

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 519/95

In the matter between
SWAZILAND DEVELOPMENT & SAVINGS BANK PLAINTIFF

And

MARS (PTY) LIMITED 1st DEFENDANT

YVETTE MARLENE CARDOSO 2nd DEFENDANT

NATALIA FARIA DA CUNHA 3rd DEFENDANT

Coram S.B. MAPHALALA – J

For Plaintiff MR. D. SMITH SC

For 1st Defendant NO APPEARANCE

For 2nd Defendant MR N. KADES SC

For 3rd Defendant NO APPEARANCE

JUDGEMENT (25/01/99)

Maphalala J:

Default judgement was granted on the 16th September 1998 in respect of the first and the third respondent in absentia for an order in the following terms;

- a) Respondents to pay the sum of E1,692,177-29 (Emalangeneni one million, six ninety two thousand, one hundred and seventy seven and twenty-nine. cents.
- b) An order granted declaring the mortgaged property executable in terms of surety mortgage bond no. 138/93

In respect of the second defendant the plaintiff filed with the Registrar of this court on the 15th September 1998, a notice of amendment of its particular of claim as follows:

1. By deleting paragraph 3 in its entirety and substituting it with the following:

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- 3.1. The second defendant is Yvette Marlene Cardoso, a major female married in community of property to Isidoro Ferreira Cardoso.
- 3.2. The second defendant is cited herein as duly assisted herein by her husband aforementioned in his capacity as her guardian and administrator of their joint estate.
- 3.3. The second defendant, as cited herein, has chosen her domicile of citation for purposes of this action as Lot No. 1494, Mbabane Ext. No. 11, Thembelihle Township, District of Hhohho, Swaziland.

Mr. M. Smith for the plaintiff placed before the court a number of points in support of this application and indicated that Mr. Kades for the second respondent was to argue in opposition raising the issue that his client was sued in her personal capacity in her own name and that ex facie she had no locus standi and thus the pleadings are a nullity.

In dealing with the issue of lack of locus standi Mr. Smith is of the view that she does have locus

standi to be sued in these proceedings. He directed the court's attention to page 1 of the particulars of claim paragraph 3 which reads thus:

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"The second defendant is Yvette Marlene Cardoso, an adult male businessman of Mbabane in the Hhohho Region whose chosen domicile of citation for purposes of this action is Lot No.

1494, Mbabane Ext. No. 11 (Thembelihle Township) District of Hhohho, Swaziland".
That at a pre-trial conference held on the 18th March 1996 the minutes reflect the following:

"Matters agreed upon –

- a. That the mis-description of the second defendant is not to be an issue at the trial
- b. That the second defendant is married to one Isidoro Cardoso by civil rites and without antenuptial contract.
- c. All other matters admitted in the second defendant's plea.

Mr. Smith contends that the second defendant does not plead in her plea that she does not have locus standi. If she does not have locus standi where did she get the authority to instruct an attorney who filed a plea on her behalf wondered Mr. Smith. Mr. Smith referred the court to annexure "C" of the particulars of claim, viz, a surety mortgage bond which indicates that the 2nd defendant was married to Isidoro Ferreira Cardoso in terms of the laws of Portugal. The point Mr. Smith is making is that in order for the Deeds Registry to register property of a married woman who is married

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in terms of the common law she needs to be assisted by her husband. That in the present case there was a misrepresentation made by her to the Registrar of Deeds as evidenced by annexure "C".

The marriage certificate filed in her plea states at particular no. 25 that the parties were married in terms of the common law and the marriage took place on the 20th April 1990 in Mbabane. That the parties were married in Portugal is entirely misleading. Mr. Smith further argued that in this case the husband implied assisted her not only in the registration of the bond but also in the defence of this case as reflected in annexure FP3 which is a company resolution by Mars (PTY) LTD Building and Civil Engineering dated the 8th October 1992 as read as follows:

"At a board meeting held on the 8th October 1992, at Mbabane at which the following directors were present:

1. I. F. Cardoso
2. C. F. O Frazao
3. D. E. Zietsman

A resolution was passed and approved in which it was proposed that residential erven 1430 and 1494 at Thembelihle, Mbabane owned by the wives of directors of Mars (PTY) LTD would be offered to Swaziland Development and Savings Bank as security against performance bonds, and also to facilitate overdraft facilities for the company's account.

This would be reviewed in the near future, pending release of performance bonds and repayment of debts to Swaziland Development and Savings Bank or against other securities..."

Further Mr. Smith contended that the husband of the second respondent in annexure FP4 expressly agreed that second respondent enter into this transaction with the bank. The letter is addressed to the Manager of the Swaziland Development and Savings

Bank from I. F. Cardoso dated the 9th October 1992 and reads as follows:

"RE: Legal consent Yvette Rennie Cardoso

Dear sir,

This is to confirm that I have given Yvette Rennie Cardoso legal consent to use our property being Lot 1494 at Thembelihle, Mbabane as security for and on behalf of Mars (PTY) LTD at your bank"

The letter is signed by her husband Isidoro Ferreira Cardoso. It should be noted that this letter was written a day after the company passed the resolution as reflected in annexure FP3. Mr. Smith referred the court to the case of Van Tonder vs Coetzee 1965 (2) S.A. 101 (o) and the case of Mathee vs Van Schalkwyk 1949 (2) S.A. 95 (o) which allowed for a postponement for purposes of amendment. He also referred the court to The South African Law of Husband and Wife by H.R. Hahlo (2nd ED) and argued that for the sake of justice and equity the court must allow the amendment and

order that the papers be served on the second respondents' husband. The second respondent ordered to pay the costs of opposition of this application.

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Mr. Kades on behalf of the second respondent opposes this application. He contends that further particulars have not been proved before the court. These documents have not been handed to court and proved. The parties have not been questioned on the veracity of the papers before court. The court is invited to take cognizant of statement made from the bar. That it is common cause that the second respondent and her husband were married to each other in community of property and thus the second respondent has no locus standi in these proceedings. The proceedings in this case are a nullity and are stillborn according to Mr. Kades. The plaintiff is endeavoring to give life to proceedings, which are still born. The wrong party is before the court. To this effect he cited the case of Northern Acceptance Corporation (Pty) Ltd vs Johnston 1983 (1) S.A. 613 where it was held that where a woman married in community of property was sued "assisted by her husband" for recovery of monies lent to her prior to her marriage and the summons was not served on her husband, it was held that despite the fact that he as well as his wife had signed the power of attorney to defend the action, the wrong person had been brought before the court.

In reply on points of law Mr. Smith argued that there is no document from the second respondent that indicate that a point of loci standi was to be raised. The point was not even introduced as a special plea. The matter merely came as a complete surprise to the plaintiff. Mr. Smith further argued that Mr. Kade's submission that further particulars were not proved did not hold water. The reason being that Rule 21 of the High Court Rules provide for the request for further particulars. Subsequently the second respondent filed a plea.

Mr. Smith applied on the alternative that the court order that the plaintiff serves the papers on the second respondent's husband for him to reply within 14 days why he could not be joined.

These are the legal issues for determination by the court.

I seem to agree with Mr. Smith for the plaintiff that there are no documents from the second respondent that indicate that an issue of loci standi was to be raised. The point is not even introduced as a special plea. The other side is taken by surprise by this issue being introduced for the first time from the bar. I am also satisfied by the authorities cited by Mr. Smith to buttress plaintiff's case to wit, Van Tonder vs Coetzee 1965 (2) S.A. 101 and the case of Mathee vs Van Schalkwyk 1949 (2) S.A. 95 (o).

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I thus rule that the plaintiff serves the papers on the second respondent's husband for him to reply within 14 days of the service of this order why he could not be joined in these proceedings.

Costs to be costs in the course.

S. B MAPHALALA JUDGE