



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.2356/11

In the matter between:

KUKHANYA (PTY) LTD

Plaintiff

And

ANZWA INVESTMENTS (PTY) LTD

Defendant

Neutral citation: Kukhanya (PTY) Ltd. and Anzwa Investments (PTY) Ltd.
2356/11 [2012] SZHC52 (15 March2012)

CORAM: M. Dlamini

FOR PLANTIFF: L. R. Mamba

FOR DEFENDANT: B. Ngcamphalala

Pleadings-purpose – exception - particulars not disclosing cause of action; sufficiency of averment on existence of partnership - fiduciary relationship basis for cause of action -

whether defendant is expected to assume from prayers per se the basis for the cause of action - procedure to be adopted where exception is upheld.

[1] The action commenced by way of summons. The defendant filed an application in terms of Rule 23, excepting to the pleadings on the basis that the particulars of claim disclosed no cause of action.

The pleading raised by defendant's exception prompts one to ask - what is the purpose of pleadings?

The answer lies in **Marais Dowson & Dobson Industrial Ltd v Van der Merwe & Others 1981 (4) S. A.** at page 425 in highlighting the purpose of pleadings states:

"It is to my mind sufficient if a summons not only set out the relief claimed, but states concisely the legal relationship between the parties as a consequence of which the plaintiff alleges his right to that relief. The defendant is thereby sufficiently advised not only for what but upon what ground he is brought into court ..." [words in bold and underline are my emphasis]

This position was applied in our courts in the case of **Sabatha Mkhonta v Wayne Thring Case No1454/2007** unreported, Mabuza J. held:

"The object of requiring parties to file pleadings is to enable each side to come to trial prepared to meet the case of the other ... It follows therefore that the plaintiff must set out his facts with such particularity that the defendant will know exactly what facts he will have to meet so as to enable him to disprove the correctness of the facts alleged against him".

[2] In the *case in casu*, plaintiff's counsel during submissions, *viva voce* informed the court that the cause of action was based on a fiduciary relationship flowing from a partnership agreement entered into between the parties as evident by annexure "A", attached to the particulars of claim. He relies on paragraph 3 of the particulars of claim which is set hereinunder. He further cites Harms *supra* as authority on the issue of a claim for account *viz.* that first there has to be delivery of an account, followed by debate and then payment. It was his contention that as the prayers so outline, the defendant ought to be informed therefore that the ground for the action is emanating from the fiduciary relationship which is as a result of the partnership agreement.

The particulars of claim reads as follows:

3.

On or around November, 2010, at Manzini, the plaintiff duly represented by Charles Gakuo and the defendant duly represented by Ndumiso Zwane, entered into a written partnership agreement in terms of which the parties were to engage in the construction of SWADE farm roads for Lots 1 and 2 at Siphofaneni. A copy of the agreement is annexed marked "A".

4.

The material terms of the agreement were:

- 4.1 That both parties would jointly manage the contractual and technical issues, including measurements, submission of certificate, claims variations, materials and resources for the project;*
- 4.2 that the parties would open a joint venture account in respect of which all the proceeds would be paid directly thereto;*
- 4.3 that contra charges for plant and labour would be charged at market prevailing rates and payable to the supplier of such plant;*
- 4.4 that the addendum on plant and labour rates would form part of the agreement;*
- 4.5 that after a consideration of all costs the balance of the monies would be shared equally on a 50/50 basis.*

5.

The parties failed to open a joint venture account.

6.

Defendant received payment in respect of the work done but deposited such payment into its own account thus denying the plaintiff access into the monies for completion of the project.

7.

As a result of the aforementioned plaintiff cancelled the agreement on around December 2010.

8.

In terms of the agreement, the construction was to be completed in January 2011.

9.

Defendant has failed to render to Plaintiff a full account of all the affairs in respect of the said construction supported, where necessary, by vouchers.

10.

Notwithstanding demand, defendant has failed and/or neglected to render any account at all for the conduct of the partnership business.

WHEREFORE Plaintiff prays for an order:

- a) *That Defendant renders a full account of all the partnership transactions for the period between November, 2010 and December 2010, supported by vouchers.*
- b) *Debate of the said account.*
- c) *Payment to plaintiff of whatever amount appears to be due to it upon debate of the account.”*

[3]

The question faced by this court at this stage is not whether there was a fiduciary relationship between the parties or whether annexure “A” is evidence of the same. That is a matter for the merit. The court is seized with ascertaining whether *ex facie* the particulars of claim establishes any cause of action or rather as observed by various authorities, is the ground for calling upon the defendant explicitly set out in the declaration in order to enable the defendant to plead directly without having to speculate.

Harms LTC in **Amler’s Precedents of Pleadings 7th Edition 2009 Lexis Nexis Durban** at page 2 gives a precedent on the averments for a claim of delivery and debate of account. He states:

“2. It was an express [tacit or implied] term of the partnership agreement that the defendant would regularly, and not less than monthly, render to the plaintiff a full account of all the affairs of the aforesaid business which account would, where necessary, be supported by vouchers.

“ 3. Despite demand, the defendant has failed to render any account at all for the period [state period].

It would seem to me from the precedent set out by Harms that the plaintiff ought to state explicitly to the effect that there was a consensus of minds as to the duty to account as indicated in Harms paragraph marked 2 above. As to whether it was tacit or implied, is not the issue at this stage of the proceedings although the plaintiff again should indicate this. The period of intervals of the delivery of the account should also form part of the averment.

On the above premises, it is clear that Plaintiff's particulars of claim falls short of the averments as highlighted by Harms *op cit*. The submission that the prayers for delivery of account and debate are sufficient to inform the Defendant of the cause of action where a partnership agreement has been concluded cannot stand not only on the basis that there is no specific averment but due to the fact that a fiduciary relationship is not the only basis for demanding account and debate. There are other grounds such as emanating from the terms of a contract or statutory provision. The Defendant must be informed therefore which of the three the plaintiff is relying upon in his pleadings.

In the result, the application for an exception is upheld.

The defendant has prayed that should the exception be upheld, plaintiff's action should be dismissed with costs.

However, in **Group Five Building Ltd. v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1993 (2) S.A. 593 A** the court held that:

“In cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of South African Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. Such leave has been granted irrespective of

whether at the hearing of arguments on exception the plaintiff applied for such leave or not.”

I see no good reason why the same approach should not be adopted by our courts as it avoids matters being disposed off on technicalities, thereby according justice to the litigants by tackling the merits of their case.

I therefore make the following order:

1. Application for exception is upheld.
2. Plaintiff is ordered to pay cost.
3. Plaintiff is granted leave to amend his particulars of claim and file the same within three (3) days from date of delivery of this ruling.
4. Thereafter, the matter should take its normal course.

M. DLAMINI

JUDGE

