THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No: 18/2012

In the appeal between:

KUKHANYA (PTY) LTD **Appellant**

and

ANZWA INVESTMENTS (PTY) LTD **Respondent**

Neutral citation: *Kukhanya (Pty) Ltd vs Anzwa Investments (Pty) Ltd 18/2012 SZSC 08 [2012] (31 May 2012)*

Coram: **EBRAHIM JA**

MOORE JA

AGIM JA

Heard: **24 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Civil Appeal – dismissed – exception – what amounts to sufficient particulars disclosing cause of action – failure – to follow precedent as expounded in *Amler's Precedents* not fatal – particulars not disclosing cause of action – Pleading - declaration.**

EBRAHIM J.A.

[1] In this matter both sets of attorneys have conducted themselves in the same way as alluded by me in the case of *Kukhanya (Pty) Ltd v Jomas Construction (Pty) Ltd Civil Appeal 48/2011*. Both have sought condonation and both have opposed the indulgence sought by the other. We dealt with the issue in the same way as we did in the above referred to matter. The condonation sought was granted to both parties and they were asked to deal with the merits of the dispute between them.

[2] This is an appeal against the judgment of *Dhlamini J*, in which she upheld an exception by the Respondent in answer to the claim brought by the Appellant.

[3] In its summons and particulars of claim (which effectively formed part of the summons), the Appellant averred that it and the Respondent entered into a partnership agreement in November 2010. In terms of the agreement, the two parties were to engage in the construction of certain farm roads. The partnership agreement (which, for some reason, was called a "memorandum of understanding") set out the arrangements in some detail, including which party was to provide what equipment, labour and so on. It was specifically agreed that the parties would open a joint venture account to be jointly operated by both parties. It was agreed that each would deposit into the joint account the sum of E250 000.

[4] The Appellant alleged that the parties failed to open a joint venture account. The statement of claim does not explain why this omission occurred. The Appellant alleged that the Respondent received payment in respect of the work done but deposited such payment into its own account, thus denying the Appellant access to the monies for the completion of the project. As a result, the Appellant cancelled the agreement in December 2010.

[5] It sought from the Respondent a full account of all the partnership transactions for the period the agreement was in existence, debate of the account, and payment of any sums apparently due upon debate of the account.

[6] The Respondent's reaction was to except to the claim, on the grounds that-

(1) the Appellant failed to state whether or not it carried out or performed all its obligations as set out in the agreement;

(2) although the Appellant stated that it cancelled the agreement, it did not state whether the Respondent accepted such cancellation;

(3) the particulars did not support the orders sought, as they directed the Respondent to perform in terms of an agreement which had been cancelled.

[7] *Dhlamini J* upheld the exception. She held, following the precedent set out in *Amler's Precedents of Pleadings 7 ed* at page 2, that the Plaintiff ought to state explicitly that -

- there was a consensus of minds as to the duty to account;
- whether it was tacit or implied;
- the period of intervals of the delivery of the account.

She found that the summons and statement of claim did not comply with the requirements as reflected in *Amler's Precedents of Pleadings (supra)*.

The purpose of pleadings, as she rightly pointed out at the start of her judgment, is to enable each side to come to trial prepared to meet the case of the other.

[8] The question is, do the pleadings in this case serve that purpose? To my mind, specimen pleadings are undoubtedly very useful in assisting parties to prepare their own pleadings, but the fact that pleadings in a particular type of case do not fully comply with the precedent supplied for such a case does not *ipso facto* invalidate them or make them excipiable.

[9] In this case, the Appellant alleged that there was a partnership. The agreement set out the roles of the partners. The Respondent was to cede all rights to the proceeds of the project and pay the proceeds into a joint account. There were to be regular meetings and accounting. The Appellant alleges that monies were received by the Respondent but not accounted for, and is demanding a full account.

[10] What the appellant did not do however is as the learned judge *a quo* stated in her judgment:

> "The submission that the prayers for delivery of account and debate are sufficient to inform the defendant of the cause of action where a partnership agreement has been concluded cannot stand not only on the basis that there is no specific averment but due to the fact that a fiduciary relationship is not the only basis of demanding account and debate. There are other grounds such as emanating from the terms of a contract or statutory provision. The defendant must be informed therefore which of the three the plaintiff is relying upon in his pleadings."

[11] This approach of the learned judge *a quo* is supported by in *Beck's Theory and Principles of Pleadings in Civil Actions* 6th Edition at page 60 where the following remarks appear:

> "where the plaintiff sues on a contract between himself or herself and the defendant and claims performance of the defendant's obligation to him or her under the contract and where his or her

right to such performance is conditional on the performance by him or her of a reciprocal obligation due by him or her to the defendant, it is necessary that in the declaration the plaintiff should tender performance of his or her obligation to the defendant…

Not only is it advisable to allege the performance of conditions precedent, such as the plaintiff's performance or tender of performance, but it is necessary to do so since it is part of the plaintiff's cause of action. It has to be pleaded specifically, and failure to do so renders the declaration excipiable". (emphasis added)

[12] In *Beck's Theory supra* at page 125 also appears the following passage:

"Every pleading must set out the complete chain of valuable facts relied on by way of action or defence, and the omission of any linking fact must break the sequence and will obviously render the conclusion false. In such a case an exception will be sustained." (emphasis added)

[13] See also *S.A. Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* S.A. 1955, 541 where Caney J. stated at 543H;

"The remaining exception, namely that the declaration is 'bad in law and insufficient in law to sustain the claim for specific performance', is based upon the absence of a tender by the plaintiff to perform, and the absence of an averment that the plaintiff is willing and able to perform, its obligations under the contract alleged by it. There are indeed no such averments in the declaration; the nearest to them, if it can be called near, is an

> averment that the 'plaintiff refuses to accept the aforesaid repudiation by defendant."….
>
> "So far as the declaration shows, contended Mr Friedman, there is nothing to indicate that the plaintiff is willing, nor indeed able, to perform its part of the contract, and unless and until it is, it is not entitled to call upon the defendant to perform its part."

The learned Judge Caney then concluded;

> "I consider that the plaintiff cannot hold the defendant to the contract and demand performance on the part of the defendant unless it, the plaintiff, is willing and able to perform its part of the contract-and that it must aver this in its declaration. Since the declaration fails to make the essential averment, the second exception must also be allowed." (emphasis added)

[14] This is precisely what the appellant should have pleaded in this matter. It is also not apparent to me what the difficulty was for the appellant to explain in his pleadings the roll he played in the partnership. This would have been critical in challenging the granting of the exception but this was not done and in line with what Beck *supra* and what Caney J. stated in the above cited case. I find the failure by the Appellant to do so to be fatal. The learned judge however, granted leave for the appellant to rectify these shortcomings and amend his particulars of claim but instead he chose to appeal the upholding of the exception. This in my view was ill advised.

[15] In my view, therefore, the appellant in this matter must fail in the relief he seeks. He has not pleaded his case in a manner which is sufficient for the respondent to have defended his rights.

[16] In the result the appeal fails and is dismissed with costs.

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A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE **:** _____

S.A. MOORE
JUSTICE OF APPEAL

I AGREE **:** _____

E.A. AGIM
JUSTICE OF APPEAL

For Appellant **:** **Mr. L. Mamba**

For Respondent **:** **Mr. B. Ngcamphalala**