

IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 30/08

In the matter between:

SIBONISO CLEMENT DLAMINI N.O. APPLICANT

AND

DEPUTY SHERIFF - HHOHHO REGION 1st
RESPONDENT

SWAZILAND BUILDING SOCIETY 2nd
RESPONDENT

In Re :

SWAZILAND BUILDING SOCIETY PLAINTIFF

AND

THE TRUSTEES FOR THE TIME BEING
OF SIBONISO CLEMENT DLAMINI
FAMILY TRUST DEFENDANT

CORAM: MAMBA J

FOR APPLICANT: V. L.M. MAZIYA
(instructed by T.L DLAMINI &Ass.)

FOR RESPONDENTS: E.J. HENWOOD

JUDGEMENT
26th June, 2008

[1] Mr Siboniso Clement Dlamini is the sole trustee of The Siboniso Clement Dlamini Family Trust. He has in his capacity as such trustee filed this application wherein he seeks inter alia for a stay of the auction sale (in execution of judgement) scheduled for tomorrow following a judgement of this court in the main action. He also seeks that the said judgement, which was granted in a summary judgment application on the 28th March 2008 be rescinded or set aside.

[2] The Applicant submits that the summary judgment application was sought by the second respondent and granted by the court in error in as much as he, the sole trustee of the above cited trust was not cited in the action or summary judgement application.

[3] The defendant as appears in the papers filed herein and in particular the main action, is "THE TRUSTEES FOR THE TIME BEING OF THE SIBONISO CLEMENT DLAMINI FAMILY TRUST". The applicant in effect says, that this not a proper citation of him or, if there were more than one trustees, of

such trustees. He argues that he should, albeit in his nominal capacity, have been cited as Siboniso Clement Dlamini and not in the all inclusive and embracing appellation referred to above. The applicant argues that as a matter of law, the wrong party was cited as the defendant in the action and resulting summary judgement, to his prejudice as the sole trustee.

[4] I should mention here that it is not insignificant that the applicant in his capacity as an Attorney under the style of S.C. Dlamini and Co., filed the notice of intention to defend the action on behalf of the defendant. He also, on behalf of the said defendant transmitted or communicated certain information to the Plaintiff's attorneys regarding the future conduct of the action. The essence of this information or correspondence was to admit that the trust was indebted to the Plaintiff; was in arrears in its instalment payments and this would be corrected. Finally, he requested by letter dated the 27th March 2008, that the summary judgement application scheduled for the next day be postponed to the 18th April 2008. This request was evidently not acceded to by the Plaintiff's attorneys who successfully applied for summary judgment on the appointed date; in the absence of defendant's attorneys.

[5] In his affidavit for rescission the applicant avers that there was an agreement between him and the plaintiff's

attorneys to postpone the summary judgment application as requested by him. This is, however, denied by the Plaintiff's attorneys.

[6] I now examine each of these grounds for the stay and rescission in turn. But before doing so I think it is opportune at this stage to state the law relating to the status and locus standi of a trust regarding being sued or being able to sue. The position in my view, was sufficiently and correctly summarized in the case of ROSNER v LYDIA SWANEPOEL TRUST, 1998 (2) SA 123 (WLD) @ 126H-127C where the court stated that;

"It is settled that in our law a trust is not a legal persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the property for purposes of administration of the trust, but qua trustee he has no beneficial interest therein... . Unless one of the trustees is authorized by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust... . In legal proceedings trustees must act nomine officii and can not act in their private capacities.

See MARIOLA AND OTHERS v KAYE-EDDIE N.O. AND OTHERS 1995 (2) SA 728 @ 731C-F. In GOOLAM ALLY FAMILY TRUST t/a TEXTILE, CURTAINING AND TRIMMING

v TEXTILE, CURTAINING AND TRIMMING (PTY) LTD 1989

(4) SA 985 (C) @ 988D-E the court stated that

the general rule is that joint trustees must act jointly. Generally speaking a joint trustee may delegate his duties to a co-trustee or to any other agent but the power to do so depends on the provisions of the trust deed. ...If it is prohibited it cannot be done. Where the trustees litigate in their representative capacity judgement cannot, of course, be given against them personally and neither does a judgement in their favour enure for their personal benefit, since it accrues to the fund of the trust. It follows from the above that all the trustees must act jointly unless one has the authority of the others to act. The trustees must also act *nomine officii* and not in their personal capacities, and they must of course be cited as such in legal proceedings. In the present case the trust itself was cited as plaintiff and the question is simply whether an amendment to correct the position is in order." See also the case of TRUSTEES AFRICAN EXPLOSIVES PENSION FUND v NEW HOTEL PROPERTIES (PTY) LTD, TRUSTEES AFRICAN EXPLOSIVES PENSION FUND v NESTEL, 1961 (3) SA 245 (WLD).

[7] The general legal position as stated by the Applicant regarding the locus standi of a trust to sue and be sued is correct; that the trustees and not the trust - which is a discrete institution - must be cited. This much is accepted by the respondents. However, on the facts of the present application, applicant's submissions are incorrect. The trust

has not been cited as the defendant. "The trustees for the time being of the trust" are cited as the defendants. Such citation is not unknown in practice, especially where there are several trustees and their exact names are unknown. But to suggest that where there is only one trustee as in this application, it would be fatal to use such description or citation of the trustee, would in my judgement be placing form over substance and for the court to insist on it would amount to the sort of ineffectual technicalities that the Court of Appeal discouraged in the SHELL OIL SWAZILAND (PTY) LTD v MOTOR WORLD PTY t/a SIR MOTORS (Appeal Case 23/2006). I therefore hold that there is no merit on this ground and it fails.

[8] I should also mention that the summons was in fact brought to the notice of the Applicant herein, from inception of the proceedings in the main action. He filed the notice to defend on behalf of the defendant - "the trustees for the time being". He was that defendant; the sole trustee. He suffered no prejudice by his none citation in his own name, nor did the trust suffer any prejudice by this. The judgement that was issued by the court in the main action is not against the trust qua trust but against "the trustees for the time being of The Siboniso Clement Dlamini Family Trust."

[9] There is a dispute of fact pertaining to the issue of whether or not there was an agreement between the parties

to have the summary judgement application postponed on the 28th March 2008. Other than the averments by the applicant that there was such an agreement, there is nothing in support of this. The second respondent's attorneys deny it. I am unable to resolve this on the papers before me. It is a matter or an issue that at least explains the defendant's attorneys non appearance in court on the 28th March 2008 during the summary judgement application. Such dispute, if such issue be defined as such in the context of this application, should have been and was foreseen by the applicant when he filed this application. He thus can not be heard to say at this stage that the matter should be referred to oral evidence to resolve the issue.

[10] Taking into account the overall weaknesses in the applicant's case, such as the total lack of a defence, i.e. the admission of liability or indebtedness towards the second respondent (plaintiff in the action) and the lack of candour with which the applicant has prosecuted this application, this court finds no justifiable grounds to come to his aid and stay the sale in execution.

[11] The application is therefore dismissed with costs.

MAMBA J