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IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 38/2020**

In the matter between:

POTS CONSTRUCTION AND TECHNICAL SERVICES APPELLANT

And

KUKHANYA(PTY)LTD/GABRIEL COUTO JV 1ST RESPONDENT

KUKHANYA (PTY) LTD t/a **KUKHANYA CIVIL ENGINEERING CONTRACTORS** 2ND RESPONDENT

CONSTRUCOES GABRIEL A.S. COUTO S.A 3RD RESPONDENT

Neutral Citation: Pots *Construction and Technical Services* vs *Kukhanya (Pty) Ltd/ 'Gabriel Couto JV and 2 others. (38/ 2020) [2020} [SZSC 10} (3rd June, 2021)*

CORAM: **S.P. DLAMINI JA**
R.J. CLOETE JA
S.J.K. MATSEBULA JA

DATE HEARD: **20th April, 2021**

DATE DELIVERED: 3rd **June, 2021**

Summary: *Civil Law and Procedure: - Two summary judgments arising from the same cause of action and the principles relating to summary judgment considered; the introduction of a new party who turns out to be the principal litigant by way of Notice of Amendment considered; whether the absence of a resolution authorizing litigation is fatal to the proceedings; whether there was an insurance cover or a deed of suretyship/ co-principal debtor that existed between the parties and the effect thereof; whether the Respondents were legally obligated to seek the relief they sought against' any party other than the Appellant; and whether the summary judgment was appropriate in the circumstances of the matter; - Held that the back to back summary judgments by the Respondent and the allowing of the introduction of a new party who turns out to be the principal claimant by way of an amendment are fraught with procedural defects - Held that the purported insurance cover was in fact a deed of suretyship/* co *principal debtor and that the Applicants were perfectly justified to seek relief against the Appellant - Held that notwithstanding that the impugned summary judgment was fraught with some procedural defects it stands to be*

upheld no small measure to the acknowle d ge me nt of debt signed by the parties and that the Appellant acknowledged her indebtedness to the First Respondent in her papers before the court. - Held that due to, at the very least inelegant manner the proceeding have conducted by both parties before the High Court, each party to bear its costs - Held that the appeal is dismissed.

JUDGMENT

S. P. DLAMINI JA

PARTIES:

[1] The Appellant was the defendant in the proceedings before the High Court under Civil case No: 1815/ 16.

[2] The First and Third Respondents were not cited in the summons initiating the proceedings at the High Court. However, they became party to the proceedings through an amendment at a later stage. The issue of the amendment is revisited in the judgment.

[3] The Second Respondent was the plaintiff 1n the proceedings before the High Court.

PROCEEDINGS BEFORE THE HIGH COURT:

(4) The Second Respondent by way of action proceedings sued the Appellant on the strength of a written agreement demanding the following;

) ***Payment of the sum of E287,*** **309.46;**

(b) ***Interest at the rate of 9% per annum a temporae morae;***

(c) ***The costs of suit.***

[5] Furthermore, the Second Respondent asserted that the Appellant acknowledged it indebtedness to the claim by signing an acknowledgement of debt letter.

[6] The Appellant entered an appearance to defend the claim. However, before a plea could be filed an application for Summary Judgement was launched.

[7] It is noteworthy that it was only at the stage of the first application for Summary Judgement that the Second and Third Respondents surfaced as parties to the proceeding apparently without any explanation or any Court process at all.

[8] The Appellant opposed the application for Summary Judgement and filed its Affidavit resisting Summary Judgement.

[9] The High Court heard the application for Summary Judgment on 15 December 2017 and the judgement was delivered on 9 February 2018 per Her Ladyship Langwenya J.

[10] The Learned Judge Lahgwenya J. made the following order at pages 11 and 12 of the Judgment;

> ***"(a} The applicati on for summary judgment is refused;***
> ***(b} The Defendant is granted leave to defend the action;***
> ***(c} The costs of the application including the costs of the opposed hearing are reserved for decision by the trial court."***

(11] To a greater extent, th.e basis of Her Ladyship Langwenya J's Judgment turned on the issue of the citation or lack thereof of the First Respondent in the summons. In this regard, Langwenya J . had this to say at paragraphs (8] and (9] of the judgement;

> ***"[BJ It is my view that plaintiffs assertion that the defendant acknowledged being indebted to the plaintiff in the letter of 28 May 2015 (annexure 'Kl 1 is at best misguided and at worst disingenuous. This, I say for the following reasons: first the letter is written on Kukhanya/Gabriel Couto's letter heads. Second, the letter is sig n_ed by a representative of Kukhanya/Gabriel Couto JV. There is no reference to the Kukhanya Civil Engineering contractors - the plaintiff in the letter of 28 May 2015 (marked 'Kl1 and addressed to the defendant.***

[9] Quite astonishingly, the plaintiff notes and does not deny defendant's denial of indebtedness* to *the plaintiff as well as the defendant's admission* to *being a party to a subcontract with Kukhanya/Gabriel* Couto *JV in its replying affidavit. This, in my respectful view does not help the case for the plaintiff, instead it lends credence and supports defendant's defence that the amount claimed is owed to Kukhanya/Gabriel Couto JV nor has it set out what the relationship between Kukhanya/Gabriel Couto JV is with the plaintiff."

[12] Notwithstanding that Lfillgwenya J. had granted Appellant leave to defend the suit, the matter could not proceed in that direction as the Second Respon ent filed a notice of amendment of the summons in terms of rule 28(1).

[13] Essentially, the said amendment sought to co-Join the First Respondent with the Second and Third Respondents as co litigants.

[14] It appears that the amendment sought by the Second Respondent was granted by the High Court.

[15] Thereafter, the Respondents re-issued the amended summons.

[16] Subsequently, the Respondents launched the second application for Summary Judgment now based on the Amended Summons.

(17) It appears that a day after the Respondents had launched the second application for Summary Judgment, the Appellant filed a request for Further Particulars.

[18] The second Summary Judgment was heard notwithstanding that the Appellant did not file any opposing papers ostensibly because the request for Further Particulars according to the Appellant was that the Application of Summary .J u d gm e n t was premature.

[19] The High Court per his Lordship Maphanga J. granted the Summary Judgment on 10 August 2018 and ordered as follows;

> ***"l. The Defendant makes payments* in *the total sum ofE287, 309.46 (Two Hundred and Eighty Seven Thousand Three Hundred and Nine Emalangeni Forty Six Cents),***
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> 2. ***The Defendant pays interest on the sum of E287, 309.46 (Two Hundred and Eighty Seven Thousand Three Hundred and Nine Emalangeni Forty* six *Cents) at -t he rate of 9%per annum a temporae morae.***
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> 3. **Costs *of this suit."***

[20] The Appellant in apprehension of a looming writ of execution as per the order of the High Court per Maphanga J., launched an Application requesting; firstly, for the stay of execution pending the rescission and/ or setting aside of that order; secondly, that the Summary Judgment granted by Maphanga J. be rescinded and/ or set aside and; thirdly costs of suit.

[21] Although the record does not show that the rescission application was heard and granted nor is there a court order to that effect, it can be inferred from the developments that it was heard and granted having regard to the fact that the High Court per His Lordship Hlophe J, as he then was and now a Justice of the Supreme Court, proceeded to hear the Summary Judgment application.

[22] Before Hlophe J, it was contended on behalf of the Appellant that;

22.1 Since the Appellant had issued the notice for request of further particulars the Respondents ought to have provided the requested particulars instead of proceeding by way of Summary Judgment.

22.2 The Respondents did not have the necessary authority to launch the proceedings against the Appellant as, according to the Appellant, there was no proof that the Board of Directors approved such.

22.3 Appellant had taken Insurance cover against its liability and the Respondents ought to have made a claim against the Insurer. Furthermore, Appellant contended that the Respondents failed to claim against the Insurer during the lifetime of the Insurance Policy and therefore the harm of not getting paid was self-inflicted, so to speak.

22.4 In the circumstances, according to the Appellant, the application for Summary Judgment ought to be dismissed.

[23] In opposition to the Appellant's contentions, it was argued on behalf of the Respondents that;

23.1 The summary judgment was filed prior to the request for further particulars. Therefore, according to the Respondents, the Appellant ought to have filed an affidavit resisting Summary Judgment.

23.2 The Appellant has no *bona.fide* defence in that the debt was acknowledged in writing.

23.3 There is no reqiliirement for authority of the Board of Directors; it is enough that an attorney was appointed to act.

23.4 The request for further particulars was filed as a dilatory tactic.

23.5 The second and third plaintiffs are the parties that joined to form the first plaintiff.

23.6 The performance bond was required by the first Respondent only in relation to Appellant's performance of her duties under the Construction Agreement and not the loan advance.

[24] Hlophe J. was not persuaded by Appellants arguments in opposition to the application for Summary Judgment and rejected them *in toto*.

[25] The learned Judge had this to say at paragraph 37 of the judgment;

> ***"I have therefore come to the conclusion that there is no reason why the Plaintiffs application for summary judgment should not succeed. Accordingly I make the following order:-***
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> **37.1.** ***The Plaintiffs application for summary judgment succeeds with the result that the Defendant be and is hereby ordered to pay to the First Plaintiff the sum of E287 309.46 (Two Hundred and Eighty Seven Thousand, Three Hundred and Nine Emalangeni Forty Six cents).***
>
> **37.2.** ***The Defendant be and is hereby ordered to pay to the first Plaintiff the costs of these proceedings."***

[26] The Appellant was dissatisfied with this judgment and hence the appeal before this Court.

PROCEEDINGS BEFORE THE SUPREME COURT:

[27] The Appellant, by notice of appeal dated 9 June 2020, prayed before this Court to set aside the judgment of the High Court with costs on the following five (5) grounds of appeal;

"1. The Court a quo erred in fact and in law in holding that the request for further particulars was not necessary to enable the Appellant to plead and that the same were requested outside the Rules;

2. ***The Court a. quo erred in fact and in law to hold that the Appellant's challenge of the Respondents' authority to institute the proceedings was based on conjecture;***

3. ***The Court a quo erred in fact and in law in holding that the challenge to the Respondents' authority to institute th'e legal proceedings could not stand because the further particulars were not sought for a proper purpose;***

4. ***The Court a quo erred in fact and in law in holding that the insurance cover taken by the Appellant does not show that the Respondents were the entity to claim from the policy;***

5. ***The Court a erred in fact and in law to grant the Summary Judgment Application in the matter whereas the Respondents had Jailed to prove that the proceedings were properly instituted or authorized by th_e Boa rd s of Directors of the Respondents."***

ARGUMENTS AND FINDINGS BEFORE THIS COURT:

[28] Regarding the first grou d of appeal; namely that the request for further particulars served as a bar against the application for summary judgment, while this ground is not dealt with in the Appellants head of Argument; it was submitted by Counsel for the Appellant that the application of summary judgment ought not to have been entertained by the Court and the requested further particulars ought to have been provided.

[29] On the other hand, the First Respondent's Heads of Argument dealt in great detail irt their opposition to the first ground of appeal. It contended for the First Respondent that the request for the Further Particulars was irregular in the face of an application for Summary Judgment.

29.1 The First Respondent for its contention placed reliance on Rule 32(5)a of the High Court Rules which provides that;

"A defendant may show cause against an application under sub-ru le : (1) by affidavit or otherwise to the satisfaction of the court and, with the leave of the court, the plaintiff may deliver an affidavit in reply".

2 9 . 2 The First Responq nt in so far as the contents of an Affidavit Resisting Summary Judgment and request for Further Particulars are concerned, rely on cases of **NIHON INVESTMENT (PTY) LTD vs TILLY S.I. INVESTMENTS (PTY) LTD (103/2017) [2018] SZSC AND PURDON MILLER 1961(2) SA 21 l(AD).**

[30] Hlophe J. dealt with this ground in his judgment;

30.1 At paragraph 8, the learned Judge states that;

"It is clear from my perusal of the papers.filed of record that the said request for further particulars was filed after the Plaintiff had already filed and served a Summary Judgment Application. This I say because whereas the Notice of Intention to Defend was filed on the 2CJth July 2018, the application for Summary Judgment was filed on the 3()th July 2018 whilst the Request for further particulars was filed on the 1st August 2018, per the Registrar's stamp as pointed out above.»

30.2 At paragraph 12, the learned Judge states further that;

"On *the question whether or not the further particulars were sought timeously or procedurally,* it *seems to me that in* so

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far as they were sought after a summary judgment application had been filed, it was no longer opened (SIC) to the Defendant to ask for such particulars, in particular where the liquidity of the claim was not in dispute."

30.3 At paragraph 19, the learned Judge concludes as follows;

"I am therefore convinced that the point on the further particulars having not been given. before the summary judgment could be pursued is not a material one. It would have no bearing on continuing to decide the question whether or not the summary judgment application succeeds at this point which means that I shall go ahead and determine the said summary judgment application notwithstanding the said further particulars having been sought."

[31] I see no fault with the analysis and application of law by the Learned Judge relating to the first ground of appeal. In my view the request for further particulars in the face of a summary judgment application was irregular on the part of the Appellant. Therefore, the Respond nts were within their rights to ignore it and proceed with the application for Summary Judgment. Accordingly, the first ground of appeal stands to be dismissed.

[32] I will deal with the second and third grounds of appeal jointly because they both turn·on the same question of authority of the Respondents to institute the proceedings.

32.1 Firstly, the Appellant contends that the Second and Third Respondents have no *locus standi* to institute the proceedings since:. t h e y were not party to the agreement in question and therefore she could not be indebted to them.

32.2 The Respondents did not challenge the Appellant's argument regarding the status of the Second and Third Respondents.

32.3 In fact it can be surmised that it was this very realization that the Second and Third Respondents were non-suited that prompted the amendment that introduced the First Respondent to the proceedings. I accordingly agree with the Appellant on this point. Furthermore, Mr. Tenbegh introduced himself as Counsel for the First Respondent and the Heads of Argument are styled as the First Respondent's Heads of Argument.

32.4 However, that is not the end of the argument. The Appellant also challenges the First Respondent's authority to institute the proceedings on the basis that there was no Board resolution authorizing same.

32.5 The First Resportdent 1n opposition to the Appellant's challenge reporting a resolution of the Board argue that it is without basis and rely on the cases of **MBILIMBI (PTY) LTD** vs **KUKHANYA CIVIL ENGINEERING CONSTRACTORS (PTY) LTD (443/ 17) [2018] SZHC 23; TATTERSALL AND ANOTHER vs NEDCOR BANK LTD 1995 (3) SA 222 (A); AND SHELL OIL SWAZILAND (PTY) LTD vs MOTOR WORLD (PTY) LTD** t/ a **SIR MOTORS (23/2006) [2006] SASC (1).**

32.6 His Lordship Hlophe dealt with and rejected this ground in his judgment and had this to say at paragraph 23;

"In my view the Defendant cannot, without a factual basis, challenge the direct evidence of the Plaintiff's deponent to the said affidavit. He should, at least contend, by giving a factual basis, why he says the latter had no authority to *institute the proceedings. I for this reason conclude that the Defendant's challenge to the Plaintiff's authority*

is *a weak one. faced with the challenge to the authority to institute proceedings that was ambiguous, bare and probably tactical the Appellate Division or supreme Court in the Republic of South Africa, had the following to say in Tattersall And Another vs Nedcor Bank LTD 1995 (3) SA 222(A):-*

"A copy of a resolution authorizing the bringing of an application need .no always be annexed, nor does Section 242 (4) of the C 1973 provide the exclusive method of providing a conipany's resolution: there may be sufficient aliunde evidence of authority, and in casu there was. The court pointed out that the Appellant's denial of S's *allegations was ambiguous, bare and probably tactical. Accordingly, the instant case was one in which the approach adopted in MALL (Cape) (PTY) LTD vs MERINO Ko Operaste* ***BBPK*** *1957 (2) SA 347 (CJ namely that when the challenge* to *authority was a weak one, minimum evidence will suffice, applied. Weight had* to *be given* to *the use by* S, *of the word "duly" (authorized): it was an*

indication that

the authority conferred on him was an indication that the authority conferred on him was properly conferred.
Furthermore, "S" had dealt with the grant of the loan and subsequently req-u; sted payment, and if this was so, S would surely have been t'1.e person who would have acted on behalf of the bank. The court accordingly held that the bank had discharged the onus of showing that the application was properly authorized."

32.7 I agree with the learned judge's rejection of this ground. The law has evolved around the requirement for Board resolutions as proof of authority to institute proceedings. Indeed, the requir ment is still necessary where for example fraud is alleged to be associated with initiating the proceedings. In tlle circumstances, the second and third grounds of appeal stand to be dismissed.

[33] Regarding the fourth ground of appeal, it is contended for the Appellant that she took an insurance cover and the claim ought to have been deman ded .a gai n s t the policy.

33.1 The Appellant in the Heads of Argument, *inter alia*, states that she was not Ii.a ble for the debt as long as the policy was in place; the debt was recoverable against the policy; and that this constituted a *bona.fide* defence.

33.2 It is contended for the First Respondent that she was not a party of the insurance cover and as such could not lodge any claim.

33.3 The Learned Judge had this to say on the issue of the insurance cover at paragraphs 30 and 31 of the judgemen_t;

"[30] As I underJtand it, the Defendant's defence in the merits of the summary Judgement application is that it had obtained an insurance cover to secure the very debt that was nowsought to be recovered from it. The Insurance policy it claimed was handed over to the First Plaintiff to recover its debt from it. The Insurance Policy concerned is annexed to the affidavit resisting summary Judgement as "PC3".

[31] I have scrutinized the annexure concerned and it nowhere shows th Plaintiff as the entity to *claim on it. If anything, it is not in dispute that the insured in terms thereof is the Defendant, who would under normal circumstances be entitled* to *raise a claim with its insurer to pay the amount covered by the Policy should the insured event occur or arise."*

33.4 The learned Judge proceeds to state at paragraphs 32 and 33;

"[32} Besides, I note that on the face of annexure "PC3" to the summary Judgement application, the entity covered in terms of the Insurance Policy concerned, is the Principal debtor whilst the Insurer is the surety and co-principal debtor who renounced the exception of beneftcum ordimus seu excussionist et divisionis. If the insurer provided the cover as a surety and co-principal debtor, it then means that such did not abso lve the Defendant from being liable as a Principal debtor. :S h e could inf act be sued alone Just as she could be sued together with the surety and co-principal debtor.

[33} If the Defend nt sought indemnification for its liability assuming it was entitled to that in law, it was in my view required to issue a third Party notice to have the insurance company concerned joined as a party. If that was not done, the Defendant ha.$ itself to thank if such could have been done successfully."

33.5 I agree with the learned Judge's conclusion on this issue albeit through a different route.

33.6 The proper readipg of the document relied upon by the Appellant as an Insurance Policy is actually an agreement of suretyship whereby Lidwala Insurance Company bound herself to be a surety and so-principal debtor to debts owed to first Respondent by the Appellant subject to the following;

) That the agreement will remain in force up to 30th June 291s (it was signed on 13 March 2014); and

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(b) That any claim to succeed must be lodged on or before 30th June 2016.

33.7 In my view, First Respondent had an election whether to sue Appellant alone or to sue Appellant and Lidwalajointly and severally. The First Respondent elected the former.

33.8 On 28 May 2019 ,a letter termed "the acknowledgement of debt" was written to the Appellant and the penultimate paragraph reads a follows;

> ***"By signing this letter you hereby acknowledge that you are indebted to Kukhanya/Gabriel Couto JV (SIC) the above mentioned amount."***

33.9 The Appellant signed the acknowledgement without any objection nor did the Appellant point to Lidwala for the recovery of the claim.

33.10 Infact on 12 June 2015, the Appel]ant wrote a letter acknowledging its indebtedness in the amount claimed by First Appellant. Ip the letter apart from acknowledging the indebtedness, the Appellant proceeded to state that;

> ***"We confirm the amount as per the joint agreement and therefore request to owner (SIC) the debt as soon as funds are available.***
> ***We are currently experiencing cash flow problems as most of our jobs and government jobs hence payments are more oft delayed."***

33.11 Having unequivocally acknowledged being indebted to the First Respondent in the amount claimed and made an undertaking to pay, it did not lie with the Appellant to subsequently seek to extricate itself from the debt and point to Lidwala. Accordingly, this ground of appeal must fail.

[34] The fifth ground of appeal also goes to issue of authority by the Board to institute the proceedings.

34.1 It is contended for the Appellant that Summary Judgement ought not to haye been granted on account of lack of authority by the oard.

34.2 In granting the Summary Judgement His Lordship Hlophe J. had this to say at paragraph 36 of the judgement;

> **"That the Defendant is liable to the Plaintiff for the amount claimed cannot be disputed.** It **was in fact acknowledged by the Defendant in writing as an amount that, was not only outstanding but one that was also due. Tbe acknowledgement of debt and the letter requesting an indulgence for the payment of the acknowledged debt are respectively annexed to the Summary Judgment application as annexures "Kl" and "K2". There is no triable issue** I **can see a requiring a trial particularly because all the other issues have been considered and rejected in the manner set out above."**

[35] This Court has had to pronounce itself on the essential elements for application summary judgement. In this regard see **DULUX PRINTERS (PTY) LTD** vs **APOLLO SERVICES (PTY) LTD (72/ 12) [2013] SZSC 19 (31 MAY 2013); SWAZILAND NATIONAL ASSOCIATION OF TEACHERS** vs **EXPROP INVESTMENTS (PTY) LTD (43/2014) [2014] SZSC 79 (03 DECEMBER 2014);** and **GODFREY KHETHO SIBANDZE** vs **SALIGNA DEVELOPMENT CO. (PTY) LTD (59/2016) [2017] SZSC 33 (09TH OCTOBER, 2017),** to mention but a few.

[36] In the present proceedings I single out only one requirement as the matter rests on it alone namely the requirement that in an affidavit resting Summary Judgment the Respondent has to demonstrate a *bona fide* defence to the claim and not a mere denial (see **DULUX PRINTERS (PTY) LTD** (*sup ra)) .*

[37] In this matter the Appellant admitted liability for the amount claimed. It is only at a later stage where while admitting liability to the First Respondent denied liability to the Second and Third Respondent and correctly so. Therefore, there is no valid or *bona fide* defence against the First Respondent as claim is on appellant's own papers before this Court. Even in the grounds of appeal, the Appellant does not deny being indebted to the First Respondent in the amount claimed.

[38] In the circumstances of this case whereby the Appellant acknowledged being indebted in the amount claimed, to entertain the technicalities raised in the appeal would serve no other purpose than to make a mockery of our justice system. No evidence that tender was ever made of the outstanding amount to the correct party by the Appellant namely the First Respondent. Appellant only demanded proof of authority of the Board to institute the proceedings. Interestingly, when the advance payment was made there was no demand for the authority of the Board on the part of the Appellant. Accordingly, this ground of appeal must fail.

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COSTS:

[39] Costs normally follow the cause but in certain circumstances either the reverse occurs or a portion of the costs is awarded.

.1 I have grappled with the question of costs;

39.1.1 Firstly, the manner 1n which whereby parties who were clearly non-suited launched the proceedings and the introduction of the suited party via the backdoor on my view on the part of the Respondent concerned with me when it came to issue of costs.

39.1.2 Secondly, the stance taken by the Respondent whereby she acknowledges the claim at demand level as well as proceedings stage but then employing delaying tactics cannot be encouraged by a sympathetic costs order. Therefore, in my view costs must follow the cause.

COURT ORDER:

[40] In view of the aforegoing, the Court makes the following order;

1. **That the Appeal is dismissed.**
2. **That the Judgment of the High Court is confirmed.**

3. **That the First Respondent is awarded costs.**

S. P. DLAMINI

JUSTICE OF APPEAL

I AGREE

R. J. Cloete

(JUSTICE OF APPEAL

I AGREE

S.J.K. Matsebula

JUSTICE OF APPEAL

Counsel for the Appellant: Mr . N. Manzini of C. J. Littler and Company

Counsel for the First Respondents: Mr. F. M. Tenbegh of S.V. Mdladla and Associates