

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE No. 3560/97

IN THE MATTER BETWEEN:

BARCLAYS BANK OF SWAZILAND

PLAINTIFF

AND

BUILDERS SUPPLIERS (PTY) Ltd

FIRST DEFENDANT

MARZIO MAURIZIO D'ORSI

SECOND DEFENDANT

LUD PROPERTY INVESTMENTS (PTY) LTD

THIRD DEFENDANT

CORAM:

DUNN J.

FOR THE PLAINTIFF:

MR. FLYNN.

FOR THE DEFENDANTS:

MR. FINE.

JUDGMENT

8th MAY 1998

This is an application for summary judgment. The plaintiff issued summons against the defendants, seeking judgment as follows -

1. As against the first and second defendants, jointly and severally, the one paying and the other being absolved:

a. Payment of the sum of E1 019 638 . 48

b. Interest thereon at the rate of 21% per annum compounded monthly in arrears and calculated from the 3rd December 1997, to date of final payment

c. Costs of suit.

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2. As against the second defendant:

a. Costs of suit on the scale between attorney and his own client scale including payment of collection commission

b. An order declaring the property mortgaged in terms of Mortgage Bond No. 821/1991 to be executable.

3. As against the third defendant:

a. Payment of the sum of E400 000.00

The application is opposed by the defendants.

The plaintiff's claim arises from monies lent and advanced to the first defendant at the latter's special instance and request during January 1997, which monies it is alleged the first defendant has failed to

repay as agreed. It is averred that the second defendant signed a Deed of Suretyship in terms of which he stood surety for and became co-principal debtor in solidum with the first defendant to an unlimited extent. It is further averred that the third defendant also signed a Deed of Suretyship in terms of which the third defendant stood surety for and became co-principal debtor with the first defendant for an amount up to E400 000.00.

The affidavit in support of the summary judgment application is deposed to by Frank Griffiths, a manager of the plaintiff, who states inter alia " I am duly authorised to make this affidavit, the facts deposed to herein being within my personal knowledge and belief and are true and correct."

The opposing affidavit is deposed to by the second defendant who states that he is authorised to make the affidavit on behalf of the first and third defendants. It will be convenient to set out the defendants' full response to the application . It is as follows -

4. I deny that Frank Griffiths is duly authorised to make the affidavit on behalf of the plaintiff.

5. I say that on the 7th February 1998 when the deponent purported to sign the affidavit, the plaintiff was no longer in existence and the plaintiff accordingly has no locus standi in judicio to bring this application for summary judgment as it had ceased to exist on or about the 31st December 1997.

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I say therefore that the deponent is in no position to verify the facts and the cause of action claimed in the particulars of claim.

7. I say that the defendants have a bona fide defence to the plaintiff's claim because the plaintiff has ceased to exist as a result of a merger between itself and the STANDARD BANK OF SWAZILAND LIMITED and that a new entity in law, namely, the STANDARD BANK OF SWAZILAND LIMITED has come into existence.

8. I further say that in respect of the plaintiff's claim against me in my personal capacity, which is based on Annexure " C", the meaning and purport of the renunciation of the benefits were not explained to me and I was under the impression that plaintiff would have to proceed against the first defendant before proceeding against me.

The 5th and 7th paragraphs were dealt with simultaneously, as a preliminary point. I dismissed the point for the following reasons -

According to a Certificate of Incorporation dated 13th January 1998, filed by the Registrar of Companies, the plaintiff had its name changed to STANDARD BANK SWAZILAND LIMITED. This change of name was, according to the certificate, made pursuant to a special resolution of the plaintiff dated 14th November 1997. The resolution was subsequently confirmed on the 28th November. In terms of section 10 of the Companies Act No. 7/1912 a special resolution to change the name of a company, requires the approval of the Minister for Commerce Industry and Mines. In the present matter, the Minister's approval was granted on the 12th January 1998.

Mr. Fine urged the court to look beyond the Certificate of Incorporation and to enquire into the transaction which he stated had resulted in a merger of the plaintiff and Standard Bank of Swaziland Limited. It was his submission that the transaction in question amounted to more than a mere change of name of the plaintiff. Neither Mr. Fine's submission nor the averments in the opposing affidavit provide any material to substantiate this contention or that a triable issue is raised thereby. The production of the Certificate by the Registrar of Companies puts an end to the defendants' contention. This court must accept the fact that the plaintiff simply changed its name.

Section 10 (7) of the Companies Act provides that " the change of name of a company shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name." The present proceedings were issued out of the office of the Registrar on the 16th December 1997 and the plaintiff is entitled to continue the proceedings

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under its old name

Mr. Fine next raised a point which was not raised in the opposing affidavit, to the effect that the plaintiff had not complied with the provisions of section 13 (2)(a) of the Financial Institutions Order No, 23/1975. The section provides that no financial institution shall alter its name as set out in its licence without the prior written consent of the Minister for Finance. There is no substance in this point. The present proceedings are under the plaintiff's old name and in any event section 14 of the Order in question provides specific sanctions for a breach of any of the provisions of the Order, including section 13, by a financial institution. These sanctions do not include the invalidation of any acts taken by a financial institution following non-compliance by it of the provisions of section 13(2)(a).

I turn now to paragraphs 4, 6 and 8 which were argued after the dismissal of the preliminary point raised by Mr. Fine. The issue raised under paragraphs 4 and 6 is as to the authority of Frank Griffiths to depose to the verifying affidavit in support of the summary judgment application. The submission by Mr. Fine was that the plaintiff was required to file a resolution to the effect that Griffiths was duly authorised by the plaintiff, to depose to the affidavit.

The submission on behalf of the plaintiff is that there is no legal requirement that the verifying affidavit should be deposed to with the authority of the plaintiff. Mr. Flynn referred the court to the case of BARCLAYS NATIONAL BANK v. LOVE 1975 (2) SA S14 where Miller J. stated at 515-

The making of an application for summary judgment was clearly an act which fell within the ambit of the special" power so conferred by plaintiff on its attorneys. Rule 32 (2) does not require that the supporting affidavit be made by the plaintiff himself; any person who can swear positively to the facts may make an affidavit in support of the application and no special authority by the plaintiff is required for the validity or effectiveness of an affidavit made by him. But even if plaintiffs authority were required, such authority might, in the absence of an express allegation that the deponent was duly authorised, be properly inferred from the affidavit and other documents properly before the court. -----The terms of the special power of attorney given by the plaintiff to its attorneys are clearly wide enough to include the power to obtain from a suitable deponent an affidavit necessary to the proceedings which they were authorised by the plaintiff to take.

Mr. Flynn also referred to the case of SAND & CO. LTD v. KOLLIAS 1962 (2) SA 162 which was cited with approval in the BARCLAYS NATIONAL BANK case supra.

Rule 32, as amended, differs in material respects from Rule 32 of the South African Rules of Court. Rule 32 is modelled on the English High Court Rules.

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In interpreting our Rule, attempts must in the first instance be made at reference to relevant English authorities. I have had sight of the 1985 edition of THE SUPREME COURT PRACTICE. This is the latest edition available in the High Court It appears from the commentary on the relevant English Rule, appearing at p134 of the publication that the effect of the relevant sub-rule is the same as that of the South African Rule dealt with in the BARCLAYS NATIONAL BANK case supra. It is, however stated in the publication that if the supporting affidavit is not made by the plaintiff, the affidavit must itself state that the

person making it is duly authorised to do so. Further, that the affidavit should be made by a responsible person or officer of the plaintiff.

The supporting affidavit filed in this application is in my finding in accordance with the requirements of Rule 32 .

The averment under paragraph 8 of the opposing affidavit is without any merit whatsoever. The third defendant signed the deed of suretyship , personally . There is no legal requirement that the third defendant should have had all or any of the words appearing above his signature, explained to him. He has only himself to blame for signing what he now states he did not understand correctly.

Summary judgment is, in the circumstances, granted against the defendants as prayed.

B. DUNN

JUDGE