



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Case No. 446/2017

In the matter between:

SWAZILAND BUILDING SOCIETY

And

KEITH BHUTANA SIGWANE N.O.

Neutral citation: *Swaziland Building Society v Keith Bhutana Sigwane N.O.*
(446/2017) [2017] SZHC 265 (6 December 2017)

Coram : **T. L. Dlamini J**

Heard : 03 November 2017

Delivered : 6 December 2017

Summary: *Civil Procedure – Application for summary judgment – Application in terms of Rule 30 filed by defendant seeking to set aside the summary judgment application – Defendant alleged that application is irregular because there is pending before court a notice to remove a cause of complaint in terms of Rule 23 (1).*

Held: *That notice to remove cause of complainant is without merit and was nonetheless answered by the plaintiff – Rule 30 application dismissed*

Held Further: *That the defendant’s conduct is meant to delay the finalization of the proceedings and that it demonstrates the lack of a bona fide defence to the claim – Summary judgment application granted*

JUDGMENT

[1] For determination are two applications, one made in terms of Rule 30 of the Rules of this court, and the other one being an application for summary judgment.

- [2] The plaintiff is a local bank called the Swaziland Building Society, a body corporate and incorporated in terms of the Building Society's Act.
- [3] The defendant is Keith Bhutana Sigwane N.O. cited in his nominal capacity as a Trustee for the time being of the Keith Bhutana Sigwane Trust.
- [4] According to the particulars of claim, a trust known as the Keith Bhutana Sigwane Trust entered into a written loan agreement with the plaintiff, for amounts of E468, 000.00 and E406, 000.00 at the instance and request of the defendant. These amounts were loaned to the defendant on the basis of two loan agreements that were signed on the 16th March 2006 and 8th September 2013 respectively.
- [5] Mortgage bonds using the same property, viz., Lot No. 10 Mukelwa Township situate at Ezulwini urban area in the Hhohho District, Swaziland, were entered into and signed in favour of the plaintiff in respect of both loan agreements.

[6] The defendant, according to the particulars of claim, failed to pay instalments as and when they became due. Consequently, the plaintiff sued out a combined summons for judgment against the defendant for the sum of E913, 187.53, interest thereon at the rate of 9.75% per annum *a tempore morae*, declaring Lot No. 10 Mukela Township situated in Ezulwini urban area in the Hhohho District, Swaziland, measuring 1001 (one zero zero one) square metres, held under Deed of Partition Transfer 390/2013 dated 2nd June 2006, to be executable, plus costs of suit at attorney and client scale.

[7] The combined summons were sued out on the 27th March 2017. The defendant did not file a notice to defend but instead filed a notice to remove a cause of complainant in terms of Rule 23(1). This notice was file on the 18th April 2017. Rule 23 (1) provides as quoted hereunder:

“23.(1) where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6 (14):

Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall, within the period allowed under this

sub-rule, by notice afford his opponent an opportunity of removing the cause of complaint within fourteen days;”

[8] In a nutshell, the defendant’s complaint is that the pleadings in the summons are not clear about who is the defendant between Keith Bhutana Sigwane Trust, Keith Bhutana Sigwane in his official (nominal) capacity or Keith Bhutana Sigwane in his personal capacity.

[9] In a letter dated 21st April 2017, the plaintiff’s attorneys answered the complaint and stated that ***“It is the Trust that is the Defendant and is indebted.”*** The letter further directed the defendant to withdraw its complaint not later than close of business on Wednesday 26th April 2017 failing which the plaintiff ***“shall respond there to and file for summary judgment on the outstanding balance.”***

[10] Based on the papers filed of record, nothing happened thereafter and the plaintiff then filed an application for summary judgment on the 27th June 2017. The defendant responded to the summary judgment application by filing a notice in terms of Rule 30 seeking to set aside the summary

judgment application. It alleged that the application is an irregular step as there is pending before court a notice to remove a cause of complaint in terms of Rule 23(1).

Determination of the Rule 30 application

[11] Rule 30 *inter alia* provides as quoted below:

“30. (1) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding:

Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.

(2) ...

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems fit.”

[12] The basis of the defendant’s Rule 30 application is that “ ***There is pending before court a notice to remove a cause of complaint made in terms of Rule 23 (1).***” The defendant’s contention is that the plaintiff ought to have first dealt with the notice to remove the cause of complaint before it could file the application for summary judgment. For this reason, it submitted that the summary judgment application is irregular and must be set aside.

[13] In the heads of argument, the defendant contends as follows:

“2.6 It is submitted for the defendant that the irregularity objected to in terms of Rule 23 (1) is not only based on the pleading being technically imperfect, but also goes to the root of the plaintiff’s case. Same therefore, cannot remain unattended by the plaintiff.

2.7 Despite having been afforded an opportunity to address the irregularities on the summons, the Plaintiff has failed to do so, but opted to file for summary judgment. It is submitted that the citation of the Keith Bhutana Sigwane instead of the Trust rendered the Plaintiff’s case vague and embarrassing and subject to being excepted to by Defendant.

See Paragraphs 5.2.1.7, 5.3, 5.5.7.7, 7.1, 7.2 and 7.3 of the particulars of claim.”

[14] I state however, that the correct legal position regarding lawsuits against a trust, is that the Trustee or Trustees are cited and not the trust itself. **Mamba J** in the case of **Siboniso Clement Dlamini N.O. v Deputy Sheriff – Hhohho Region and Another In re: Swaziland Building Society v The Trustees for the time being of Siboniso Clement Dlamini Family Trust, High Court Case No. 30/2008**(unreported) in paragraph [7] held as follows:

“[7] The general legal position as stated by the Applicant regarding the locus standi of a trust to sue and be sued is correct; that the trustees and not the trust - which is a discrete institution – must be cited.”

[15] **Dlamini J** cited with approval **Labuschague J** in **Mariola and Others v Kaye – Eddie N.O. and Others 1995 (2) S.A 728 at 731**, who held as follows:

“In our law a trust is not a legal persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purpose of administration of the trust but qua trustee he has no beneficial interest therein.”

Elphas Mabhawodi Dlamini v Thabsile Mbali Nkosi and 8 Others (1582/2012) [2013] SZHC 98 (3rd May 2013).

[16] In a lawsuit against a trust, the trustee or trustees are to be cited and not the trust. The plaintiff correctly did so *in casu*.

[17] I now must determine if there is before court a pending notice to remove a cause of complaint. The cause of complaint alleged by the defendant emanates from six (6) paragraphs of the particulars of claim. These are reproduced hereunder as stated by the defendant:

1. In paragraph 5.2.1.7 the Plaintiff pleads that the defendant was represented by its Trustee Mr. Keith Sigwane. The defendant is Keith Sigwanne in his official capacity. Does the reference to defendant in this paragraph, mean Keith Bhutana Sigwane N.O. or The Keith Bhutana Sigwane Trust?

2. AD PARAGRAPH 5.3

The averments contained herein are incoherent and are contradictory to the terms and conditions of the mortgage bond. The trust has the obligation to pay, not the defendant.

3. AD PARAGRAPH 5.5.7.7

The party that made this undertaking is the trust, through the defendant. Reference to the defendant in this paragraph is therefore vague and ambiguous.

4. AD PARAGRAPH 7.1

There is a discrepancy between the averments made in this paragraph, in reference to the parties to the loan agreement and the averments contained in the bond. The plaintiff alleges in the particulars of the claim that, Plaintiff (Swaziland Building Society) and the Defendant Keith Bhutana Sigwane N.O. entered into a second loan agreement and it is annexed marked "2". When you look at annexure "2" the parties are Keith Bhutana Sigwane Trust, not Keith Bhutana Sigwane, the individual.

5. AD PARAGRAPH 7.2

The contents of this paragraph are vague and embarrassing. How can the defendant (Keith Bhutana Sigwane N.O.) in his representative capacity be represented by a trust? It is incoherent and does not make sense. Unless the defendant is the trust, which is not the case as per the citation of the parties. Yes it is in terms of the mortgage bond that established the relationship between the parties. This apparent contradiction, makes the particulars of the claim to be vague and embarrassing.

6. AD PARAGRAPH 7.3

Similarly in this paragraph, the mention of the defendant in reference to the trust, makes the reading of the entire paragraph vague and embarrassing.

TAKE NOTICE FURTHER THAT unless the aforesaid cause of complaint is removed within fourteen (14) days of delivery of this notice the Defendant will except to the Plaintiff's particulars of claim accordingly.

[18] Through its attorneys, the plaintiff addressed a letter to the defendant dated 21st April 2017 wherein it stated that ***“It is the Trust that is the Defendant and is indebted.”*** In addition to the explanation, the plaintiff called upon the defendant to withdraw the notice filed in terms of Rule 23 (1) forthwith. The withdrawal, according to the latter, was to be done no later than close of business on Wednesday 26th April 2017. The contents of the letter are reproduced hereunder:

“21ST April 2017

Magagula Attorneys

Office, Suite No. 28

The New Mall

Mbabane

Fax No. 2404 1453

Dear Sir,

**RE: SWAZILAND BUILDING SOCIETY / KEITH BHUTANA
SIGWANE TRUST: HIGH COURT CASE NO. 446/17**

1. The above matter refers, in reference to your email dated 21st instant.
2. We are taking instructions from client.
3. In the interim kindly withdraw your notice in terms of Rule 23 (1) forthwith. It is the Trust that is the Defendant and is indebted.
4. We await your withdrawal by no later than close of business Wednesday 26th April, 2017.
5. Failing which we shall respond thereto and file for Summary Judgment on the outstanding balance.
6. We await your response.

Yours faithfully

S. V MDLADLA & ASSOCIATES

[19] The defendant's attorney argued that the plaintiff's letter was not copied to the court and for that reason the pleadings before court remained unchanged and still contain the cause of complaint. He however conceded that there is no specific form that is required when addressing the cause of complaint raised.

[20] The plaintiff's attorney submitted that the defendant's complaint was properly answered in the letter of 21st April 2017 and that Mr Keith Bhutana Sigwane is cited in his nominal capacity in the summons. He therefore applied for a dismissal of the Rule 30 application as there is nothing irregular with the summary judgment application, submitted the plaintiff's attorney.

[21] On a reading of the combined summons, the cause of complaint by the defendant is without merit in my considered view. The defendant who is cited is **Keith Bhutana Sigwane N.O.** Mr Sigwane is cited in a nominal capacity and not in a personal capacity.

[22] The letters ‘NO’ after a person’s name are used to indicate that such person is acting in a representative capacity. They are an abbreviation for ***nomine officio***, a latin expression meaning ‘*in the name of the office.*’ The term is used to refer to a person such as a guardian, or trustee, or curator. **See:** the Glossary in “ ***Civil Procedure, A Practical Guide***” ***third edition, 2016, by Stephen Pete et al.***

[23] Paragraph 2 of the particulars of claim which defines the defendant states the following:

2.

“The Defendand is KEITH BHUTANA SIGWANE N.O., an adult Swazi male with full legal capacity whose fuller and further names and occupation are to the Plaintiff unknown, cited herein in his capacity as Trustee for the time being of KEITH BHUTANA SIGWANE TRUST whose chosen domicilium citandi et executandi is Lot No. 10, Mukela Township, Ezulwini, in the Hhohho District.” (own emphasis)

[24] The above quoted paragraph is very clear about the capacity in which Mr Keith Bhutana Sigwane is cited in these proceedings. He is cited as a trustee of the Keith Bhutana Sigwane Trust.

[25] The court is conferred with a discretionary power in determining an application made in terms of Rule 30. See: **Rule 30 (3)** and **Herbstein and Van Winsen, “The Civil Practice of the High Courts of South Africa”, 5th ed, Vol. 1 at page 735.**

[26] In my opinion, the cause of complaint filed by the defendant is without merit. Nonetheless, the complaint was answered by letter dated 21st April 2017. As I have already stated, the complaint is unjustified because the combined summons properly and clearly define the defendant as Keith Bhutana Sigwane N.O. (*nomine officio*), and further states that he is cited in his capacity as the Trustee for the time being of Keith Bhutana Sigwane Trust.

[27] For the foregoing, the Rule 30 application ought to be dismissed and I so order.

Determination of summary judgment application

[28] The defendant's attorney applied for leave to answer the summary judgment application in the event the Rule 30 application is unsuccessful and is dismissed. When asked by the court if the defendant has a defence to the claim, he submitted that he doesn't know yet because he has still not taken instructions thereon.

[29] The plaintiff's attorney opposed the application for leave to answer the summary judgment application and stated that the defendant is merely delaying finalization of the proceedings. He also submitted that the defendant has no defence to the claim and referred the court to a letter that is however written on a **"without prejudice"** basis dated 21st April 2017 at page 11 of the Book of Pleadings. For the **"without prejudice"** basis I will not take into consideration the contents of the letter.

[30] In terms of the summary judgment application the plaintiff seeks against the defendant an order in the following terms:

1. Payment of the total sum of E885, 846.05 (eight hundred and eighty five thousand eight hundred and forty six emalangeni five cents).
2. Interest thereon at the rate of 9.75% per annum *a tempore morae*.
3. Declaring Certain: Lot No. 10 Mukela Township situate in Ezulwini urban area, Hhohho District, Swaziland, measuring: 1001 (one zero zero one) square metres; held under Deed of Partition Transfer No. 390/2006 dated the 2nd June, 2006, subject to the terms and conditions contained therein, to be executable.
4. Costs of suit at attorney and own client scale
5. Further and/ or alternative relief.

[31] **Ramodibedi CJ**, in the case of **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/2007** (unreported) states the following regarding summary judgment:

“[8]... the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend

*has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant. See for example **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A); David Chester v Central Bank of Swaziland CA 50/03***

Each case must obviously be judged in the light of its own merits, bearing in mind always that the court has a judicial discretion whether or not to grant summary judgment. Such a discretion must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion.”

[32] I take into consideration the fact that the notice to remove the cause of complaint was filed by the defendant on the 18th April 2017. The plaintiff answered the cause of complaint in a letter dated 21st April 2017. In the letter the plaintiff also called upon the defendant to withdraw the notice by close of business on Wednesday the 26th April 2017. The plaintiff further notified the defendant that if the notice of complaint is not withdrawn as per the letter directed to the defendant, the plaintiff will file for summary judgment on the outstanding balance.

[33] There is no evidence on the papers filed of record that any further step was taken by either of the parties thereafter. Nothing was alleged to have happened either.

[34] On the 27th June 2017, which is over two months after the parties' last communication with each other, the plaintiff filed for summary judgment. The defendant then responded by filing a Rule 30 application. From this fact alone, I am inclined to agree with the plaintiff's attorney that the defendant's conduct is merely to prevent and frustrate a conclusion or finalization of the matter.

[35] No reason has been given by the defendant to explain why it turned a blind eye to the contents of the plaintiff's letter of 21st April 2017 save to submit that it laboured under the impression that the plaintiff was to file a formal response to the cause of complaint. He could not, however, indicate or state the form that the formal response was to take, or the format that the formal response had to comply with.

[36] I have also taken into consideration the submission made by the defendant's attorney that he has not taken instructions that will enable him to know if the defendant has a defence to the claim. I find this submission to be untenable because instructions regarding the particulars of claim were taken and whose product was the cause of complaint that was filed in terms of Rule 23 (1). I honestly do not accept as truthful that the defendant's attorney has not taken instructions to determine if the defendant has a *bona fide* defence to the claim or not.

[37] I have taken the above stated view because the proceedings have gone through the stage of filing a notice to remove a cause of complaint that was answered, and also through the stage of filing an application in terms of Rule 30. In my opinion and finding, the defendant's conduct demonstrates that the defendant has no *bona fide* defence to plead to the claim.

[38] I have further taken into consideration the fact that the defendant was notified by the plaintiff in the letter of 21st April 2017 that if the notice to remove the cause of complaint was not withdrawn by close of business on the 26th April 2017, the plaintiff will file for summary judgment. The

defendant turned a blind eye to this warning. This leaves me with the inescapable conclusion that the defendant has no *bona fide* defence to plead to the claim.

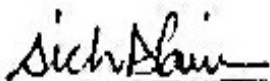
[39] As an alternative of the Rule 30 application, the defendant ought to have filed an affidavit resisting summary judgment in the event that the Rule 30 application is not successful. I am therefore not inclined to perpetuate the defendant's effort to frustrate or delay a conclusion of the matter as that would occasion an unjustified prejudice to the plaintiff. The application for leave to answer the summary judgment application is therefore refused.

[40] For the foregoing, the summary judgment application is successful and is hereby granted, save the issue of costs which however, are granted at the ordinary scale.

[41] The following order is accordingly issued:

1. The application made in terms of Rule 30 is hereby dismissed.

2. The application for leave to answer the summary judgment, in the event that the Rule 30 application is unsuccessful, is refused and is hereby dismissed.
3. The application for summary judgment is granted in the following terms:
 - (a) Payment by the defendant in favour of the plaintiff in the sum of E885, 846.05 (eight hundred and eighty five thousand eight hundred and forty six emalangeneni five cents);
 - (b) Interest on the above stated amount at the rate of 9.75% per annum *a tempore morae*;
 - (c) Declaring Certain lot No. 10 Mukela Township situate in Ezulwini urban area, Hhohho District, Swaziland Measuring 1001 (one zero zero one) square metres, Held under Deed of Partition Transfer No. 390/2006, subject to the terms and conditions contained therein, as executable;
 - (d) Costs of suit at the ordinary scale.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Plaintiff: Mr H. Mdladla

For Defendant: Mr A. Hlophe