 3rd Respondent. He should find out whether an environmental impact assessment was made and whether homes along the affected area were consulted and whether they were advised where to source information with regard to damages incurred to properties along the route.

[12] The application is granted with costs on the ordinary scale together with the certified costs of counsel in terms of rule 68 (2). I see no reason for the issue of costs to be postponed. Costs follow the award and there is no point

in burdening the court with a subsequent hearing with regard to the issue of costs.

Q.M. MABUZA -J