



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 1582/2012**

In the matter between:

**ELPHAS “MABHAWODI” DLAMINI**

**Plaintiff**

and

**THABSILE MBALI NKOSI**

**1<sup>st</sup> Defendant**

**BHEKITHEMBA MZWAKHE NKOSI**

**2<sup>nd</sup> Defendant**

**KHANYISILE NOMSA NKOSI**

**3<sup>rd</sup> Defendant**

**SIBUSISO CHARLES NKOSI**

**4<sup>th</sup> Defendant**

**THAMSANQA EDWARD NKOSI**

**5<sup>th</sup> Defendant**

**NTOMBIKAYISE ROSEMARY MANANA**

**6<sup>th</sup> Defendant**

**GCINAPHI NONKULULEKO NKOSI**

**7<sup>th</sup> Defendant**

**THABISO FAKUDZE**

**8<sup>th</sup> Defendant**

**BHEKI HLATSHWAKO**

**9<sup>th</sup> Defendant**

**Neutral citation: *Elphas “Mabhawodi” Dlamini v Thabsile Mbali Nkosi and 8 Others 1582/2012 [2013] SZHC 98 (3<sup>rd</sup> May, 2013)***

**Coram:** M. DLAMINI J.

**Heard:** 15<sup>th</sup> April 2013

**Delivered:** 3<sup>rd</sup> May 2013

*Action proceedings – citation of trustees – failure by plaintiff to indicate N.O. (nominee officii) against name of trustees – implications thereof – failure to cite trust.*

**Summary:** The plaintiff instituted action proceedings against the defendant. He cited the trustee but did not indicate in the citation that they are sued as trustees. He also did not cite the trust upon which the defendants are trustees. The defendants raised a special plea on those grounds calling upon the court to dismiss plaintiff's action.

[1] Two issues are for determination herein. Firstly, whether it should be held against plaintiff for his failure to indicate on the citation of the defendants that the defendants are sued in their *nominee officio* capacity? Secondly, whether it is necessary for the plaintiff to cite the trustee?

[2] Defendants have submitted that as plaintiff has described the defendant in the declaration as having been sued in their capacity as trustees, it was peremptory that when they were cited, the inscription N.O. be inserted against their names. It was further submitted on behalf of defendants, that the trust – Nkhosi – Dlamini Trust – ought to have joined. The non-joinder of Nkhosi- Dlamini Trust will result in the miscarriage of justice as the Trust has direct and substantial interest in the matter. In *casu*, this

submission holds more weight because the Trust has properties, including immovable which do not belong to the trustees.

[3] Both issues raised by defendants can easily be dealt with by an answer to one question viz. is a trust a legal *persona* in our law? If the answer is to the positive, then the special plea ought to succeed. As to whether the action should be set aside or an amendment be granted with or without costs is then a question for determination as well. If the answer is in the negative, the special plea should be dismissed and the action proceeding by plaintiff be allowed to be prosecuted.

[4] **Mariola and Others v Kaye – Eddie N.O. and Others 1995 (2) S.A. 728** is a *classicus* case on legal proceedings by and against trust and trustees.

[5] **His Lordship Labuschagne J.** hearing this matter as an appeal held at page 731:

*“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 trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein”*

[6] In **Rosner v Lydia Swanepoel Trust 1998 (2) S.A. 123** the court, applying this principle of the law that a trust is not a legal *persona*, allowed the plaintiff who had sued the trust to amend its pleadings by citing the

trustees. The court held that the reason for allowing the said amendment was because a trust lacks a legal personality.

[7] The learned **Judge Mamba J.** in **Siboniso Clement Dlamini N.O. v Deputy Sheriff Hhohho region and Another Case No. 30/2008** put the issue at rest when he held at page 6:

*“The general legal position as stated by applicant regarding the locus standi of a trust to sue and be sued is correct; that the trustee and not the trust – which is a discrete institution – must be cited.”*

[8] Now that I have demonstrated that it is settled law that a trustee is not a legal *persona* it follows that it is unnecessary or not peremptory that a trust should be cited in legal proceedings. I use the words not necessary or peremptory because where for instance a trust ventures into business and trades in its name or other name a litigant may cite the trust or the name under which it trades as that is the name of the business displayed to the public. This position finds support in **Cupido v Kings Lodge Hotel 1999 (4) S. A. 257.**

[9] I now turn to the second issue that *ex facie* the defendants are sued in their personal capacity

[10] The plaintiff in both the combined summons and particulars of claim has described all the defendants as:

*“cited herein in her /his capacity as Trustee of Nkhosi – Dlamini Trust.”*

[11] Subsequent to receipt of the combined summons defendants by further particulars requested to know as to under what capacity the defendants were sued. The plaintiff stood his ground that they are cited in their capacities as trustees of the Nkhosi-Dlamini Trust.

[12] This was in line with the *dictum* by my brother **Mamba J.** in **Siboniso Clement Dlamini N, O. v Deputy Sheriff – Hhohho Region & Another Case No.30/2008** who wisely held at page 5:

*“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.”*

[13] For the above reason, the defendants knew from the onset that they were sued in their capacities as *nomine officii* of Nkhosi-Dlamini Trust. Why they decided to move the special plea is not clear. That *ex facie* the summons they are not sued in their official capacity is correct. However, this argument goes as far as form and does not attack substance. Surely this court cannot entertain matters of style or the so called technicalities as propounded in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal Case 23/2006**. I must point further on this issue as cited over and over by our courts, the words of his **Lordship Innes C. J.** in **Geldenluys and Neethling v Benthin 1918 AD 426** at 441 that:

*“after all courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advice upon differing contentions, however important.”*

[14] In as much as I agree that it is practice or rule of procedure that the initials N. O. will be placed against the name of an individual who appear *nomine officii*, however it should be noted as was the case in **Trust Bank Bpk v Dittrich 1997 (3) S. A. 740** where the court held:

*“The court does not encourage formalism in the application of rules. The rules are not an end in themselves to be observed for their own sake. They are provided to clear the inexpensive and expeditious completion of litigation before the courts.”*

[15] For the above reasons the following orders are entered:

1. The special plea is dismissed.
2. 4<sup>th</sup> defendant is ordered to pay costs in respect of his special plea.

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**M. DLAMINI**  
**JUDGE**

**For the Plaintiff : Mr. S. Mavimbela**

**For the Defendants: Mr. H. Mdladla**

