

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CIVIL APPEAL NO. 32/2010

CITATION: [2010] SZSC 7

In the matter between

THABO S. MABUZA

APPELLANT

AND

SURETY SERVICES (PTY) LTD

RESPONDENT

CORAM:

RAMODIBEDI, CJ

EBRAHIM, JA

DR. TWUM, JA

HEARD:

22 NOVEMBER 2010

DELIVERED:

30 NOVEMBER 2010

SUMMARY

Insurance claim – The respondent resisting payment on the ground that the deceased's birth certificate was obtained posthumously – The court a quo mero motu dismissing the appellant's claim on the ground that he should have proceeded by way of an action and not motion proceedings – No material dispute of facts on the papers – Appeal upheld with costs.

JUDGMENT

RAMODIBEDI, CJ

[1] The appellant launched a notice of application in the High Court (Masuku J) for an order directing the respondent to pay him E5 000.00 in respect of an insurance scheme between the parties. The learned Judge a quo mero motu raised the question whether the appellant had adopted a proper procedure in proceeding by way of motion proceedings instead of an action. After hearing submissions in the matter, the Judge dismissed the appellant's claim on the ground that he should have proceeded by way of an action and not motion proceedings. This appeal challenges the correctness of that decision.

[2] At the outset it is important to point out that the material facts as contained in the appellant's founding affidavit are not disputed. Thus, for example, in paragraphs 4 and 5 he avers as follows:-

“4.

Sometime during the year 2003, whilst in Mbabane I entered into an insurance contract being a funeral scheme which covers my death and that of my dependants.

5.

It was a material term of the contract that I pay monthly subscriptions to respondents which were deducted from my salary. In turn, respondents were to pay an amount of E5000-00 (five Thousand Emalangeni) as compensation upon my death or the death of any of my registered dependants”.

[3] In paragraphs 7 and 8 of the answering affidavit of the respondent's Administration Manager, Abel Motsa ("Motsa"), the respondent merely said the following:-

"7. AD PARAGRAPH 4 - 5

On or about the 12th February, 2003 at Mbabane the

Applicant duly entered into a written family funeral plan agreement with the Respondent, which was duly represented by its authorized agent, one Hendry Marks. The agreement was entered into at the Mbuluzi Army Barracks.

8. The material terms of the family funeral plan agreement

were inter alia:

8.1 The Applicant would pay a monthly premium (contribution) to the Respondent:

8.2 The applicant would be entitled to make a claim of E5000.00 (five thousand Emalangi) to the Respondent upon the death of a registered dependant.

8.3 The Applicant must provide the full details of the dependants he seeks to benefit under the agreement.

8.4 Proof that the registered person is the deceased would be requested when a claim is made, for the purpose of satisfying the insurer that a claim is in fact for such insured person.

8.5 The Respondent would provide original and certified copies of all required documents when claiming benefits. (Annexed hereto is a copy of the written agreement marked "B").(Emphasissupplied.)

[4] I have underlined the words "when claiming benefits" to indicate my view that the deceased's birth certificate would only be produced when the appellant claimed the benefit referred to in the contract. Indeed it is of utmost importance, in my view, to observe that nowhere does the respondent make a case that it was a material term of the contract that

the deceased's birth certificate had to be produced before she died. On the contrary, it was clearly contemplated between the parties that a birth certificate could be produced posthumously. This view is supported by the respondent's own insurance form which contains the following crucial "special notes":-

"We must satisfy the insurer that a claim is in fact for an insured person. This means we need a certified copy of the Death Certificate, a Completed Claim Form and proof that the deceased was the Registered Person which means we may request a certified copy of a Marriage or Birth Certificate" (Emphasis supplied.)

[5] I have underscored the word "was" to indicate my view that it was plainly envisaged that a birth certificate could be produced after the deceased's death. Indeed, the respondent appears to confirm this view in paragraph 8.5 of Motsa's answering affidavit in which, as indicated above, he deposes as follows:-

"8.5 The Respondent would provide original and certified copies of all required documents when claiming benefits".(Emphasis added.)

Logically, it was in the nature of the insurance scheme between the parties that the appellant could only claim benefits in question after the deceased's death. As per the agreement between the parties then, that was the time for providing the certificate in question.

[6] I am driven to the inescapable conclusion in these circumstances, therefore, that the appellant was not contractually obliged to produce the deceased's birth certificate before her death. Instead, he was only obliged to do so on demand after the deceased's death when claiming the benefits in question.

[7] In dismissing the appellant's application, the learned Judge a quo said the following in paragraph [16] of his judgment:-

"[16]...It would constitute an unwelcome departure from our Rules that I do not know to be followed elsewhere, to allow claims for a debt based on a contract to be applied for on motion proceedings".

In my view, that statement goes too far. It is not in every case that motion proceedings to recover a contractual debt are objectionable. Indeed, I consider that it is undesirable to lay down any hard and fast rules in the matter. Each case must be decided on its own merits and particular circumstances. There may be cases, like the present matter, where there are no real disputes of fact on the papers. In such cases an applicant, as dominus litis, would be perfectly entitled to choose the speedy, less cumbersome and indeed less costly method of proceeding by way of motion proceedings as opposed to an action. This is especially the case where, as here, the respondent does not object to motion proceedings. In casu, as will be remembered, the point was raised by the learned Judge a quo mero motu.

[8] Contrary to the learned Judge a quo's approach in the matter, it is instructive to recall the following apposite remarks of Van Blerk JA in *Da Mata v Otto* N.O. 1972 (3) SA 858 (A) at 865, namely:-

“...But the permissibility of motion proceedings as opposed to trial action is not a question of any difference of character between the various kinds of claim which is being enforced, but a question of the proper method of determination in each case of the facts upon which any claim depends. If the dispute of fact is genuine, and is of such a nature that it cannot be satisfactorily determined without the advantages of a trial, which affords the opportunity of estimating the credibility of witnesses, and observing their demeanour, it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed by the affidavit evidence. In every

case the Court must examine the alleged dispute and ascertain

whether it is of the afore-mentioned kind and not fictitious.

(Peterson v. Cuthbert & Co. Ltd., 1945 A.D. 420 at p. 428, and

Room Hire Co. (Pty) Ltd. V. Jeppe Street Mansions (Pty) Ltd., 1949

(3) S.A. 1155 (T) at p. 1162”.

[9] Similarly, the learned Judge a quo was in my view wrong to rely on Rules 17 (2) and 18 (6) of the High Court Rules for non-suiting the appellant merely on the ground that the subject matter of the suit related to a breach of a contract. Those Rules have nothing to do with applications which are in fact governed by Rule 6 of the High Court Rules. Instead, Rules 17 (2) and 18 (6) govern actions. They provide as follows:-

“17. (1)

(2) In every case where the claim is not for a debt or liquidated demand there shall be annexed to the summons a statement of the material facts relied on by the plaintiff in support of his claim which statement shall, inter alia, comply with rules 18 and 20.

18. (1)

:

:

(6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading”.

[10] On a proper consideration of the foregoing factors, I am satisfied that the appeal should succeed. Accordingly, the following order is made:-

The appeal is upheld with costs.

The matter is remitted to the court a quo for completion on the merits before a different judge.

The costs occasioned by the point raised by the court a quo mero motu in the matter shall be costs in the cause.

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree

DR. S. TWUM

JUSTICE OF APPEAL

For Appellant: Mr. M.C. Simelane

For Respondent: No Appearance