THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No: 48/2011

In the appeal between:

KUKHANYA (PTY) LTD **Appellant**

and

JOMAS CONSTRUCTION (PTY) LTD **Respondent**

Neutral citation: *Kukhanya (Pty) Ltd vs Jomas Construction (Pty) Ltd 48/2011 SZSC 07 [2012] (31 May 2012)*

Coram: **EBRAHIM JA**

MOORE JA

M.C.B. MAPHALALA JA

Heard: **16 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Civil Appeal – dismissed – summary judgement – rescission of judgement – judgement granted in error meaning – representation of company usually by a legal practitioner – when rule may be relaxed - questionable whether rule still exists or whether there is a need for it to exist (obiter).**

EBRAHIM J.A.

[1] The legal practitioners representing both parties appear to have been embroiled in acrimony which so clearly has been overtaken by emotions that regardless of the merits of the application for condonation sought by the one party the other has opposed. In my view the most sensible way of dealing with this appeal is to concentrate on the merits and grant both parties the condonation they seek. The application for condonation is granted to both parties.

[2] The documentation in this matter is, to say the least, very confusing. The parties have been referred to as Plaintiff, Defendant, Applicant, Respondent, Appellant and Respondent in such a manner as to make it very difficult to know which is which. Accordingly, I will call them by name.

[3] It consists of an appeal record, which itself is confusingly arranged, as well as some other documents. Part of the confusion arises from the fact that the documents in the appeal record are not filed in chronological order.

Appeal Record – sequence of events

[4] I will deal with the appeal record first.

[5] The appeal is against a judgment of *Sey J*, in which she dismissed an application, brought by Kukhanya, for rescission of an order for summary judgement granted by *Ota J* in favour of Jomas.

[6] The record shows that Jomas Construction brought an action against Kukhanya in the High Court. The allegation was that Jomas rendered building services and supplied building materials for the construction of a residence. Bills of quantity were to be submitted as the work proceeded. The full amounts due were not paid, and Jomas was demanding the sum of E391 975.29, plus interest and costs.

[7] The summons was issued on 9 August 2011. On 27 August Kukhanya entered appearance to defend. On 10 October Jomas filed its declaration, which included the bills, some 57 pages worth. It is not clear why it was necessary to burden the record with those bills.

[8] On 26 September 2011 a director of Jomas filed an affidavit averring that Kukhanya had no *bona fide* defence. An application for summary judgment was received by Kukhanya's attorney, Mr. Mamba, on 10 October.

[9] It appears that on 26 October summary judgment was granted in favour of Jomas though there is no copy of the court's order in the record.

Application for rescission

[10] Kukhanya then brought an application for rescission. In the application, Mr. Mamba asked for costs on the higher scale and for costs *de bonis propriis* against Jomas's attorney, Miss Boxshall-Smith. Mr. Mamba also filed a certificate of urgency. In addition, he filed an affidavit, in which he seems himself to be confused as to which party was Applicant and which was the Respondent

[11] He also alleged that Jomas was unlawfully represented at the summary judgment proceedings by a director and not by a legal practitioner.

[12] Opposing affidavits were filed on behalf of Jomas on 4 November 2011. Apart from denying any impropriety on the part of Miss Boxshall-Smith, it is mentioned that there had been a Law Society resolution forbidding local legal practitioners to appear in court in Swaziland. It is argued that in the circumstances the judge was correct in allowing companies to be represented by their directors.

[13] A replying affidavit from Mr. Mamba, filed on 9 November, makes further allegations of impropriety against Ms Boxshall-Smith, accuses her of perjury and queries her suitability to be an officer of court.

Allegations of impropriety and unprofessional conduct

[14] The matter was heard on 11 November. Ms Boxshall-Smith, on behalf of Jomas, applied for the striking out of various portions of Mr. Mamba's affidavit, on the basis that the portions constituted scandalous and vexatious matter, that they were abusive or defamatory and that they conveyed an intention to harass and annoy.

[15] In her judgment handed down on 8 November 2011, *Sey J* upheld the application to strike out those portions of Mr. Mamba's affidavit. I consider that she was correct in so doing. The allegations made of professional misconduct were very serious. If there was a basis for them – something on which I can express no view – this was not the forum to air them. If they were true, then disciplinary proceedings would have been the appropriate forum.

Judgment granted in error – meaning

[16] The main issue in the application was whether summary judgment was erroneously granted. Kukhanya's argument was that the Jomas, a company, was not entitled to be represented in court by a director and that the court should, in terms of Rule 42 of the High Court Rules, rescind the order for summary judgment on the grounds that it was "erroneously sought and erroneously granted".

[17] As *Sey J* points out, the overriding criterion in the grant of rescission is that where there is an error by the court, in the sense of a mistake which, had the court been aware of it, would have induced the court not to grant the order or judgment. On the face of it, I would not have thought that the fact that Jomas was not represented by counsel was something of which the court was unaware. It clearly was quite aware of the fact, but overlooked it or condoned it. Was it right to do so?

[18] Counsel representing the appellant submits that summary judgement was granted or a result of a mistake or in which there was a patent error or omission, the "error" consisting of the appearance by a director on behalf of the Jomas. I am satisfied that this was not an "error" in the sense one would normally understand that word: the court was well aware of the situation and decided, in my view correctly, on good grounds, to relax the rule.

[19] I assume that the "rule" still exists, though along with Gower (cited) by Gubbay C.J. in the passage quoted, *supra*, I myself question the point of it. After all, directors can carry out more far reaching acts on behalf of a company without having a legal practitioner being involved (other than in an advisory capacity). Furthermore, I do not accept that Jomas could do nothing when the legal profession was boycotting the courts. How else could Jomas have appeared?

Representation of company other than by legal practitioner

(a) History of rule

[20] It is a well established rule of practice that a juristic person must be represented in the High Court by a legal practitioner. In *Lees Import and Export (Pvt) Ltd v Zimbank (2) ZLR 36 (S)* at, the Supreme Court of Zimbabwe held (*per Gubbay CJ)* considered the history and development of the rule and cited numerous cases from various jurisdictions upholding the rule. The cases include: in South Africa, *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue 1956 (1) SA 364 (A)* at 365B-E; *Ramsey v Fuchs Garage (Pty) Ltd 1959 (3) SA 949 (C)* at 950E-G; *Dormehl's Garage (Pty) Ltd v Magagula 1964 (1) SA 203 (T)* at 205E-F; *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd & Anor 1977 (3) SA 448 (W)* at 449F-G; and In re *Bankorp v California Spice and Marinade (Pty) Ltd & Ors [1997] 4 ALL SA 317 (W)* at 325C-d. In England, *Charles P Kinnell & Co Ltd v Harding, Wace & Co [1918-1919] ALL ER Rep 594 (CA)* at 597H-598B: *Frinton and Walton Urban District Council v Walton & District Sand & Mineral Co Ltd & Anor [1938] 1 ALL ER 649 (ChD)* at 649G-H; *Tritonia Ltd v Equity & Law Life Assurance Society [1943] 2 ALL ER 401 (HL)* at 403C-D at 402E-F; *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd & Ors (1997) 54 Con LR 137(QB)* at 162; and *Radford v Freeway Classics Ltd [1994] 1 BCLC 445 (CA)* at 447c. In the Republic of Ireland, *Battle v Irish Art Promotion Centre Ltd; Battle v Irish Art*

Promotion Centre Ltd 1968 IR 252 (SC) at 253 *in fine*. In New Zealand, Re *G J Mannix Ltd [1984] 1 NZLR 309 (CA)* at 310 at lines 52-54; *Mihaka v Police [1981] 1 NZLR 54 (H)* at 58. In Australian States, Re *Education (Pty) Ltd & the Companies Act [1963] NSWR 1340* at 1341; *Hubbard Association of Scientologists International v Anderson & Anor [1972] VR 340* at 341; and *Bay Marine (Pty) Ltd v Clayton Country Properties (Pty) Ltd (1986) 11 ACLC 326* at 326-327. In Canada, *Banque Nationale du Canada v Atomic Slipper Co Ltd et al (1991) 80 DLR (4th) 134 (S)* at 141 *in fine;* and *Manitoba Ltd et al v Liquor Control Commission [1996] 113 Man R (2d) 64* at para 8; and in Zimbabwe itself, *Pumpkin Construction (Pvt) Ltd v Chikaka 1997 (2) ZLR 430 (H); Diana Farm (Pvt) Ltd v Madondo NO & Anor 1998 (2) ZLR 410 (H),* and *Agramac (Pvt)Ltd v Chisvo & Anor 1991 (2) ZLR 185 (S)* at 186D-F.

[21] The learned Chief Justice concluded:

> "Some of [the] policy considerations may be thought not sufficiently persuasive as to warrant adherence to the Rule. Certainly, the denial of the right of audience to persons who are organs of the company, as distinct from merely agents, is criticized somewhat cynically in *Gower's Modern Company Law 4 ed* at 212 as appearing to 'achieve no useful purpose other than to protect the monopoly of barristers and solicitors'. In my opinion, the rule is too well settled and entrenched in many jurisdictions to allow its validity to be impugned other than upon a contention that enforcement of it may infringe a constitutional right of access to the courts."

[22] It is not necessary here to decide whether the Rule should continue. I will assume that it exists.

(b) When rule may be overlooked

As *Gubbay CJ* pointed out at page 43, one must not overlook –

> "the court's residual power to regulate its own proceedings unless fettered by legislation. And in doing so, in the exercise of a discretion and in the interests of justice, to permit a person other than a legal practitioner to appear before it on behalf of a company; but only if the exceptional circumstances of the case so warrant."

[23] *Sey J* has cited authorities in support of this proposition. I respectfully agree with them. The court clearly has the power to relax the Rule in appropriate circumstances. The boycott of the court by the Law Society was obviously such a situation and it was necessary, in the interests of justice, to allow the appearance by a director on behalf of Jomas. See also *Mittal Steel South Africa Limited t/a vereeniging Steel v Pipechem CC (7072/07) ZAWCHC 55; 2008 (1) SA 640 (C)*.

Did the court err?

[24] The court did not make an error, in the sense of doing something by mistake. It consciously decided, for good reasons, to relax a Rule to procedure. Consequently, I agree that the order for summary judgment was not erroneously granted.

No other meaningful reason appears to have been advanced as to why it would have been just and equitable to grant rescission.

Order for costs on higher scale

[25] The learned judge *a quo*, in dismissing the application for rescission, ordered that Kukhanya should pay the costs on an attorney and client scale. There are numerous grounds upon which costs may be awarded on the higher scale. It is not clear, though, which grounds the learned judge relied on. She did not say. If such grounds exist in this matter, they are not so manifest that this court can safely conclude that the award was proper. Counsel representing the respondent in this court concedes that the learned *judge a quo* erred in awarding costs on the higher scale.

Conclusion

[26] I would dismiss the appeal with costs, including the certified costs of Counsel but order that paragraph 3 of the order of the court *a quo* be deleted and substituted with –

"The Applicant is ordered to pay the costs of this application."

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A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE : _____

S.A. MOORE

JUSTICE OF APPEAL

I AGREE : _____

M.C.B. MAPHALALA

JUSTICE OF APPEAL

For Appellant : Advocate S. Kuny

For Respondent : Adv. J.M. van der Walt