



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No: 3501/07

In the matter between:

**WILLIE NTSHANGASE**

**APPLICANT**

And

**SWAZILAND DEVELOPMENT & SAVINGS BANK  
JOSEPH DLAMINI**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

In re:

**SWAZILAND DEVELOPMENT & SAVINGS BANK**

**PLAINTIFF**

And

**WILLIE NTSHANGASE**

**DEFENDANT**

Neutral citation : Swaziland Development Finance & Savings Bank and Willie Ntshangase (3501/07) [2012] SZHC 246 (19 OCTOBER 2012)

Coram : MABUZA J

Heard : 23/01/2012

Delivered : 19/10/2012

Summary : Pleadings – Further particulars – Request for – Rule 21 – When Defendant entitled to further particulars – Principles governing such applications – Application dismissed.

[1] In this matter the Plaintiff who is Swaziland Development and Savings Bank (Swazi Bank) issued a combined summons against the Defendant, Willie Ntshangase for the payment of the sum of E118,442.32 ( One hundred and eighteen thousand four hundred and forty two Emalangeni thirty two cents); interest at the rate of 22%; declaration of the Defendants immovable property named “Clifton farm” to be executable and costs. The Defendant entered a notice of intention to defend the action.

[2] By copy of a letter dated 16<sup>th</sup> November 2009 the Defendant requested further particulars from the Plaintiff. The Plaintiff did not furnish the requested further particulars. The Defendant thereafter filed a formal request through the office of the Registrar of the High Court on the 14<sup>th</sup> January 2010. The request was to enable the Defendant to properly plead and or to except the summons. This request was served on the Plaintiff’s attorneys on the 14<sup>th</sup> January 2010. The Plaintiff ignored the said request until the Defendant’s attorneys filed an application to compel further particulars and set it down for hearing on the 11<sup>th</sup> June 2010. It was only then that the Plaintiff’s attorneys responded with a notice to oppose the said application which was accompanied by an affidavit deposed to by Mr. Mdladla the Plaintiff’s attorney of record. In it he states that the information

sought by the Defendant is not for the pleading stage but shall be brought forth and disclosed at discovery stage.

[3] In order to do justice to the matter I shall set out the relevant particulars of claim, the request and response. At the hearing hereof the parties agreed that:

- (a) Where the statements in relation to the loans from their inception are sought in the request for further particulars these would be provided;
- (b) That the balance of the issues such as copies of the documents, including vouchers and entries substantiating the disbursement of the moneys in relation to the loans and paragraphs 7, 11, 13 of the request for further particulars would arise in discovery in terms of Rule 35.

[4] The Defendant says that he requires the further particulars he requested from the Plaintiff to enable him to articulate his defence instead of pleading a bare denial. To that end Mr. Jele for the Defendant has directed this Court to authorities from South Africa before 1998 because from that date and afterwards South Africa abolished the request for further particulars for purposes of pleading. These can only be requested after the close of

pleadings not less than twenty days before trial and only such further particulars as are strictly necessary to enable a party to prepare for trial. Before then their Rule 21 in relation to the request for further particulars was similar to ours.

[5] Our Rule 21 provides that:

21 (1)

“The court may order a party to deliver to any other party further particulars of any claim ... and the order may be on such terms as the court thinks just.”

(3)

“An order under this rule shall not be made before delivery of the plea unless, in the opinion of the court, the order is necessary or desirable to enable the defendant to plead or for some other special reason”.

[6] For ease of discussion I set out relevant paragraphs hereunder:

(a) Combined summons: Paragraph 4 states:

“In terms of a written agreement, the Plaintiff loaned and advanced to the Defendant a sum of E147,000.00 on the 27<sup>th</sup> October 1986 at

Plaintiff's Nhlango branch... a copy of the said agreement is annexed hereto and marked "A".

Request: AD Paragraph 4:

"A copy of the application allegedly submitted by the Defendant on the 28<sup>th</sup> July 1986 in respect of the loan dated 27<sup>th</sup> October 1986 in respect of the loan dated 27<sup>th</sup> October 1986 for the sum of E147.00 is hereby requested"

Response:

The information sought by the Defendant is not for the pleading stage but shall be brought forth and disclosed upon discovery stage.

(b) Combined summons: Paragraph 5

"The parties further entered into a written agreement on or about the 9<sup>th</sup> day of August 1991 at Nhlango, Plaintiff loaned and advanced to the Defendant a sum of E50,000.00 at the Defendant's instance and request. A copy of the said agreement is annexed hereto marked "C".

Request: AD Paragraph 5

"A copy of the application allegedly submitted by the Defendant in respect of the loan dated 8<sup>th</sup> August 1991 marked Annex "C" is hereby requested".

Response:

The information sought by the Defendant is not for the pleading stage but shall be brought forth and disclosed upon discovery stage.

(c) Combined summons: Paragraph 6

“In terms of a further written agreement Plaintiff loaned and advanced to the Defendant the sum of E20,000.00 to the Defendant on the 15<sup>th</sup> December, 1992. A copy of the said agreement is annexed hereto marked “B”.

Request: AD Paragraph 6

“A copy of the loan application allegedly submitted by the Defendant in respect of this loan is hereby request”.

Response:

“The information sought by the Defendant is not for the pleading stage but shall be brought forth and disclosed upon discovery stage.”

[7] Mr. Jele’s argument is that the facility loan applications by the Defendant have not been attached to the summons to indicate the different dates on

which the Defendant made these applications to the Plaintiff. It is therefore necessary that the Defendant be furnished with copies of the application “facility loan agreements” on which he made these different requests to the Plaintiff and which form the basis of the Plaintiff’s claim.

[8] It is further contended on behalf of the Defendant that he would be embarrassed if he has to plead to the summons in the manner in which they have been drawn. The Defendant contends further that in order to plead appropriately he be furnished with the alleged application he submitted in respect of each of the loans so as to ascertain which loan is covered by which bond.

[9] It is further argued on behalf of the Defendant that where the particulars requested would if supplied cure the vagueness and embarrassment then the Court should make an order compelling the furnishing thereof rather than to allow an exception because it would then put an end to disputes whereas to allow the exception would probably give rise to a flurry of pleadings.

[10] In his counter arguments Mr. Mdladla for the Plaintiff says that there was no allegation about the loan application in paragraph 4 of the combined

summons, it is only the attached agreement (Annexure A) that refers to the loan application. He contends that the Defendant is not entitled to this document by way of further particulars as the document is not strictly necessary for the Defendant to obtain the document in order to plead or to except to the summons as stated in their request for further particulars.

[11] Mr. Mdladla further raises the salient point that the Defendant's affidavit which supports the notice to compel does not indicate the Defendant's difficulty to plead. Instead this difficulty has been raised in the Defendant's heads of argument. He submits therefore that this issue can be dealt with in terms of Rule 35 which provides for discovery, inspection and production of documents and tape recordings. He further argues that the Defendant is not embarrassed, that he should in his plea be able to admit or deny whether he made the application or not and this need not be a bare denial. He states that the Defendant clearly wants background information to the Plaintiff's case and that their request goes beyond the scope of the Plaintiff's cause as made out.



[12] Mr. Jele further advanced the argument that the nature and the extent of the claim by the Plaintiff when one has regard to the provisions of Rule 18 (6) which deals with pleadings generally thus:

“A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading”.

His argument is that it is necessary that the loan facility agreements that were signed by the Defendant on each loan account be furnished so as to enable the Defendant to properly plead. He says that the Plaintiff is obliged to attach the contract and it goes without saying that if the contract makes reference to other documents such as the loan application then the Plaintiff is obliged to furnish them; that if the Plaintiff cannot show any prejudice then it should hand the documents over to the Defendant.

[13] Mr. Mdladla’s counter argument is that Rule 18 (6) states the requirements for pleading when a contract is relied upon and that the Plaintiff has complied with its requirements and that the documents sought are not part of Rule 18 (6).

[14] Mr. Jele's final argument is that the allegations made by the Plaintiff in his particulars of claim are in some respects too general and there is a need to define with more precision the issues for determination for purposes of pleading. There is also a need to ensure that the Defendant is not embarrassed by pleadings to facts that are not within his knowledge.

[15] Mr. Mdladla's response is that Mr. Jele has widened the scope of his arguments in his heads and these do not appear on the affidavit supporting the notice to compel. I agree with Mr. Mdladla, nevertheless I shall address the issues that Mr. Jele has raised.

[16] The general principles which govern an application calling upon a party to furnish further particulars are summarized in the case of **South African Railways and Harbours v Deal Enterprises (Pty) Ltd** 1975 (3) SA 944 as follows:

"1. The function of particulars to a plaintiff's particulars of claim or declaration, at the pleading stage, is to fill in the picture of the plaintiff's cause of action, to limit the generality of the allegations therein, and to define with greater precision the issues which are to be

tried; the purpose of such particulars is to enable the defendant to plead or to tender an amount in settlement.

2. Whereas formerly a plaintiff was obliged to furnish such particulars as were “reasonably necessary” to enable the defendant to plead or tender, the position is now that such particulars only are required to be furnished as are “strictly necessary” for either of the said purposes; the new Rule has restricted the scope of a request for particulars to “absolute essentials”.
3. No hard and fast rules can be laid down as to the facts of each case; and the decision in one case is no safe guide to the solution of another unless the relevant facts are identical.
4. A defendant seeking an order for further particulars to be supplied must satisfy the Court that without such particulars he will be embarrassed in pleading; he must show that the plaintiff has failed to deliver particulars “sufficiently” in terms of what is required, i.e. that particulars are lacking which are strictly necessary to enable him to plead or to tender. This he can do by relying only upon the terms of the plaintiff’s pleadings as such, but it is also open to him to adduce evidence on affidavit of matters extraneous to the pleadings in order to explain the cause of his embarrassment; outside evidence, however, may be used only for the purpose of satisfying the Court that particulars are required within the ambit of the general principles applicable, and not for the purpose of extending the scope of the particulars required in terms of those principles.

5. A defendant is not entitled to know the plaintiff's evidence, as opposed to the outline of the case which is being brought against him. He is not entitled to information simply because it would be useful to him. In particular, he is not entitled to be supplied with information which forms no part of the plaintiff's cause of action as formulated, or which relates to matters extraneous to the *facta probanda* put forward by the plaintiff himself, for the purpose of enabling him to ascertain whether he has a defence to the claim, or to formulate such a defence.
6. If a defendant is entitled to particulars in accordance with the abovementioned principles, the plaintiff cannot avoid the obligation of furnishing them and thus incorporating them in the pleadings, by stating that the relevant information is in the possession of the defendant, or available to the defendant from other sources.
7. The procedure relating to particulars has been much abused for many years, and it is still being abused.
8. Where a plaintiff relies on a written contract as part of his cause of action, the defendant is not ordinarily entitled to be supplied with a copy of the contract by way of particulars. Whether he is so entitled or not must be determined by applying the general principles summarized above in paragraphs 1 – 7. It is only in rare and exceptional circumstances that the furnishing of a copy of the contract could be regarded as "strictly necessary" for the purpose of enabling the defendant to plead or to tender.

9. Where a plaintiff relies upon a contract as part of the cause of action put forward by him, the defendant is entitled to the particulars mentioned in Rule 18 (6) as of right and independently of the application of the principles summarized in paragraphs 1 – 7 above.
10. Where a plaintiff, as part of his cause of action, relies upon a juristic act other than a contract, such as payment, the provisions of Rule 18 (6) do not apply mutatis mutandis to a request for particulars in respect thereof; the general principles as summarized in paragraphs 1 – 7 above must be applied to such a request”.

[17] No. 1 of the general principles outlined above deals with the need to limit the generality of the allegations in the particulars of claim and to define with greater precision the issues which are to be tried. In this case the particulars set out the cause of action clearly and such particulars are based on a contract and comply with the provisions of Rule 18 (6). The contracts and the amounts loaned to the Defendant on the basis of the application are set out in the agreements which are signed by both the Defendant and the Plaintiff. In my view once the statements have been provided as agreed their contents should adequately complement the information that appears in the particulars of claim for example the amount loaned is stated in the particulars of claim, it should also appear in the credit column of the

statements. The particulars of claim as provided are precise and do not require any further definition and precision; they are brief and to the point; there is nothing too general about them. They define the cause of action precisely.

[18] Mr. Jele contends that without the further particulars requested, the Defendant is embarrassed to plead. In terms of the general principles outlined above (4 and 5) a Defendant seeking an order for further particulars to be supplied must satisfy the court that without such particulars he will be embarrassed in pleading; he must show that the Plaintiff has failed to deliver particulars “sufficiently” in terms of what is required i.e. that particulars are lacking which are strictly necessary to enable him to plead (or except). This he can do by relying on the terms of the Plaintiffs pleadings but is also open to him to adduce evidence on affidavit of matters extraneous to the pleadings in order to explain the cause of his embarrassment.

[19] As stated earlier I find that the Plaintiff’s pleadings as outlined in the paragraphs from which further particulars are sought are in order. The Defendant has opted not to file an affidavit that explains the cause of his embarrassment and I can find no justifiable cause for his embarrassment.

The Defendant seems to be on a fishing expedition and is not entitled to be supplied with information he seeks as it does not form part of the Plaintiff's cause of action as formulated. The application for further particulars cannot be used as a fishing expedition see **Van Tonder v Western Credit Ltd** 1966 (1) SA 189 (c).

[20] In conclusion and in view of the foregoing I must re-iterate that in my view the information requested by the Defendant is not strictly necessary to enable him to plead and or to except. He can plead and or except without it.

[21] The parties hereto agreed not to apply for costs in view of the concessions already made to which I refer at paragraph 3 of this judgment.

[22] In the circumstances and save for the concessions agreed to the application

is dismissed. No order is made as to the costs of the application.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Plaintiff : Mr. Mdladla

For the Defendant : Mr. Jele