

THE HIGH COURT OF SWAZILAND

THE BROTHERS (PTY) LTD

Plaintiff

And

THE SWAZILAND WATER SERVICES CORPORATION

Defendant

Civil Case No. 1196/2003

Coram: S.B. MAPHALALA-J

For the Plaintiff: J MR. P. SHILUBANE

For the Defendant: MISS S. ZONDI

JUDGMENT

(20th May 2005)

[1] The Plaintiff has filed a Notice in terms of Rule 30 seeking for an order setting aside the Defendant's Notice of Exception dated 31st May 2004, an irregular step on the ground that the Defendant has been barred from pleading and no application to lift the bar has been made. The Plaintiff also seeks for a costs order.

[2] The Plaintiff issued a combined summons dated 23rd May 2003, for the ejection of Defendant from its properties which is more fully described in the summons. The Defendant after entering appearance to defend on 25 July 2003, failed to file its plea notwithstanding a Notice of Bar which was filed on 4th September 2003, by Plaintiff.

[3] On 31st May 2004, the Defendant filed a "Notice of Exception" whereby the Defendant excepted to the Plaintiffs summons on the ground that they fail to disclose a cause of action there being no allegation to the effect that the Defendant's occupation of the premises is either unlawful, invalid or wrongful.

[4] In argument, it was contended for the Plaintiff that the Defendant was not entitled to file the "Notice of Exception" without first making an application to remove the bar in terms of Rule 27 of the Rules of Court. As a result the filing of the "Notice of Exception" by the Defendant was an irregular step and ought to be set aside as provided for in terms of Rule 30 of the Rules of Court. Consequently, Plaintiff has now filed a Rule 30 application. In any event, so the argument goes, the so-called Notice of Exception has no legal basis because it is trite law that in an action of ejection it is not necessary to allege that the property is being occupied unlawfully in the case where the cause of action is by the owner of the property in question. To support this proposition the court was referred to what is said by Amler's Precedents of Pleadings, 4th Edition at page 189 and page 408 and the authorities cited at page 350 where the following appears:

"Wrongfulness: In view of the fact that the possession of an owner's property by another is prima facie wrongful, it is not necessary for the Plaintiff to allege and prove that the Defendant's possession is wrongful or against the wishes of the Plaintiff. If these allegations are made, they do not draw any additional onus".

[5] See also the cases of Krugerdorp Town Council vs Fortuin 1965 (2) S.A. 335 (T); Chetty vs Naidoo 1974 (3) S.A. 13 (A) and Singh vs Santam Insurance Co. Ltd [1997] (1) S.A. 291 SCA.

[6] Miss Zondi who appeared for the Defendant advanced per contra arguments the essence of which is that they have been negotiations between the parties from the time summons were issued and various letters of correspondence have been exchanged between the parties until "out of the blue" on the 27¹ May 2004, the Defendant's attorneys were served with a Notice of Set down on the uncontested roll, the effect of which was that the Plaintiff now were applying for default judgment. The Defendant upon inquiry was informed that Mr. Gwebu had since left the offices of P.M. Shilubane & Associates. The Defendant quickly filed their Notice of Exception upon realizing that the Plaintiff reneged from their earlier agreement. The Defendant's view was that the late filing of the Notice of Exception was not to be an issue as they had hoped that Mr. Gwebu would have then clarified the position to whoever was presently handing the matter at the offices of P.M. Shilubane & Associates.

[7] It was contended on the alternative that in the event the court holds that the Notice of Exception is an irregular step the court may not grant default judgment on the Plaintiffs summons at they stand because they are defective. It is contended that the summons do not disclose a cause of action as they do not contain an allegation that the Defendant's occupation is either unlawful, wrongful or invalid. In casu, there is no lease agreement that was concluded by the Plaintiff and the Defendant in relation to the property in question thus there is no legal relationship between the parties. In the premise, the Plaintiff ought to allege and prove the essential elements to be fulfilled before an order for eviction is granted. All in all, the court was urged to take into consideration the fact that there were negotiations between the parties, thus Defendant's failure to file its exception in time. In the alternative, it was contended that even if the notice in terms of Rule 30 is upheld the application for default judgment should not be granted on the basis of the defect in the Plaintiffs summons.

[8] Miss Zondi further contended that the legal authority cited by Mr. Shilubane that of Aimer's Precedents of Pleadings (op cit) at 350 does not apply on the facts of the present case because here the court is concerned with a right of servitude not a lease agreement.

[9] The crux of the matter in this case is whether it was competent for the Defendant to file the "Notice of Exception" without first making an application to remove the bar in terms of Rule 27 of the Rules of Court. According to the authors Herbstein and Von Winsen, The Civil Practice of the Supreme Court of South Africa, 4 ' Edition at page 552 when a party has been barred from pleading he may apply to court for a removal of bar. In such a case, the provisions of Rule 27 (1), (2) and (3) apply, but the court also has inherent jurisdiction to raise the bar. The non-defaulting party will usually first be approached to agree to a removal of bar as envisaged by Rule 27 (1) (see also the case of Nathan (Pty) Ltd vs All Metals (Pty) Ltd 1961 (1) S.A. 297 (A) at 300 B - D).

[10] Rule 27 thereof provides as follows:

"27. (1) In the absence of agreement between the parties, the court may upon applications on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit.

(2) Any such extension may be ordered although the application therefore is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from the rules.

(3) The court may on good cause shown, condone any non-compliance with these rules.

(4) After a rule nisi has been discharged by default of appearance by the Applicant, the court or a Judge may revive the rule and direct that the rule so revived need be served again".

[11] In casu it has not been shown that any agreement was ever made by the parties as envisaged by sub-rule 1 of the above- cited rule. It is also common cause that no application on notice has been filed in accordance with the Rule. It would appear to me that the explanation given by Counsel for Defendant in her Heads of Argument that the parties were involved in negotiations, thus the late filing of the "Notice of Exception" should have gone a long way to prove "good cause" under sub-rule 1. However, at this stage this explanation cannot assist the Defendant outside the ambit of Rule 27 and after Plaintiff has filed a Rule 30 Notice. Therefore, on the totality of what I have just said the application in terms of Rule 30 is upheld.

[12] Having disposed of the application in terms of Rule 30 that the Notice of Exception is an irregular step it now behoves me to consider the application for default judgment itself.

[13] It appears to me that the submission made by Mr. Shilubane is the correct one that the Notice of Exception, in any event, has no legal basis in that it is settled law that in an action for ejection it is not necessary to allege that the property is being occupied unlawfully in the case where the action is by the owner of the property in question. The authority in Aimer's (supra) has put the legal position beyond doubt. The argument advanced by Miss Zondi, although quite interesting does not assist the Defendant as nowhere in the affidavits is it mentioned that the relationship between the parties is founded on a right of servitude. This fact was merely mentioned by Counsel from the bar. In the circumstances the Notice of Exception ought to have failed even on the merits.

[14] In the result, the application is granted in terms of prayers 1 and 2 of the Notice of Set-down dated the 26th May 2004.

S.B. MAPHALALA

JUDGE