IN THE COURT OF APPEAL OF SWAZILAND

CIVIL CASE NO.17/2003

In the matter between:

TOZITHWALA Appellant

And

ESTER FUNANI NKAMBULE N.O. Respondent

CORAM :BROWDE J.A.

STEYN J.A.

BECK J.A.

For the Appellant:Mr J.I. Waring

For the Respondent :Ms N.E. Gwiji

JUDGMENT

BROWDE J.A.

In June 2003 the applicant filed a notice of appeal against a judgment of Maphalala J. that was delivered in May 2003. However, before the record of the trial could be transcribed and lodged the

Court of Appeal did not sit from November 2002 until November 2004. Only thereafter was the record of the trial transcribed and lodged. There is now before us an application for condonation of the late filing of the record. The application is understandably not opposed. It is clear that trie delay in preparing and lodging the transcript of the trial was not due to any fault of the applicant or her attorneys and the condonation that she seeks is therefore granted.

The appellant was the unsuccessful plaintiff in an action in which she claimed payment by the respondent of the sum of El34 900, being the total sum of monies that the appellant allegedly contributed towards the purchase of various assets for a partnership between the respondent's husband and the appellant. That alleged partnership existed for some 15 years until it was dissolved in September, 1995 by the death of the respondent's husband. The respondent is the duly appointed executive in the deceased estate of her late husband and the appellant alleges that the respondent is in possession of the assets of the dissolved partnership.

The respondent defended the action for payment by her to the appellant of El34 900. She denied that a partnership between her late husband and the appellant ever existed, and she denied that any monies had ever been paid by the applicant towards the purchase of assets for the partnership.

Not only did the respondent oppose the appellant's claim, she also instituted a counterclaim against the appellant for the return to her by the appellant of various personal effects of the respondent's deceased husband which the respondent alleged are in the appellant's possession, or for payment to her of their alleged total value amounting to E28 230.00.

The trial court dismissed the appellant's claim with costs. It also dismissed the respondent's counterclaim, but made no order as to the costs of the counterclaim. One of the reasons that was given for dismissing the appellants claim was that the appellant had contracted a customary law marriage with the deceased when he was already married under the civil law to the respondent, with the result that the appellant's customary law union was unlawful. That in the trial court's view, resulted in a situation that was contra bonos mores, and by reason of the principle that ex turpi causa non oritur actio the appellant could not be heard to rely on an alleged business contract of partnership between herself and the deceased.

No such contention was ever raised by he respondent and, with respect to the learned trial judge, it was clearly wrong to have stigmatized a contractual business relationship between the applicant and the deceased as turpitudinous simply because their customary marriage was legally incompetent.

Although Ms Gwiji. who appeared before us on behalf of the respondent, did not concede that the learned judge had erred in this respect, she supported it only very tentatively. It was not included in her heads of argument, however, and it is clearly insupportable.

Apart from the above erroneous reason for dismissing the appellant's claim, the trial judge found that the alleged partnership had not been proved. The correctness of that finding is dubious in the light of an apparently genuine document in which the existence of the partnership was recorded and which had been disclosed as a document upon which the Appellant would rely in her discovery affidavit.

The witness Manene Sukati, who gave evidence in the court a quo, stated that the contents of the

document had been dictated to her by the deceased shortly before his death, and that at his request she had typed the document. On completion the document was signed in her presence by the deceased. It was also signed by herself and by the appellant. This evidence was not seriously challenged in cross-examination and it was not suggested to the witness that she was not telling the truth regarding the crucial facts that the deceased dictated and subsequently signed the document. Ms Gwiji submitted that because the appellant relied, in her pleadings, on an oral agreement the court should have placed no reliance on the written document. This submission overlooks the fact that by dictating the terms of the agreement to the witness, and then appending his signature to it, the deceased was confirming in tangible form the oral agreement relied upon by the appellant. There is, therefore, no substance in the submission that the document should be disregarded.

In terms of her pleadings it was an express term of the partnership relied upon by the appellant that "'upon termination the assets of the partnership would be shared equally between the partners." (See para.6 of her Amended Particulars of Claim). As to what the assets of the pannership were on 3'[J] September, 1995 when me partnership, assuming ic existed, was dissolved by the death of the respondent's husband, is not clear from the evidence. The fact, if it be a fact, that the appellant from time to time during the 15year existence of the partnership, made payments totaling El34 900 towards the purchase of various items for the benefit and use of the partnership, affords no evidence whatsoever as to which of those items still formed part of the assets of the partnership at the date of dissolution, nor as to what the value might have been in September, 1995 of such of those items as may still have been in the partnership's possession. Proof of these facts was a prerequisite for her to obtain the relief she sought.

As appears from the aforegoing the learned judge dismissed the appellant's claim as a result of two

conclusion to which he came - firstly that the "written partnership deed is highly suspect" and secondly that the alleged partnership agreement was contra bonos mores and therefore unenforceable. I have already stated why the latter conclusion is, fallacious. As to the former the suspicion of the learned judge appears to lose sight of the evidence of the witness Sukati to which he does not refer at all. Had the learned judge accepted the existence of the pannership agreement as in my opinion he should have done, the only justifiable basis for a finding against the appellant would have been her failure to prove what assets of the partnership were still available for distribution and the value thereof at the time of the deceased's death. The evidence in that regard was, save for one item, not clear enough to justify the appellant's claims to her share of the partnership assets or their value. Because of this lack of clarity in the evidence the learned judge should have considered whether it was proper to dismiss the appellant's claims or whether, in the circumstances of the case, the proper judgment should have been one of absolution from the instance. In considering this question it must be borne in mind that one of the items claimed by the appellant to be an asset of the partnership and which, if properly proved, would probably result in the appellant deriving a benefit from the deceased's estate, is the plot referred to as Stand No.996/1 Sidwashini. If given the opportunity the appellant may well adduce evidence which would cast sufficient light on the precise history of the fixed property in question and its value to justify her claim. She may also be able to discover further evidence regarding the other assets of the partnership to which she laid claim in her evidence. This would be material to the real dispute between the parties which was not properly before the Court a quo. In the case of SHAHMAHOMED v HENDRICKS

HENDRICKS AND ANOTHER 1920 AD 151 the court altered, on appeal, a judgment in the Court below of judgment for the defendant to one of absolution from the instance. Innes C.J. at p 160 said;

"Under all the circumstances it seems to me that the order which the Provincial Division should have made was an order of absolution from the instance. That would allow the plaintiff to clear up the question of ownership, if he is minded to do so; or it would leave it open to either side to raise the point of the validity of the Trust in a competent court. I do not say this however, with the view of encouraging fresh litigation; on the contrary it is to be hoped that the parties will be able to settle their differences without further recourse to law."

The principle is clear. If there is a reasonable likelihood that the plaintiff may find the evidence which would result in the Plaintiff succeeding in a claim which has not been proved to the satisfaction of the court, the proper judgment is one of absolution from the instance. That applies in casu and I am of the view that the correct judgment of the court a quo should have been one of absolution from the instance with costs.

If the judgment is altered accordingly, the question arises regarding the proper order which should be made in respect of the costs of appeal. In Shahahomed's case (supra) where a similar order was made on appeal Juta A.J.A. said at page 171.

"Now the mere change from judgment for defendants into one of absolution of instance of appeal is not such an alteration as would necessarily entitle the appellant to costs. Where for example there seems to be no probability of the plaintiff having anything further to advance or of giving further evidence, such an alteration is of little avail, if any, and is really one only of form. But that is not the case here. The main and real dispute has not been properly before the Court and the plaintiff should be afforded an opportunity of bringing it forward for decision, and therefore the alteration in the judgment which was

for defendant and might debar the plaintiff from further proceedings, into one of absolution, is not merely one of form."

The appeal in that case was upheld with costs and I am of the view that a similar order should be made in this case.

See too Oliver's Transport vs Divisional Council. Worcester 1950 (4) SA 537 (C) at 544/545.

During the course of his submissions to us Mr Waring on behalf of the appellant asked that the rights which would flow from a judgment of absolution should include protection against the possible alienation of the property in question by respondent who is the executrix of the estate of the deceased. In view of the inimical attitude of the respondent towards the appellant as expressed in the evidence the apprehension of such alienation is a reasonable one. I am of the view therefore, that we should protect the rights of the appellant by a temporary interdict pending further action in this matter as set out below.

The appellant has also appealed against the failure of the trial court to have ordered the costs occasioned by the unsuccessful counterclaim to be paid by the respondent. With regard to those costs the trial judge gave no reason for not making the normal order that costs follow the result, and the appellant's dissatisfaction with that omission by the trial court is well founded. That aspect of her appeal is therefore allowed together with any costs of appeal that have been occasioned thereby, and the order of the court below with regard to the counterclaim is altered to read the counterclaim is dismissed with costs.

In the result the appeal is allowed with costs and the following order made;-

1. The judgment of the Court a quo is altered to read;

(i) Absolution from the instance is granted to the defendant with costs.

(ii) The counterclaim of the defendant is dismissed with costs.

2. The respondent is interdicted from alienating or in any manner dealing with Lot No.996/1 Sidwashini, pending the institution and subsequent determination of an action which may be instituted by the appellant in respect of the share in the proceeds of the said Lot to which she claims title.

3. The said interdict will fall away and be discharged should the appellant fail to institute the said action and serve the necessary process therefore on the respondent on or before the last day of January 2006.

J. BROWDE, J.A.

I AGREE

J.H. STEYN, J.A.

I AGREE

C.E.L. BECK, J.A.

DELIVERED ON THIS 11th DAY OF NOVEMBER, 2005