

**IN THE HIGH COURT OF SWAZILAND**

**CHARLES GULE**

**Plaintiff**

**And**

**APEX SHOP EQUIPMENT (PTY) LTD**

**Defendant**

**Civil Case No. 1259/2006**

**Coram**

**S.B. MAPHALALA - J**

**For the Plaintiff**

**MR. N. MABUZA**

**For the Defendant**

**MR. L. GAMA**

**JUDGMENT 23<sup>rd</sup>**

**March 2007**

[1] Before court is an opposed application for summary judgment in terms of Rule 32 of the High Court Rules. Plaintiff seeks for payment of the sum of E50, 000-00 and interest thereon at the rate of 9% *a tempore morae*. Further Plaintiff seeks for costs of suit.

[2] The Plaintiffs claim arose this way. On or about the 21<sup>st</sup> August 2004, the parties entered into an oral agreement in terms of which Plaintiff loaned and advanced to Defendant the sum of E50, 000-00 at the Defendant's special instance and request. Plaintiff represented himself and Defendant was represented by one of its directors Robert Grenoble. On or about the 21<sup>st</sup> August 2004, Plaintiff duly advanced to Defendant the sum of E50, 000-00. A copy of the cheque is attached and marked "A". In terms of the agreement aforesaid the loan was repayable after a period of three months. Despite the expiry of the time and despite demand Defendant refuses and/or neglects to make payment to Plaintiff in the sum of E50, 000-00 or any sum at all.

[3] The Defendant on the other hand opposes the granting of the above cited orders and has filed an affidavit of its Managing Director, Mr. Robert Grenoble to that effect. In the said affidavit the Defendant respond that it has a *bona fide* defence to the Plaintiffs claim in that the Plaintiff never loaned any monies to the Defendant. The only sum of money received in the sum of E50, 000-00 which was towards the buying of shares by the Plaintiff from the Defendant and Plaintiff is not entitled to be paid that sum. The cheque in the sum of E50, 000-00 drawn in favour of the Defendant referred to in paragraph 7 of the Plaintiffs Declaration was not a loan, but payment for shares. Defendant denies that the sum of E50, 000-00 is due to the Plaintiff or any amount whatsoever.

[4] In arguments before me Counsel for the Plaintiff relied on a number of decided cases in South Africa including the case of *Maharaj vs Barclays National Bank Ltd 1976 (1) S.A. 418 AD*, *Arend and another vs Astra Furnishers (Pty) Ltd 1974 (1) S.A. at 303 - 4*,

*Caltex Oil (S.A.) Ltd vs Webb 1965 (E) at 917 C, Central Agency Ltd vs Cilliers 1971 (4) S.A. 353A, and that of Traut vs Dutoit 1966 (1) S.A. at page 69. The gravamen of the Plaintiffs argument is that Defendant has dismally failed to prove that it does have a bona fide defence. Defendant merely stated that the E50, 000-00 payment was towards the buying of shares Defendant and has failed to annex even one shred of documentary evidence or a contract to that effect. Defendant does not even disclose how many shares were purchased, the price of one share and the full particulars of the contract of sale, if any. It is contended further for the Plaintiff that as the affidavit stands, it discloses no defence but merely tells a story full of speculative conjuncture, with no answer to Plaintiffs claim.*

**[5] The Defendant on the other hand also relies on what is stated by Corbett JA in the case of *Maharaj vs Barclays National Bank (supra)* and the local case of *Variety Investments (Pty) Ltd vs Motsa (CA) 1982 - 86(1) S.L.R. 76*. In *Maharaj (supra)* the learned Judge of the Appellate Division stated the following:**

**"Where the defence is based upon facts, in the sense that material facts alleged by Plaintiff in his summons, or combined summons are disputed or new facts are alleged**

**constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is:**

- a) Whether Defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded and;**
- b) Whether on the facts so disclosed the Defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good on law**

[6] The remedy provided by the rule is an extraordinary and a very stringent one in that it permits a judgment to be given without a trial. It closes the doors of the court to the 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. While on the one hand the court wishes to assist a Plaintiff whose right to relief is being balked by the delaying tactics of a Defendant who has no defence, on the other hand it is reluctant to deprive the Defendant of his normal right to defend, except in a clear case. This is why the courts have often emphasized the need for strict compliance with the rule but this does not mean that technical defects in procedure will not be condoned, (see *Harms, Superior Court Practice, Juta at Bl -207* and the cases cited thereat).

[7] It appears to me after assessing the facts of the matter that the position adopted by the Defendant is correct in the circumstances of the case. It appears to me that the Defendant's denial of the loan and that no money is due to the Plaintiff is a valid defence to Plaintiff's summons and a triable issue, (see also the South African case *Breitenbach vs Fiat S.A. (EDMS) 1976 (2) S.A. 226 (T) at 228 B - C*).

[8] In the result, for the afore-going reasons the application for summary judgment is refused with costs.

**S.B MAPHALALA**

**JUDGE**