IN THE HIGH COURT OF SWAZILAND

SWAZILAND DEVELOPMENT AND SAVINGS BANK

Applicant

And

AGECON INVESTMENTS (PTY) LIMITED T/A MEGABYTES COMPUTERS

1st Respondent

ALFRED G. DLAMINI

2nd Respondent

MLUNGISI DLAMINI

3rd Respondent

Civil Case No. 1664/2007

Coram: S.B. MAPHALALA-J

For the Applicant: MR W. MKHATSHWA

For the Respondents: MR. M. MABILA

JUDGMENT

15th June 2007

[1] The Respondents have raised points of law *in limine* in terms of Rule 6 (12) (c) of the High Court Rules as follows:

1. The application cannot be sustained as the Applicant's affidavit when read together with the annexures thereto do not establish a cause of action.

1.1 At paragraph 8 of the affidavit Applicant alleges that the agreement (annexure "A") was concluded on the 28th March 2007 yet annexure "A" reflects the 28th March 2006.

1.2. At paragraphs 10.1 and 10.2 of its affidavit alleges that the loan of El35, 000-00 was for a period of twelve (12) months yet the alleged written agreement reflects that same was for a period of thirty six (36) months.

1.3. At paragraph 10.3 of its affidavit, the Applicant alleges that the interest chargeable on the loan agreement was 14% per annum at a prime rate plus 3% yet the alleged written loan agreement reflects that same was 13.5% plus 3%.

1.3. At paragraph 11.1 of Applicant's affidavit that the allegation is the deed of hypothecation (annexure "A2") is for a period of twelve (12) months yet a perusal of annexure "A2" reflects that same is for a period of thirty six (36) months.

2. The Applicant has not alleged non-compliance with any of the provisions of annexure "A2" by the Respondents.

3. The Applicant has failed to allege how the sum of E240, 436-84 is arrived at i.e. whether it constitutes the principal debt or it constitutes the principal plus finance charges or it reflects the contract balance.

[2] In arguments before me Counsel for the Respondents cited what is stated by the learned authors *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 366* that 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, and that although sometimes it is permissible to supplement the allegations in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the Respondent is called upon either to affirm or to deny. The Appellate Division has held that it is not permissible to make any new grounds for an application in a replying affidavit, any fortifying paragraphs in his replying affidavit will be struck out.

[3] The court was further referred to what the above-cited authors *Herbstein et al* state at page *380* regarding the effect of Rule 6 (12 (c) of the High Court Rules. The court was further referred to page 364 of the same textbook.

[4] On the other hand Applicant opposed the Notice to anticipate the return date in a Notice with the Registrar's stamp of the 25th May 2007. In the said Notice Applicant contends that **"Respondents' Notice has been improperly brought before court without a proper application and supported by affidavit, explaining fully the special circumstances why the matter cannot await its turn for hearing on the opposed roll or that the anticipation is reasonable in the circumstances".** In the said Notice the court was referred to the South African case of *Peacock Television Co. vs Transkei Development Corporation 1998 (2) S.A. 259* and the local division case in the matter of *Cornelius Van Niekerk N.O. vs Jameson Vilakati and another- Civil Case No. 255/2006 (unreported).*

[5] Counsel for the Applicant further handed to court brief Heads of Argument which set out clearly the issue for decision by the court.

[6] Having considered all the pros and cons of this dispute I have come to the considered view that the position adopted by the Applicant is correct in the circumstances of this case. I say so because the Notice to anticipate filed by the Respondents has not been properly brought before the court, in the absence of a proper application, supported by affidavit, explaining fully the exigency warranting the matter to be brought forward. Nor is there any cause shown to what prejudice the Respondents may be exposed if the matter were to await the return date (see the cases of *Peacock Television (supra)* and that of *Cornelius Van Niekerk supra)).*

[7] I further agree with the Applicant that if the Notice of anticipation itself does not fulfill the requirements of the procedure, the court cannot, as of necessity entertain the notice in terms of Rule 6 (42) (c) outside Rule 6 (22). This would

amount to an abuse by which Respondent gains itself unfairly, an earlier date without showing cause the reasons therefore.

[8] Furthermore, it appears to me that the Applicant is correct that in the alternative the points of law *in limine* the Respondents seek to raise nothing that could not have been properly raised in opposing affidavits, as they amount to no more than alleged errors on the merits. The proper approach for the Respondents would have been to anticipate the return date in terms of Rule 6 (22) (on 24 hours notice) to the Applicant, if eager to raise any points *in limine* and such notice would be **an application** to this court, **supported by affidavit.**

[9] Lastly, I agree with the Applicant who has asked a very pertinent question; can a litigant simply anticipate a return date anytime, without proper explanation?

[10] In the result, for the afore-going reasons the notice to anticipate is dismissed with costs.

S.B. MAPHALALA

JUDGE