

THE HIGH COURT OF SWAZILAND

SWAZILAND BUILDING SOCIETY

Plaintiff

And

SOLOMON J. NXUMALO

Defendant

Civil Case No. 506/2004

Coram

For the Plaintiff For
the Defendant

S.B. MAPHALALA- J
MR. B. MAGAGULA MR.
M. SIMELANE

RULING

(On application for amendment)

(16/07/2004)

The relief sought

Before me is an application for amendment brought by the Plaintiff to amend its Particulars of Claim in the manner set out herein below:

1. AD paragraph 3.

By deleting paragraph 3 in its entirety and replacing it with the following:

3.1 "During or about the 1st March 1990 and within the jurisdiction of the above Honourable Court, the Plaintiff lent to the Defendant the total capital sum of E55 000-00 (fifty five thousand emalangeni) upon the terms and conditions contained in Mortgage Bond No. 132 of 1990 which was registered as ongoing security for the said loan on or about the 21st February 1990. A copy of the said Mortgage Bond is annexed hereto marked annexure "A" and will hereinafter be referred to as the "First Bond".

3.2 During or about the 26th day of November 1990, and within the jurisdiction of the above Honourable Court, the Plaintiff lent to the Defendant the total capital sum of E33 000-00 (thirty three thousand emalangeni) upon the terms and conditions contained in Mortgage Bond No. 750 of 1990 which was registered as ongoing security for the said loan on or about November 1990. A copy of the said Mortgage Bond is annexed hereto marked annexure "B" and will hereinafter be referred to as the "Second Bond".

2. AD Paragraph 4

By renumbering paragraph 4 to read paragraph 4.1 and adding an additional paragraph 4.2 to read:

"4.2 The Second Bond *inter alia* provides that the capital outstanding from time to time bear interest at the rate of 15.5% per annum or such increased rate of interest which the Plaintiff may levy by giving notice to that effect in terms of Clause 22 of the Bond".

3. AD Paragraph 5

3.3 By deleting the reference to the amount of E2 202-00 (two thousand two hundred and two emalangeni) and replacing it with E753-00 (seven hundred and fifty three emalangeni).

3.4 By renumbering paragraph 5 to read paragraph 5.1 and adding an additional paragraph 5.2 to read:

"5.2 It was specific term of the Bond that the Defendant undertook to make payment of regular successive instalments of E452-00 (four hundred and fifty two emalangeni) per month or such increased payments as are provided for as a result of an increase in the rate of applicable interest from time to time".

2. The objections.

Defendant has filed a notice of objection to the proposed amendment on the following grounds:

a) Plaintiff has applied for summary judgment on the first Particulars of Claim and it has not withdrawn the same yet the application has been set down for hearing on the 4th of August 2004.

3.5 The account of Defendant has not been called up and same is operating effectively as Defendant is servicing his loan.

3.6 The Defendant has paid double the capital loans hence he is not indebted to the Society. Full details can be printed by Plaintiff and presented to Court.

3.7 The Manager or Secretary of the Plaintiff has not filed any certificate to show that Defendant is in arrears in terms of Clause 21 of the Mortgage Bonds.

3.8 There are no sufficient averments to sustain the cause of action as it has not been proved that the Defendant did not pay for the other months when he paid more than the instalment as agreed in any given month

3.9 Clause 7 and 8 in the main Particulars of Claim is contradictory and confusing to the proposed amendments.

3.10 Paragraph 5.1 and 5.2 in the proposed amendment is also confusing and contradictory as same do not state or demarcate the bond they refer to and or describe that the Defendant had two mortgage accounts to service his loan.

h) Nor do the aforementioned paragraph state as to how much each account owes.

i) The proposed amendment is an abuse of court process and it has no merit to advance the claim.

3. The arguments.

It was contended on behalf of the Plaintiff that the purpose for seeking the proposed amendment of its Particulars of Claim is to ensure that all material terms of the cause of action against the Defendants are contained therein. The court was referred to the cases of *Moolman vs Estate Moolman 1927 CPD 27 at 29 F- H*; *Nxumalo vs First Link Insurance Brokers (Pty) Ltd 2003 (2) S.A. 620 (T)*; *De Kerk and another vs Du Plessis and others 1995 (2) S.A. 40 (T) at 43 - 44A*; *OK Motors vs Van Niekerk 1961 (3) S.A. 149 (T) at 152 C*; *McDonald, Foreman's Co. vs Van Aswegen 1963 (2) S.A. 150 (o) at 153 (D)*; *Myer vs Abramson 1951 (3) S.A. 438 © at 449H-450A* and of *Cross vs Ferreira 1950 (3) S.A. 443 (c) at 447* to the general proposition that where a party opposes a proposed amendment on the ground that, if such amendment were granted, it would render the pleadings excipiable, both the application for amendment and the objection should be heard simultaneously.

The argument in opposition is that the court cannot deal with" the amendment application by the Plaintiff due to the fact that there is a summary judgement application that is still pending in court. The court must first decide the summary judgment application alternatively the Plaintiff must withdraw the application for summary judgment. In this regard **Mr. Simelane** for the Defendant relied on what was decided in the Appeal Court Case No. 56/99 in the matter of **D.Z. Civils and Building (Pty) Ltd vs Standard Bank of Swaziland Limited**. In this case the Respondent obtained default judgment and whilst the Appellant applied for rescission of judgment, the Respondent applied for summary judgment before the rescission application could be argued or finalized. The court of Appeal stated the following at page 5 of the unreported judgment:

"On 10th December 1998 the matter came as an opposed one before Maphalala J. instead of dismissing the application for summary judgment with costs, he decided to deal with it as being premature; the application to rescind had first to be dealt with. He made no order as to costs. Those proceedings are not before us, but his approach seems, with respect, to have been clearly wrong. The application for summary judgment was not premature, it was incompetent... Its (Respondent's) approach to court for summary judgment as having an unanswerable case was moreover either inept or arrogant, in the light of its admission in the very papers on which it sought a second judgment, that it was not infallible, and what prima facie appear to be contradictions or errors between the annexure and the declaration. The learned Judge was, of course, quite correct that the pending application for rescission could not merely be ignored and should be disposed of *ante amnio*".

The crux of the Defendant's contention therefore is that he has filed an affidavit resisting summary judgment hence he shall be prejudiced if the amendment application is heard first without determining the application for summary judgment. He prays that a correct order to be entered by the court in the circumstances of this case is to dismiss the application for amendment with costs to be taxed on the scale as between attorney and own client scale (which costs have been agreed between the parties at Article 11 of the Mortgage Bond).

4. The law applicable to amendments.

The general principles applicable to application for amendment were clearly outlined by Masuku J in the case of *Lucky Mahlalela vs Gilfillan (Pty) Ltd Civil Case No. 2369/00* at page 4 and 5 of the unreported judgment where he said; and I quote:

"Amendments are governed by the provisions of Rule 28 of the High Court Rules as amended. The policy of the courts in dealing with amendments is that the grant or refusal of an application for amendment of pleadings is a matter that lies exclusively within the courts discretion, and this discretion should like in all other cases be exercised judicially, regard being had to all the attendant facts and circumstances of the matter ... the consideration I have to take into account in granting or refusing the proposed amendment are the following namely; whether the application is *mala fide* or it would occasion an injustice or prejudice which cannot be compensated by an appropriate order for costs".

5. The court's analysis and conclusions thereon.

The first issue to be determined in this case is whether the Defendant is correct in his contention that since he has filed an affidavit resisting summary judgment that application ought to be decided first before the present application. Therefore the inquiry is whether the *ratio* in the Court of Appeal case of *D.Z. Civils (supra)* applies to the facts of the present case.

It would appear to me that *Mr. Simelane* for the Defendant is correct that the court first has to decide the summary judgment alternatively the Plaintiff must withdraw the application for summary judgment. The Defendant has joined issue with the Plaintiff in that regard by filing an affidavit resisting summary judgment. The latter is a response to what appears in the original summons. Clearly Defendant would be prejudiced if the amendment application is heard first without determining the application for summary judgment.

It would appear to me that a proper cause for the Plaintiff to adopt is to withdraw the application for summary judgment, for the time being to pave the way for the amendments sought in the Particulars of Claim.

Therefore I would dismiss the application for amendment on the basis of the *dictum* in *D.Z. Civils (op cit)* and must stress that this dismissal is based purely on procedural

grounds, and not on the merits. The Plaintiff can still reinstate its application once the impediment I have mentioned above has been cleared.

In the result, the application for amendment is dismissed with costs.


S.B. MAPHALALA
JUDGE