IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 4223/2007

SOUTHERN TEXTILES (PTY) LIMITED Applicant

And

TAGA INVESTMENTS LIMITED 1st Respondent

THOMAS ALBREICHT 2nd Respondent

Coram S.B. MAPHALALA - J

For the Applicant MR. J. RODRIGUES

For the Respondent Advocate P. FLYNN (Instructed by Cloete / Henwood / Dlamini / Magagula & Associates)

JUDGMENT

12th March 2009

[1] The Plaintiff has filed an application for summary judgment against the Defendant for payment of the sum of El, 259, 090-19 and interest at the rate of 9% per annum calculated from the date of issue of summons to date of payment and costs of suit in prayer 1.3 thereof.

[2] The defendants oppose the granting of the above-cited application and has filed an affidavit resisting summary judgment deposed by one Thomas Albrecht cited as the 2nd Respondent. In the said affidavit a number of defences are canvassed at paragraph 7 thereof. These being what is stated in paragraph 7.1 that the Plaintiffs claim is *res judicata.* The second defence is found in paragraph 7.2 thereof that the Plaintiffs claim has prescribed.

[3] The third defence is that the Plaintiffs claim has in any event been novated by an agreement which was entered into on the 4th August 2005, in terms of which was entered into on the 4th August 2005, in terms of which the Plaintiff accepted repayment in instalments of N$20, 000-00 on condition that it supplied to the Defendants items listed in paragraph 7.3.1 to 7.3.5 of the resisting affidavit.

[4] In paragraph 7.4 of the said affidavit it is the Defendants main contention that the Plaintiff has sought to deal with these in its affidavit in support of the application for summary judgment. However, this court cannot determine those issues in such an application, i.e an application for summary judgment.

[5] According to the Respondent's arguments in this

regard Rule 32 (4) (a) requires the Defendant to satisfy the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. The effect of this Rule is that the court may refuse summary judgment notwithstanding a failure to satisfy the court that there is a *bona fide* defence. There may be other issues or questions in dispute or other circumstances which are reason enough to have a trial in the matter. Even if the defendant cannot point to a specific issue which ought to be tried he may satisfy the court that there are circumstances in the matter that ought to be investigated. The English law approach to a Defendant's case has been imported into our law. The Court of Appeal of Swaziland (as it then was) has considered the approach to a Defendant's *onus* in a summary judgment application and approved the English law approach, (see *Moses Dlamini vs National Motor Company Ltd - Appeal Case No. 9/1994).*

[6] According to the learned authors *Herbstein et al The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *434* the procedure provided by the rules has always been regarded as one with a limited objective - to enable a Plaintiff with a clear case to obtain swift enforcement of his claim against a Defendant who has no real defence to that claim. The courts have in

innurable decisions stressed the fact that the remedy provided by this rule is an extraordinary one which is **"very stringent"** in that it closes the door to the Defendant, and will thus be accorded only to a Plaintiff who has, in effect, an unanswerable case.

[7] Having considered the above legal authorities and arguments of the parties I have come to the view that the application for summary judgment ought to fail. I am persuaded by the arguments of the Defendants on the points of *res judicata,* prescription and novation that this matter ought to proceed to trial for a full ventilation of the facts which touch on private international law. Clearly on these facts the remedy provided by summary judgment cannot be available. There is a dispute on the papers as to whether the matter is *res judicata* or whether it was withdrawn in the Namibian Court. This is a question which requires evidence and would also involve the discovery of the full set of pleadings and the record of the Namibian proceedings.

[8] The Defendants allege that the claim has prescribed. What the Namibian law is with regard to prescription is a matter of evidence which can only be determined at a trial in this matter. Foreign law must be proved by expert evidence.

[9] All in all, it is abundantly clear to me that this case has a number of foreign law issues which are questions

of fact and must be proved.

[10] In the result, for the afore-going reasons the application for summary judgment is dismissed with costs including the costs of Counsel in terms of Rule 68 (2).

MAPHALALA - J