IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Civ. Appeal No. 14/2001

In the matter between

GEORGE SOPHOCLEOUS Appellant

And

SAM SOPHOCLEOUS Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For Appellant

For Respondent

JUDGMENT

LEON, JP
In case No. 2071/99 the applicant was the defendant and the respondent the plaintiff. (It will be convenient to refer to the parties as the applicant and the respondent respectively.)

The applicant sought the following order in the Court a quo:

1. That the Court order dated 27 October 2000 being Annexure "E" to the affidavit of Samuel Sydney Earnshaw be set aside.

2. That all proceedings pursuant to the aforesaid invalid Court order be set aside.

3. That the respondent (plaintiff) and all attorneys acting on his behalf be ordered to return forthwith to the applicant (defendant) all documents, including copies made thereof and in the possession of respondent (plaintiff) and his attorneys or any parties holding same on his behalf.

4. Costs against the respondent (plaintiff) but only in the event of his opposing the relief sought herein.

There followed a prayer for alternative relief.

The application was dismissed with costs by the High Court and it is against that dismissal that this appeal is brought.

The order which was sought to be set aside appears as Annexure "E" to Mr. Earnshaw's affidavit.

The case number is given as Civ. T 2071/99 and the parties are referred to as follows: SAM SOPHOCLEOUS Applicant

And

GEORGE SOPHOCLEOUS 1st Respondent

MAUD SOPHOCLEOUS 2nd Respondent

SLOTTO (PROPRIETARY) LIMITED 3rd Respondent

The following order was granted:

"1. The defendants shall produce the documents requested in plaintiff's Notice in terms of Rule 35(4) dated the 22nd August 2000 or state on oath that the said documents are not in possession within ten (10) days of the granting of this order. "

Although the order was purportedly granted on 27 October 2000 it was signed on 31 October 2000 but nothing turns on that.

That order was granted (according to the citation) in case number 2071/2000 and it was granted against three defendants, namely, George Sophocleous, Maud Sophocleous and Slotto (Proprietary) Limited.

However, it appears from Mr. Earnshaw's affidavit, in case No. 2071/2000 there was only one defendant namely George Sophocleous.

In another matter (case No. 1908/2000) the present respondent was the applicant therein and in that case there were indeed three respondents namely George Sophocleous, Maud Sophocleous and Slotto (Pty) Limited.

In error, the respondents' attorneys Millin & Currie in case No. 2071/99 sought discovery against the three defendants in the other action on 10 November 1999. Mr. Earnshaw did not notice the error and mistakenly complied with the order of 31 October 1999 which ought never to have been granted as the second and third defendants were not parties to the action in case 2071/99.

It appears from the affidavit of Mr. Earnshaw that what is described in the judgment of the court a quo as "a comedy of errors" was caused by the mistake of Millin & Currie and of Mr. Earnshaw himself.

Mr. Earnshaw sums up the position as follows:-

1. The error with regard to the caption and citation relating to "second and third respondent" as parties in case 2071/99 is a mistake common to both parties.

2. At the time of the filing of the incorrect documents and the granting of the aforesaid order neither firm of attorneys realised that persons who were not parties to the action had been incorrectly cited.

3. The order sought to be set aside was granted per incuriam against parties who are not joined

in the action and the order is invalid.

4. Documents discovered and delivered were discovered and delivered by mistake and fall to be returned.

The respondents having given notice of intention to oppose, filed a document headed: "PRACTICE NOTE: RESPONDENT" and signed by his counsel. Paragraph 2 thereof reads as follows:

"OPPOSITION

The application is fatally defective in form and substance. The Notice of Motion does not comply with Rule 6(9). There is no certificate, or allegations in respect of urgency. The relief sought is misconstrued and the proper application would have been one for rescission to the extent that the citation of the parties in the order be corrected.

In terms of Rule 6(12)(b), the Respondent need only deliver its Answering Affidavit by the 2nd April, 2001. Should these points in limine not be upheld, the Respondent will file further papers in due course, if necessary."

In the event the respondent did not file any further papers for the point in limine was upheld.

The Court a quo accepted the correctness of Mr. Earnshaw's affidavit after inspecting the Court file. However, the court held that the manner in which the application was brought was defective in that it did not comply with rule 6(9). The proceedings were brought as if the application was an ex parte application by way of the "short form" (rule 6(5)) instead of the "long form" (Rule 6(9)).

The Court a quo, having found that the use of the short form did not necessarily visit the application with nullity (Mynhardt v Mynhardt 1986(1) SA 456(T) at 464A), then went on to refer to the unreported judgment of MASUKU J in Ben M. Zwane v The Deputy Prime Minister & Another case No. 624/2000 where there had been non-compliance with the rule in question and no application for condonation had been made. Having emphasized the importance of the rules and the right of the respondent

to take the point and the fact that no application for condonation had been made, MASUKU J went on to say:

"The Respondent is perfectly entitled to raise this point and help the court set the compliance with the requirements of the rules in proper perspective.

This can only be done if this court will refuse to entertain matters which are not exparte but where the use of Form 3 has been jettisoned, less still, those cases where no condonation for dispensing with Forms is prayed for. This will be so even if the matter is urgent. It is important to comply as far as practicable in the circumstances with the requirements of form 3. The courts of the Republic of South Africa, which has Rules in pari materia with ours, correctly rendered this practice unacceptable and it is obedience to our Rules that dictate that we should adopt a similar stand as the South African courts without further delay."

I do not understand the aforementioned remarks to lay down an inflexible rule for regard must

always be had to the circumstances of a particular case.

Rule 6(9) provides that:

"Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 3 of the first schedule and true copies of the notice, the supporting affidavits and all the annexures thereto, shall be served upon any party to whom notice thereof is to be given. "

It appears from the judgment of the Court a quo that the applicant's attorney conceded that the wrong form had been used but applied from the Bar for condonation and further contended that the respondent was not prejudiced and could have applied for the proceedings to be set aside as irregular.

Having referred to the argument of the applicant's attorneys and his application for condonation the court a quo said this:

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"For this court to endeavour to cure the various mistakes inform, procedure and citation of parties would not he a proper approach. The rules are specifically in place to determine the manner in which relief is to be sought during the course of litigation. To deviate from the rules require sufficient justification , which I do not find to be the case in the present issue.

In the event, the application.... is dismissed, with costs. "

On 17 May 2001 the applicant filed a notice of appeal. On 3 October 2001 the respondent's attorneys Millin & Currie filed a notice in terms of rule 41(2) abandoning the said judgment of 31 October 2001 in so far as it requires Maud Sophocleous and Slotto (Pty) Ltd to produce any of the documents requested by the plaintiff in terms of rule 35(4) dated 22 August 2001.

It is contended on behalf of the appellant that where an applicant uses the short form of notice (designed for ex parte applications) in circumstances where the long form is appropriate this will not necessarily result in the notice of motion being a nullity which cannot be condoned.

Herbstein and Van Winsen: The Civil Practice of the Supreme Court (4th edition) p 351
Mynhardt v Mynhard 1986(1) SA 456

It is further urged that where the proceedings are interlocutory in nature and in content there is no prescribed form of notice of motion for such applications and that the somewhat cumbersome procedure laid down in Rule 6(9) need not be followed where the parties are already litigating. The practice is to use a short form of notice of motion citing the respondent.

Herbstein & Van Winsen (supra) at p 351

Muller v Paulsen 1977(3) SA 206(E) at 208

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In her heads of argument Ms van der Walt for the respondent took certain points in limine and, in the alternative, addressed argument on the merits.

However when the appeal was called Ms van der Walt stated from the Bar that she was unable to

advance any argument in support of the judgment. In my view Ms van der Walt exercised a wise discretion. The judgment takes too rigid a view of the Rules of Court because regard must always be had to all the relevant facts and circumstances of each particular case . Rules of Court, important as they are, should not be regarded as if they are the Ten Commandments. Indeed it has been held that Rules of court should be interpreted so as to provide for the expeditious disposition of litigation. (see Muller v Paulsen 1977(3) SA 206(E) at page 208E).

Furthermore, and in any event, there is authority that, where the parties are already litigating the long form need not be followed and the short form may be used. (see The Civil Practice of the Supreme Court of South Africa (4th edition), Herbstein and Van Winsen) page 352; Muller vs Paulsen (supra); Yorkshire Insurance Company Ltd vs Reuben 1967(2) SA 263(E) at 265 F - H.

I am firmly of the opinion that the Court a quo was wrong in dismissing the application. In this regard I have not overlooked the fact that an application for condonation (which appears to have been unnecessary) was made from the Bar and not on application.

This is a most unfortunate case which, in my opinion, should have been settled a long time ago. When Counsel were asked about this we were informed by Mr. Kades for the appellant that the respondent, notwithstanding the abandonment of part of the order, had not returned the documents which had been wrongly discovered. An undertaking to do this forthwith was given by Miss van der Walt who explained that her attorneys were merely acting as correspondents for the respondent's attorneys in Johannesburg.

Miss van der Walt also abandoned all the points in limine which she had taken with respect to the appellant's heads of argument and the appeal itself.

It follows that the appeal must be allowed. There seems to be no reason why the usual rule should not be followed and the respondent must pay the costs of appeal.

With regard to the costs in the Court a quo I was of the view that, as both sides were to blame for what had occurred, there should be no order as to costs in that Court. However Mr. Kades is correct in drawing attention to the fact that the appellant sought no order as to costs unless the respondent opposed. The respondent wrongly opposed. And Miss van der Walt correctly conceded that in these circumstances the respondent must pay the appellant's costs in the Court a quo.

In the result the appeal is allowed with costs and the judgment altered to read "application granted with costs ".

R.N. LEON, JP

I AGREE

P.H. TEBBUTT, JA

I AGREE

C.E.L. BECK, JA

DELIVERED this. 10th.....day of June, 2002