IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO: 1943 /2016

In the matter between:

LUSA INVESTMENTS (PTY) LTD. PLAINTIFF/RESPONDENT

AND

MINISTRY OF EDUCATION AND TRAINING 1ST DEFENDANT/1STEXCIPIENT

THE PRINCIPAL SECRETARY-MINISTRY

OF EDUCATION AND TRAINING 2ND EFENDANT/2NDEXCIPIENT

THE ATTORNEY-GENERAL 3RD DEFENDANT/3RDEXCIPIENT

Neutral Citation: *Lusa Investments (Pty) Ltd. vs. Ministry of Education and Training Case No. 1943/16 [2017] SZHC (37) (February 2017)*

Coram: MLANGENI J.

Heard: *22 February 2017*

Order made: *22 February 2017*

Judgment Delivered: 28February 2017

Summary: Civil Procedure – proceedings against the Government of Swaziland in terms of the Government liabilities Act 1967.

Plaintiff issued summons against the Defendants for debt and allowed the Defendants ten (10) days to file Notice to defend, in breach of Rule 19 (2) which stipulates a minimum of twenty (20) days. Defendants filed Notice to defend on the 23rd day after service of summons, a step the Plaintiff regarded as irregular and filed a rule 30 application.

Subsequent to the Notice to Defend the Defendants raised an exception on the basis that the Defendants have no locus standi to sue and be sued. Plaintiff took the point that this step was also irregular in that lack of locus standi is not within the parameters of Rule 23 (1).

Held: Defendants' Notice to Defend, having been filed on the 23rd day after service of summons, was not an irregular step.

Held, further, that it is permissible to raise lack of locus standi by way of an exception.

RULING ON RULE 30 APPLICATION, EXCEPTION

HISTORY OF THE MATTER

[1] On the 4th November 2016 the Plaintiff, by way of (simple) summons, instituted proceedings against the three defendants for payment of a

sum of E981, 198-00 alleged to be owing, due and payable in respect of goods sold and delivered. In terms of the summons the defendants were required to file Notice of intention to defend within ten (10) days of service of the summons should they wish to oppose the action. The ***'dies'*** allowed to the defendants fell far too short of the requirements of Rule 19 (2) of the High Court rules in that the defendants, being Government agencies, are in terms of the said rule, to be allowed ***"no less than twenty days after service of summons"*** to file Notice of Intention to defend if they so wish. It is my considered view that this shortened 'dies' is the genesis of the Plaintiff's hurdles that have unfolded in this matter, as will become apparent in this ruling.

[2] On the 9th December 2016 the Attorney-General served a Notice of Intention to defend upon the Plaintiff's Attorneys. It is common cause that this event occurred twenty-three (23) days after service of the summons. According to the Plaintiff this was out of time, and interestingly, a Notice of Set Down for Default Judgment dated 13th December 2016 conclusively suggests that the Plaintiff was now calculating the 'dies' upon twenty days rather than the ten days specified in the summons. What this tells is that at some point in time the Plaintiff did become aware that the defendants were entitled to at least twenty days notice rather than ten. It is apparent from the

record that the default judgment was not pursued, presumably because at that stage the Notice to Defend was already filed.

[3] Subsequently the Defendant's Attorney filed a Notice of exception on the following terms:-

> ***"1. The Plaintiff/Respondent has cited and joined the Ministry of Education and Training, the Principal Secretary Ministry of Education and Training and the Attorney-General as legal representative.***
>
> ***2.1 The Ministry of Education and Training and the Principal Secretary are not body corporate with power to sue and be sued in their own names.***
>
> ***2.2 The Attorney-General qua legal representative has no power to sue and be sued.***
>
> ***2.3 In terms of the Government Liabilities Act 1967 proceedings against the Swaziland Government are taken against the Attorney-General in his nominal capacity as such.***
>
> ***3. In the premises the Defendants/Excipients have no locus standi."***

[4] Faced with the exception, the Plaintiff responded by filing an application in terms of Rule 30, alleging that the Defendants' Notice to defend was an irregular step on the basis that it was filed out of time and no condonation was sought and obtained; the exception on the

basis that it was outside the parameters of Rule 23. Rule 23 (1) sanctions an exception in only two specific instances – i.e. ***"where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence ---"***

IRREGULARITY IN RESPECT OF NOTICE TO DEFEND

[5] The Defendants submit that the Plaintiff, as *dominus litis*, should have specified a date upon which the Notice was to be filed, such date being no less than twenty days after service of the summons. Legal practitioners are aware that such date is based upon estimation of when the process is likely to have been served, allowing a certain margin of error. There is no doubt that had the Plaintiff been alive to the required '***dies'*** at the time of issuing the summons it would certainly have done better. For instance, it could have stipulated that Notice to Defend is to be served and filed on or before the 7th December 2016 if such date was after the twentieth day after service of the summons. The Plaintiff's *ineptitude* could well give a Defendant an indefinite number of days, as long as it is "no less than twenty days",

[6] In its Heads of Argument the Attorney-General puts its case in the following terms:-

> ***"3. I submit that there is a difference between "not less than" and "within". Not less than twenty days means the twentieth day is the earliest day on which the action must be performed. Within twenty days means the twentieth day is the last day on which the action must be performed."***

[7] My conclusion is that by failing to give a proper date for the filing of a Notice of Intention to defend the Plaintiff is the author of its own troubles. It cannot place them on the defendant's doorstep for filing the Notice on the 23rd day – only two days after the minimum allowed. The Plaintiff's argument that the Defendants ought to have filed the Notice ***"on or before 6th December 2016"*** is erroneous, as it presupposes the need to file within twenty days, which is not the case. I am of the view that in the circumstances the Attorney-General was sufficiently diligent, and Rule 30 does not apply.

IRREGULARITY OF EXCEPTION

[8] The essence of the Defendants' case is that the Defendants who are cited have no *locus standi in judicio* – i.e. they do not have capacity to sue and be sued. They are not legal entities. The Plaintiff, while not denying this momentous argument, avers that an exception is improper, and therefore irregular, in that the facts of the matter are outside the scope of Rule 23 (1). It is settled that traditionally, lack of *locus standi*, like lack of jurisdiction, are raised in the form of a special plea or an objection or point of law *in limine*. In that manner the issue is dealt with as a preliminary one, before going into the merits of the matter, the advantage of doing so being that the matter may be disposed off without delving into the merits, and so avoiding unnecessary legal costs.

[9] But then the law grows, and it has to grow in order to respond to new socio-economic demands. Remarks by His Lordship Masuku A.J.A. (as he then was) in the case of **SATELLITE INVESTMENTS (PTY) LTD v JOSEPH DLAMINI AND TWO OTHERS**[1], are apposite. In that matter His Lordship was dealing with Section 29 of the Employment Act 1980 which lists several characteristics in the workplace that would amount to discrimination by an employer against an employee. His Lordship rejected the argument that the instances therein listed were

[1] Industrial Court of Appeal Case No. 04/2010

exhaustive of possible grounds of discrimination. In language that leaves nothing to doubt, His Lordship had this to say[2]

> ***"----- society throws up a vagary of new and unprecedented situations that the Legislature, in all its manifold wisdom would not have anticipated ----"***

and proceeded to state that the courts cannot turn a blind eye on discriminatory circumstances for the only reason that it is not mentioned in the Act in question. I note that in this instance the court was dealing with an Act of Parliament; in this matter we are dealing with a mere rule of court.

[10] The recent case of **SWAZILAND GOVERNMENT v MFANUZILE VUSI HLOPHE[3],** a Supreme Court decision, puts the argument of the Plaintiff to eternal rest. At paragraph 19 of the judgment, per S.P. Dlamini J.A.,

> ***"However, there is a plethora of authorities that support the argument by Appellant that an exception may be competent even when based on grounds not listed under Rule 23 (1) and that the listed grounds ---- are not exhaustive."***

The Honourable Court relied on, among others the case of **ANIRUDH v SAMDEI AND OTHERS[4]** where the issue was whether an exception was competent on the ground of non-joinder. The court upheld the

[2] At paragraph 25 of the judgment, *supra*.
[3] (20/20160 [2016] SZSC 38
[4] 1975 (2) SA 706 (N)

exception despite the fact that non-joinder was not listed in the rule in question.

[11] While I fully defer to the reasoning articulated above, courts should guard against a situation where all special pleas, objections and points of law are swallowed up by exceptions because with that, some exciting aspects of our adversorial litigation could be lost, forever.

[12] It remains for me to deal with one other matter, if only for the avoidance of doubt. In proceedings against the Government of Swaziland it is peremptory to cite the Attorney-General as nominal defendant[5], and not as legal representative. As a matter of practice, how often does a litigant cite a legal representative even before the legal representative is instructed to act upon the matter? Whatever doubt may have existed, Justice Shabangu A.J. (as he then was) put finis to it in the matter of **SOPHIE ZWANE v THE ATTORNEY-GENERAL AND ANOTHER[6].**

[13] Attorney Mr. M. Dlamini on behalf of the Plaintiff submitted that in the event that I hold in favour of the Respondents, rather than dismiss the

[5] Government Liabilities Act 1967, s Z.
[6] High Court Case No. 2689/2003.

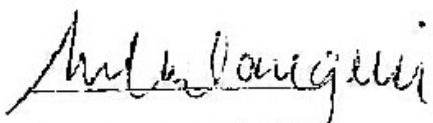
action I should grant leave to the Respondent to amend its papers as may be required. This, coming as it did at the tail end of legal submissions, poses the problem that Attorney Mr. M. Vilakati for the Respondents did not have an opportunity to deal with it. But the other aspect is that the Plaintiff, faced with the real issues raised by the Attorney-General in the pleadings had ample opportunity to take remedial action, including withdrawal of the proceedings or amendment.

[14] It is my view that an amendment of the (simple) summons would be quite cumbersome. This is over and above the fact that the Plaintiff ought to have done better in the first instance.

[15] In the totality of the issues canvassed before me in this matter, I came to the conclusion that –

15.1 The Rule 30 application is dismissed with costs.

15.2 The exception is upheld with costs.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR PLAINTIFF: **ATTORNEY MR. M. DLAMINI**

FOR DEFENDANTS: **ATTORNEY MR. M. VILAKATI**