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IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIV. CASE NO. 1525/92

In the matter between:

M.A.N. AUTOMATIVE (SWAZILAND) Plaintiff

and

CHRISILDA'S TRANSPORT (PTY) LIMITED Defendant

CORAM : Sapire A.J.

FOR THE PLAINTIFF (RESPONDENT) : Mr Dunseith

FOR THE DEFENDANT (EXCIPIENT) : Mr Nkosi

JUDGEMENT
17/08/93

Sapire A.J.,

The plaintiff has sued defendant for payment of E151,308.45 and ancilliary relief, alleging that on the 30th April, 1992 the defendant took two trucks on hire from plaintiff for an indefinite period.

Pursuant to the agreement, the plaintiff delivered the trucks to the defendant, at which time they were in an undamaged condition.

The summons further alleges that on the 4th June, 1992 while the trucks were in defendant's possession, one of them was severely damaged in a collision, and thereafter returned to the plaintiff in such damaged condition. The plaintiff claims the costs of repairing the vehicle.

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The claim as framed is based on defendant's alleged breach of his contractual obligation to have restored the truck to the plaintiff at the termination of the hiring in the same good order and condition as it was at the commencement thereof. This obligation is a term of every contract of letting and hiring implied by law. It is open to the Lessee in cases where the subject matter of the contract is lost or damaged to show that the loss or damage to the item taken or hired was occassioned by events and circumstances beyond the control of the Lessee, and which he could not have avoided.

Three points were raised in the notice of exception. Firstly it is said that:

"The plaintiff is a juristic person and in spite of it being able to acquire rights and duties, it is imperceptible in a physical sense, and cannot personally take part in legal transactions, it must be represented by an officer or director who is authorised to do so by resolution of the Board of Directors".

After stating that the plaintiff has not filed a company resolution authorising its officers or directors to institute proceedings, the notice of exception states that:

"Plaintiff does not allege in its summons that it is duly authorised to bring the action nor does it allege the source of authority to institute proceedings".

The conclusion which the defendant seeks to reach is that the summons is fatally defective in that the plaintiff lacks capacity. Were it not that there is a judgment of this court which supports the defendant's contentions, I would have no difficulty in dismissing the point without further ado.

In CIV.T.826/91, BANK OF LISBON INTERNATIONAL v A.D.S. CARDOSA, this point was raised by the defendant. The proceedings in that instance were for provisional sentence and Rooney J. held that the plaintiff if a company must allege in its summons that the proceedings are instituted in terms of a "Company" resolution which must be attached to the summons as one of the documents stipulated under rule 8(3) of the rules in cases where provisional sentence is sought.

No authority for this extraordinary ruling was referred to. I say that the ruling was extraordinary because as far as I am aware the requirement as stated by Rooney J. has been universally honoured in the breach thereof. It is unheard of for a company suing in a provisional sentence case to attach a "company" resolution to its summons, nor is it ever done to attach even a resolution of directors. Such a requirement is certainly not to be found in the rules of court.

Rooney J, sought to draw a distinction between a company resolution authorizing its officers to institute proceedings and the appointment of an attorney to conduct such proceedings.

As an authority for the proposition that the former is an imperative requirement, the case of MALL (CAPE) (PTY) Ltd v Merino Ko-operasium BPK 1957 (2) SA 347 was cited. That case however dealt with motion proceedings and was decided at a time before the rules of court were amended to read as they now do, dispensing with the necessity for filing a power of attorney in action proceedings. That case certainly did not rule that a plaintiff company in provisional sentence proceedings should attach to the summons a copy of a director's resolution, let alone a company resolution to prove that the necessary internal procedures for the institution of the action had been observed.

In terms of the Companies Act No. 7 of 1912 (which I observe in passing is in sore need of being brought into line with the developments in company law over the past eighty years), upon the registration of the memorandum of a company, the Registrar is required to certify that the company is incorporated. From the date of incorporation mentioned in the Registrar's certificate, a body corporate comes into existence, capable of forthwith exercising all the functions of an incorporated company. This would include the power to sue and be sued in its own name.

The summons in this instance alleges that the plaintiff which sues in its own name as it is entitled to do is a company registered according to law. It follows that it has been alleged in the summons that it has the capacity to sue and be sued in its own name.

The question therefore raised by the exception is whether there is an additional requirement that an allegation must appear in the summons that the internal procedures of the company in terms of which it transacts its business have been complied with. As Companys' act through their Boards of Directors, the point taken by the defendant implies that a plaintiff company has to allege that, the directors have resolved to institute the action, and have designated some individual who may or may not be a member of its board to give effect to that resolution.

This requirement has never been recognised or complied with, and no authority has been quoted other than the case referred to that such a procedure should be followed.

I am satisfied that no such requirement exists.
There is a presumption of regularity, expressed in the Latin words OMNIA PRAESUMUNTUR RITE ESSE ACTA, which applies in this case and entitles and requires a person dealing with a company to assume, in the absence of knowledge to the contrary, that all is being done regularly and that the relevant articles governing the situation have been observed. ROYAL BRITISH BANK v TURQUAND 1856 E & B 327.
In view of this presumption, it is not necessary to allege in the summons that any internal procedures such as the passing of a resolution which may be appropriate to the plaintiff company have been observed. In many cases the directors act informally and do not pass a resolution at a specially convened meeting.

No company may appear in court or litigate, except through attorney and counsel.

YATES INVESTMENTS (PTY) LTD v CIR 1956 (1) SA 364.

ARMA CARPET HOUSE v DOMESTIC & COMMERCIAL CARPET FITTINGS (PTY) LTD 1977 (3) SA 448 W.

There is a provision in the rules of court for a party to require proof of the authority of any attorney to act for any company which he represents. Since the rules of court were changed, there is no need for the production of a power of attorney and a supporting resolution unless the attorney's authority to act is challenged in accordance with the rule.

Until such challenge takes place, it is the attorney and counsel who represent the company notwithstanding that it is a juristic person and inspite of it being imperceptible in a physical sense.

I am sufficiently convinced of the incorrectness of the decision in BANK OF LISBON INTERNATIONAL v CARDOSA, that in so far as that case cannot be distinguished from the present, I am constrained to differ therefrom and hold that it is not necessary in a summons in which the plaintiff is a company to allege that a resolution of directors has been taken authorising the commencement and conduct of the proceedings, and for a copy of such resolution to be attached to the summons. The first point raised therefore fails.

The second point raised in the notice of exception is that because the plaintiff has not alleged negligence or some other fault on the part of the defendant as having occassioned plaintiff's claim, the summons lacks the averments necessary to disclose a cause of action. Plaintiff's claim is based on a breach of contract on defendant's part in failing to return the truck in the condition which it had been when taken on hire.

I have already observed that this obligation exists independent of any negligence on the Lesse's part. The Lesse may allege circumstances and events which excuse it from returning the object in such same good order and condition.

The onus of doing so is on the defendant and there is no substance in the point therefore that negligence has not been alleged in the summons.

The third ground relied on is that in an annexe to the summons, which is a copy of an order allegedly placed by the defendant, the name of the person to whom it was addressed would appear initially to have been that of someone other than the plaintiff. The order was however amended, and now seems to refer to the plaintiff.

This does not constitute a ground for an exception that the summons does not disclose a cause of action. The discrepancy , if there is one, will or will not be clarified in evidence. If the defendant maintains that it did not place the order for the trucks with the plaintiff may plead this and in due course endeavour to establish it at the trial, but the summons is not open to attack on this ground.

In the result, all three elements of the exception cannot be maintained and the exception is dismissed with costs.

SAPIRE A.J.