

THE HIGH COURT OF SWAZILAND

CIV. CASE NOS. 1386/01,

1387/01, 1388/01

In the matter between

FIRST NATIONAL BANK

PLAINTIFF

And

S. A. NKOSI AND COMPANY

DEFENDANT

Coram

S.B. MAPHALALA - J

For the Plaintiff

MR. S. EARNSHAW

For the Defendant

MR. S. NKOSI

JUDGMENT

(29/01/2002)

There are three matters before me. The first one pertains to Case No. 1388/2001 by the defendant who excepts on the grounds that the summons are sued out against a trust which by operation of law does not possess a corporate personality of its own. The second matter is an application for substitution by the plaintiff that defendant's name in the summons, declaration, summary judgement application and condonation

2

application in Case Number 1386/2001 is directed to be: Siphon Anthony Nkosi in his capacity as trustee of Nkosi Progressive Trust. The third matter argued was an application for condonation for the late filing of further affidavits by the plaintiff under Case No. 1386/2001, 1387/2001 and 1388/2001.

These matters were argued at the same time because of the similarities which run through them as in all the three matters the plaintiff is the First National Bank of Swaziland. The defendant in Case No. 1386/2001 is Nkosi Progressive Trust. The defendant in Case No. 1387/2001 is Siphon Anthony Nkosi and the defendant in the third matter viz, Case No. 1388/2001 is S.A. Nkosi and Company.

In all the three matters the affidavit resisting summary judgment is deposed to by Siphon A. Nkosi. In Case No. 1386/2001 he deposes that he is a trustee of the Nkosi Progressive Trust, which is the defendant. In Case No. 1387/2001, he deposes to the affidavit in his personal capacity. In Case No. 1388/2001, he deposes as an attorney in the defendant law company S.A. Nkosi and Company.

In order to appreciate their nature it is necessary to set out a brief history of the litigation between the parties.

In all the three matters the plaintiff issued summons against the various defendants in each case viz, in Case No. 1386/2001 for a sum of E95, 849-29 based on an oral agreement entered into between the parties during November 1996 of a loan in terms of which the plaintiff agreed to lend and advance to the defendant a total sum of E145, 500-00 and an additional sum of E29, 100-00; in Case No. 1387/2001 the plaintiff sues for a sum of E9, 132-36 also based on an agreement entered into by the parties upon or about the 3rd November 1995, where the defendant would open and operate a current account with plaintiff's Manzini branch. The balance on the bank overdraft was on the 31st May 2001, and despite

demand defendant fails and/or refuses to repay the said sum; and in Case No. 1388/2001 the plaintiff sues for the sum of E249, 012 - 69 where an existing overdraft in the name of S.A. Nkosi and Company (Account Number 62002000181) was converted to a loan of E200, 000-00 payable over sixty (60) months. The defendant defaulted in paying the agreed instalments.

3

In all the three matters the plaintiff proceeded to apply for summary judgment, which was resisted by the defendants as evidenced by the affidavits of Siphon A. Nkosi in each of these matters.

The Exception (Case No. 1386/2001).

The exception taken pertains to the Nkosi Progressive Trust (Case No. 1386/2001) that the summons are sued out against a trust, which by operation of law does not possess a corporate personality of its own. It is argued that a trust does not have a capacity to sue or be sued in its own name. The plaintiff's action is totally defective in that it failed to join the trustees of the defendant.

Mr. Nkosi for the defendant took the view that the exception put forth is in compliance with Rule 23 (3) and (4) of the rules of court that in *casu* the defendant has advanced the grounds upon which the exception is founded and such grounds have been clearly and concisely stated. Mr. Earnshaw argued *au contraire* that whenever an exception is taken to any pleadings the grounds upon which the exception is founded must be clearly and concisely stated and should conclude with a prayer for the relief sought. For this proposition he cited the work of Van Winsen et al *The Civil Practice of the Supreme Court of South Africa* (4th ED) at page 488 where the authors cite the case of *Pietermaritzburg City Council vs Local Road Transportation Board Pietermaritzburg 1960* (1) S.A. 254 (N) at 260 D - F.

The second attack on the exception by Mr. Earnshaw is that Mr. Nkosi filed the affidavit resisting summary judgment deposed by himself in his capacity as the trustee on the 10th August 2001, and two weeks later on the 28th August 2001, files an exception. The parties were *ad idem* as to who the defendant was as evidenced in the affidavit resisting summary judgment deposed by Siphon A. Nkosi at paragraph 1, which reads as follows:

"I am an adult Swazi male attorney duly admitted to practice as such by this honourable court.

4

1.1 I am a trustee of the defendant and I am duly authorised to make this affidavit by virtue of the (sic) trustee.

1.2 The facts deposed to herein save where otherwise stated are within my personal knowledge and belief true and correct".

Further, the summons gives direction to the Sheriff or his deputy, Manzini district to inform the Nkosi Progressive Trust, a trust whose full and further particulars are unknown to plaintiff of care of Siphon Anthony Nkosi in his capacity as trustee of BP Building, 8th Street, Matsapha Town, Manzini district (hereinafter called the defendant).

Mr. Earnshaw contends that there is no doubt who the parties are in the matter.

I agree with Mr. Earnshaw that the identity of the defendant, namely, Siphon A. Nkosi in his capacity as trustee of The Nkosi Progressive Trust was never in doubt and was at all times known to all the parties. The sequence of events borne out by the pleadings before court are testimony to this fact. On the 31st May 2001, plaintiff issued summons against defendant and as appears from the summons and declaration filed of record in this matter, the defendant was therein cited as:

"The defendant is The Nkosi Progressive Trust, a trust whose full and further particulars are unknown to

plaintiff of care of Siphon Anthony Nkosi in his capacity as trustee of BP Building 8th Street, Matsapha Industrial Sites, Manzini district".

Subsequent to the service of the aforesaid summons and on behalf of the defendant, attorneys Siphon A. Nkosi and Company entered an appearance to defend this action. Applicant brought an application for summary judgment. Siphon A. Nkosi and Company cause to be filed an affidavit resisting summary judgment. The affidavit is deposed to by Siphon A. Nkosi.

Siphon A. Nkosi proceeded to set out what he claims to be the defence of the defendant in detail in the paragraphs following paragraph 2 of the affidavit.

5

It would appear to me that the Plaintiff's misnomer of the defendant in the caption as The Nkosi Progressive Trust was a bona fide error and I am not able to read into it more than that.

The papers before me are abundantly clear that it was at all times the intention of the plaintiff to sue the defendant namely Siphon A. Nkosi in his capacity as trustee of The Nkosi Progressive Trust.

In the result, I dismiss the exception with costs.

The Application for substitution (Case No. 1386/2001)

In this matter the plaintiff filed an urgent application for an order inter alia that defendant's name in the summons, declaration, summary judgment, application and condonation application in Case No. 1386/2001 is directed to be Siphon Anthony Nkosi in his capacity as trustee of The Nkosi Progressive Trust.

There is obvious overlapping in this matter with the exception advanced by the defendant. I have listened to the submissions by both parties in this instance and I adopt a similar view I expressed in the exception above. It is apparent from the summons, the declaration and the affidavit resisting summary judgment that the identity of the defendant, namely, Siphon A. Nkosi in his capacity as the trustee of The Nkosi Progressive Trust was never in doubt and was at all times known to all the parties.

In the result, I grant the application in terms of prayer 2 of the notice of motion and I make no order as to costs.

The application for condonation.

This aspect of the matter pertains to all the cases before me viz, 1386/2001, 1387/2001 and 1388/2001. The applications were brought with a certificate of urgency for an order inter alia that the late filing of the further affidavit by the plaintiff in the summary judgment proceedings pending before court be condoned. Affidavits of one Steven William Hough are filed in support thereto. Per contra Siphon A. Nkosi filed affidavits in answer in all three matters.

6

Mr. Earnshaw argued that the court may on good cause shown condone any compliance with the rules. The circumstances or "cause" must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned. (see *Herbstein and Van Winsen* (4th ED) at pages 549 - 560). He contended that in casu the delay in filing was not wilful and reckless disregard of the defendant's rights. The delay has not prejudiced defendant in any manner. It is trite law that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice. The court has an inherent power to grant condonation when principles of justice and fair play demand it to avoid hardship; and when the reasons for non-compliance with the time limits have been explained to the satisfaction of the court (see *Cains' Executors vs Gharn* 1912 A.D. 181 at 186).

That in the instant case the plaintiff has given an acceptable explanation for the delay. Further, plaintiff has fair prospects of success in the main application.

Mr. Nkosi on the other hand argued that the plaintiff must establish the prospect of success on the main application and that in casu the plaintiff is unlikely to succeed in its application for summary judgement in that:

- i) A summary judgment can only be granted when there is no reasonable doubt about the Plaintiff's claim. The defendant has raised several issues which render the matter triable;
- ii) The Plaintiff's replying affidavit has raised several issues, which the defendant has no recourse to reply to these issues raised, are highly contradictory such that the matter is rendered triable.
- iii) The plaintiff claim is not one which is unanswerable; and
- iv) The defendant has raised a bona fide defence.

Finally, that the affidavit of Mr. Hough does not allege that the plaintiff has prospect of success and this only came from the bar from Mr. Earnshaw when making submissions. This cannot cure the lack of averment for the prospect of success.

I have considered the issues before and the lengthy submissions made in this matter. The court has a wide discretions to grant and refuse condonation (see Kruger vs

7

Ministry of Police 1981 (1) S.A. 765 (T). The courts are inclined to refuse to grant condonation in cases of flagrant breaches of the rules (see Tshivase Royal Council and another vs Tshivase and another 1992 (4) S.A. 852). It would appear to me that Mr. Nkosi is correct that in casu the Mr. Hough's founding affidavit lack an essential averment in an application for condonation that the applicant has prospect of success. This only emerged in the Plaintiff's Heads of Argument and the submissions by Mr. Earnshaw from the bar. The court cannot cure this defect, as there is no application before court except from the bar. The general rule which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged in it. I disagree, with respect with Mr. Earnshaw that paragraph 2.1 of the defendant's answering affidavit has cured this defect. The plaintiff ought to have at least filed a replying affidavit in answer to paragraph 2.1 of the defendant's answering affidavit to show the prospects of success. This essential averment ought to appear ex facie the Plaintiff's papers in support of such an application. It should not be gleaned from papers filed by the opposing party. In casu, no such allegation relating to the prospects of success were made by the plaintiff.

In the result, the application is dismissed with costs. To sum up, I make the following orders:

1. The exception (in Case No. 1386/2001) is dismissed with costs;
2. The application for substitution (in Case No. 1386/2001) is granted in terms of prayer 2 of the notice of motion. No order is made as to costs.
3. The application for condonation is dismissed with costs.

S.B. MAPHALALALA

JUDGE