THE HIGH COURT OF SWAZILAND

Held at Mbabane	Civil Cate No. 404/2003
In the matter between	
ALEX S. SHABANGU & COMPANY	Plaintiff
And	
SWAZILAND MANUFACTURING AND	
ALLIED WORKERS UNION	Defendant
Coram	Annandale A C J
Plaintiff	Mr. M. Simelane
For Defendant	Mr. B. Dlamini

Ruling on exception in an application for Summary Judgment

5 December 2003

An exception was noted by the defendant against an application for summary judgment. At this stage of the proceedings, defendant has not filed any notice to oppose the application for summary judgment, nor any opposing affidavit. It only relies on its exception to avoid a judgment being considered against it. Incidentally, this is the second time it does so, as an earlier application for summary judgment, in which plaintiff relied on the supporting affidavit of its own attorney was withdrawn, with tendered costs.

The practise of the defendant, to solely rely on its exception to the application for summary judgment, without also filing an affidavit to oppose it, is not a salutary one.

In Bader and another v Weston and another 1967(1) SA 134(C) at 136 E - G Corbett J (as he then was) referring to application proceedings in general but equally applicable to the present position, said:-

"It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits before the court by way of affidavit... Having done so, it is also open to him to take the ' preliminary point ... On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point."

This time, in its second application for summary judgment, plaintiff does not again rely on the supporting affidavit of its own attorney, also not on the affidavit of any member of plaintiff (a firm of attorneys) but on a very novel approach - the supporting affidavit is deposed to by the former president of defendant, a labour union. It is the union which is sued for costs, arising from professional services rendered to it by plaintiff.

The affidavit of Mr. Jonga states that he has perused the particulars of claim, that he verifies the cause of action in the matter as well as the relief sought and the amounts claimed and that he was present when plaintiff was mandated to represent defendant on diverse occasions. He also makes the usual averments that the defendant has no bona fide defence to the claim and that its notice to defend is solely to delay the matter. What he does not state is how he is able to verify the amount of the claim.

The very odd aspect is that it is in fact the defendant and not the plaintiff who does this.

The exception taken is:

"(a) That the deponent in (sic) the affidavit in support for summary judgment does not have locus standi in judicio.

(b) Further that there is no allegation that he has been authorised to depose to the affidavit, nor does he furnish proof of such authority;

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(c) That Rule 23 contemplates that the Deponent should either be the plaintiff or an agent of the plaintiff, not the plaintiff's attorney. "

The last ground has no merit. In the first application for summary judgment, the supporting affidavit was made by the plaintiffs own attorney, Mr. Simelane. This identically worded ground of exception was then raised, and it was applicable at that time. Presently, no affidavit by the plaintiff's attorney comes into play and to except to a non-existent aspect is patently unjustified. At best, one could perhaps assume that this paragraph was inadvertently carried over from the previous exception.

The second ground also has no merit. Mr. Simelane, plaintiff's attorney, correctly relies on the legal position regarding the drafting of affidavits, where deponents regularly include the unnecessary phrase of: "I have been duly authorised to depose to this affidavit." An affidavit is evidence which does not in the ordinary course of events require authorisation. In this regard, Sapire CJ held the following in Swaziland Building Society v Kalanga Ltd., umeported Swaziland High Court Civil Case No. 1496/97:-

"The first point taken in the opposing affidavit is that Nigel Caplen does not disclose any basis of authority for him to depose the affidavit. This is a bad point and I have on a number of occasions pointed out that no deponent to any affidavit requires any authority to provide evidence of facts within his knowledge. The act of attesting an affidavit is the same as giving evidence and is a personal act of the witness for which he requires no authority. "

The second ground of the exception thus equally cannot stand.

The first ground of the exception is the only one that requires further consideration. Prior to deciding on locus standi it is helpful to first briefly look at what is actually before the court, namely an exception to a summary judgment application. Summary judgment procedure, of English origin, was introduced to assist a plaintiff in a case where a defendant, who cannot set up a bona fide defence or raise against a plaintiff's case an issue which ought to be tried, enters appearance merely to delay the granting

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of the plaintiff's rights. Rule 32 was designed to prevent a plaintiff's claim, based on certain causes of action, from being delayed by what amounts to an abuse of the process of court. In certain circumstances, therefore, the law allows the plaintiff, after the defendant has entered appearance, to apply to court for judgment to be entered summarily against the defendant, without a trial. The intention is not to shut the door to a defendant who has a triable defence. This remedy is extraordinary and very stringent, permitting judgment without a trial, closing the doors of court to a defendant. Consequently, it should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. (see Erasmus, Superior Court Practice (Loose Leaf Service No. 7, 1992) at Bl- 205 and 206 and the authorities there quoted).

Exceptions must go to the root of the pleading excepted to, the allegations of which are assumed to be true for the purposes of the exception. A pleading is exceptionable when it reveals conditions that ought to have been fulfilled, but which omits an averment that they have been performed (Purcell, Yallop & Evere (Pty) Ltd v Lambrecht 1912 CPD 1044) The object is to dispose of the case or a portion thereof

expeditiously. The onus is always on the excepient to satisfy the court that sound and adequate grounds exist why an exception should be upheld. (City of Cape Town v National Meat Suppliers Ltd 1938 CPD 52). Exceptions to pleadings can be taken when it discloses no cause of action or defence, or where it is vague and embarrassing and the cause thereof is not removed.

Mr. Simelane strenuously and repeatedly argued that the defendant is not entitled to except at all. This argument is based on the assertion that it is the affidavit in support of the summary judgment application that causes the objection, and that exception cannot be taken against the affidavit as it is evidence and not a pleading, which points could only be raised in an affidavit resisting summary judgment.

If this argument is to be sustained it would be to lose sight of the heart of the matter, namely that "an exception is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial", to quote plaintiff's attorney who relies on Brown v Vlak 1925 AD 56 at 58 for the above citation. To hold that it is not competent to raise the issue

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of lack of locus standi on exception is to also ignore the fact that the supporting affidavit of Jabulane Jonga is an inextricable part of the summary judgment application, which if granted without further ado, will close the doors of court to the defendant. If defendant's exception fails, on the other hand, it will have only itself to blame for not opposing the application by way of an opposing affidavit as well, taking objection in limine to the locus standi of the deponent.

Furthermore, to hold as so strongly contended by plaintiff's attorney, would be to ignore what Tebbutt J (as he then was) held in AAIL (SA) v Muslim Judicial Council 1983(4) 855 CPD at 860 E - G, approving of and following Anirudh v Samdei and others 1975(2) SA 706(N). He held that:

"... I respectfully agree with his (Howard J in the referred to Natal decision) (my insert) reasoning and similarly agree with his conclusion that the question as to whether a party has the necessary locus standi to sue or be sued (in the resent matter, to depose to an affidavit in support of summary judgment) is a matter which can competently be dealt with on exception. "In Anirudh v Samdei (supra), Howard J came to the conclusion which he did after consideration of similar grounds raised by the present plaintiff's attorney. It was set out as (at 707 G - H):

"His opposition rested four square on the contention that Rule 23(1) of the present Rules limit the grounds of exception to those which it mentions, viz. that a pleading is "vague and embarrassing" or "lacks averments which are necessary to sustain an action or defence. "

Our Rule 23(1) in Swaziland equally refers to the abovementioned two grounds applicable to exceptions. I am of the view that it would be an overly restrictive interpretation to refuse an exception merely on the absence of such an averment in an exception on locus standi which equally goes to the core of the complaint. I respectfully agree with the views held by both Tebbutt J and Howard J as mentioned above. It cannot be the position to refuse to entertain a point of non locus standi

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raised by an exception, instead of it being raised in limine as part of an affidavit resisting summary judgment.

Before I proceed to the real merit of the matter, there is one further point, which was not argued by either of the attorneys, and that is the form of the exception itself.

Apart from the three grounds contained in the notice of exception, referred to earlier on, all it further contains are the words:

"Take notice further that plaintiff is afforded 14 days within which to remove the cause of complaint. "

The glaring omission is the absence of a prayer that the plaintiff's application be dismissed or that the pleading excepted to be set aside or for such other relief which may be competent. An exception which is lacking in such a prayer for relief, when the complaint is not removed or rectified or appropriately addressed, is bad in law. There is no application before me in which this defect is sought to be cured, rectified or amended, but, as said, no such point has been taken by Mr. Simelane.

This gives rise to two questions, the first being if the court should mero motu consider it, perhaps to cure it without an application to do so, but more importantly, whether it is only bad in law or whether it is a nullity.

In Vernom and Others N. N. O. v Bradley & Others N. N. O. 1965(1) SA 422(N) Henning J held at 424-A that:

"Accepting the position (upholding of an exception, which is bad in law for want of a prayer in conclusion without an amendment providing for a prayer as done by a full bench in Natal) (my insertion) as I am bound to do, that an exception which lacks a prayer is bad, I am in no doubt that the Court has the power to order an amendment to make good the defect, provided no prejudice or injustice is thereby caused to the respondent. The requirement of a prayer is not laid down by the Rules, and can only be a matter of practice. I can see

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no reason to believe that this rule of practice is imperative, in the sense that non-compliance therewith renders an exception a nullity."

I respectfully agree with the approach adopted by Henning J. As ho point on this basis was taken by Mr. Simelane and no argument was advanced as to whether the plaintiff would suffer any prejudice if the bad exception was to be considered, even in the absence of an application to amend it, I do not consider it to be of such consequence that the excipient has to be turned away from being heard due to the defect.

Accordingly, the exception is not found to be a nullity and secondly, if necessary, the court shall be at liberty to order an appropriate prayer as deemed to tie; apposite.

I now turn to consider the affidavit itself, which was filed in support of the summary judgment application, and excepted to. Rule 32(3)(a) regulates the requirements of the affidavit which is to be considered. It reads in part that:

"...an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, and such affidavit may in addition set out any evidence material to the claim."

This differs materially from the South African equivalent (Rule 32(2)), which requires "..an affidavit made by himself or by any other person who can swear

positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered for the purpose of delay."

Further, materially different ancillary matters are also contained in the two different Rules. This makes it difficult to seek guidance and precedents in South African sources of law, which patently has a very different perspective, though some principles are comparable.

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Under South African Law, despite a thorough search, I was unable to find any
precedent in which the deponent to the affidavit in support of a summary judgment

application, qualified in that sub-rule as :-

"...(the plaintiff) or by any other person (my emphasis) who can swear positively to the facts verifying the cause of action and the amount ...claimed..".

has been disqualified for reason of being, actually, the defendant (or its representative). Possibly, there is no precedent because this may never have been done, and judicially considered. It is also possible that my available research materials and facilities are inadequate. The authorities are trite "that the affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts; that it must be an affidavit verifying the cause of action and the amount, if any, claimed; and that it must contain a statement by the deppnent that in his opinion there is no bona fide defence to the action and that notice to defend has been delivered solely for the purpose of delay." (per Corbett J A (as he then was) in Maharaj v Barclays Bank Ltd 1976 SA (1) 418 (A.D.) at 422 B - C).

In Swaziland, Rule 32(3)(a), as it presently stands, does not specify by who the affidavit is to be made, at all. Nor does it even require the quantum of the claim to be verified. It does require a stated belief that there is no defence to the claim, but not

also that the defence is not bona fide or that the notice to defend is dilatory or that it has been delivered solely for the purpose of delay. In addition, such an affidavit may even contain statements of information or belief with the sources and grounds thereof.

Stripped of all but the bare essentials, the deponent of the affidavit in our law is really only required to verify the facts on which the claim is based and to state his belief of a non defence. There is no pre-qualification of the deponent.

I do hold reservations about the propriety of having the former president of the defendant depose to an affidavit to support a judgment sought to be taken against the Labour Union which he represented at the plaintiff law firm when it was mandated.

During the hearing of argument, I thrice asked Mr. Simelane why the plaintiff himself did not depose to the affidavit. On all three occasions he steadfastly changed the subject, evading a direct answer. The answer remains a mystery. Nevertheless, despite careful consideration, I cannot come to the conclusion that the exception must be upheld on the first ground either. The deponent swears positively to the facts within his personal knowledge, he verifies the particulars of claim and the cause of action, as well as the relief (sought) and the amount claimed. This, in my view, satisfies the requirement that he must verify the facts on which the claim is based. He fortifies this with his further disclosure that he "was present on the various occasions when the plaintiff was mandated to represent the defendant, in the company of (his) vice President and Secretary General." He finally states his belief that there is no defence to the claim. Despite the above remarks about whether his identity, his personal tie with the defendant, is in consonance with established principles and practise, it cannot derogate from his ability to swear positively to the facts, verifying the claim. He is in a unique position to do so. Attorney/client privilege also is no bar, as the privilege does not vest in the attorney but in the client, who has chosen to abandon it.

Accordingly, the exception is dismissed, which costs incidental thereto to follow the event.

No defence has been raised by defendant, which might have been considered by the court. Defendant did not avail itself to the filing of any affidavit to resist the application for summary judgment as it was entitled to do. It had more than ample time to do so, if indeed it has any defence to the claim. That leaves only the evidence in the affidavit in support of the application to be considered, with nothing to gainsay it. As said above, defendant chose to solely rely on its exception and no more, choosing thereby to stand or fall by it. With the exception having been dismissed, the outcome of the matter is inevitable.

Summary judgment is ordered to be entered against the defendant, as set in the combined summons, with costs.

ANNANDALE, A C J