

**IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE**

CASENO. 3738/09

In the matter between:

PHIWANGESIHLE INVESTMENTS (PTY) LTD APPLICANT

VS

NOMPHUMELELO PRIMEROSE RESPONDENT

LUKHELE

CORAM

OTA J.

For applicant

Miss M. Boxshell

For Respondent

Mr. M. Mzizi

JUDGMENT

[1] The plaintiff herein sued out combined summons against the Defendant, claiming *inter alia* the following reliefs:-

- 1) Payment of the sum of E190,000=00
- 2) Interest thereon calculated at 9% per annum from the 15th of June, 2009
- 3) Cost of suit
- 4) Further and / or alternative relief.

[2] After the defendant delivered a notice of intention to defend, the plaintiff commenced a summary judgment application for the reliefs claimed. The facts upon which this application is premised is a clearly depicted in the plaintiffs particulars of claim, which demonstrates the following: -

[3] That on or about the 1st June 2009 **at Manzini**, the parties entered into a written agreement in terms of which the plaintiff sold and delivered a business as a going concern known as Soul Food Butchery to Defendant for an amount of E240,000=00. That the terms of the agreement were that the defendant would pay a deposit of E50,000=00 upon signing the agreement. The balance would be paid in 10 monthly installments as clearly shown in annexure "PIP which is the Deed of Sale. That notwithstanding delivery of the business and consignment, upon demand for payment, that the "defendant failed to pay the balance of the purchase price which is the sum of E190,000=00, now due and owing.

[4] Now, I count it judicially settled that summary judgment is an extraordinary and stringent measure, this is because it is one obtained

without a plenary trial of the action. This is why courts have been enjoined from time immemorial to approach this redress with caution, because of its characteristic tendency to shut the door of justice in the face of the defendant. This is to avoid the ill consequence of precluding a defendant who may have a bonafide defence to the plaintiffs claim, from pleading to same.

[5] It is in recognition of the foregoing facts, that in the case **of Mater Dolorosa High School vs R.J.M. Stationery (Pty) Ltd Appeal case No. 3, 2005** the court declared as follows:-

"... it would be more accurate to say that a court will not merely "be slow " to close the door to a defendant, but will in fact refuse to do so if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of plaintiff's claim, the court cannot deny him the opportunity of having such an issue tried"

[6] It is to aid the court in this all too important duty of ensuring that summary judgment does not become a weapon of injustice, that Rule 32 (4) enjoins a court seized with a summary judgment application, to scrutinize the affidavit resisting same to ascertain if it discloses a bonfide defence, or triable issue, to warrant leave being granted to the defendant to plea to the claim. The defendant is required by Rule 32 (4) to satisfy the court through the said affidavit, that he has a good defence to the action on the merits, by disclosing such facts as may be deemed sufficient to enable him defend generally.

[7] The requirement that the defendant should disclose a bona fide defence does not mean that he should show the possibility of success. It suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. The defendant need not deal exhaustively with the merits of the defence, but the grounds of defence and the material facts relied upon for same, must be set forth with sufficient details to enable the court conclude that the application is not a delay stratagem.

[8] In the celebration case **of Maharaj v Barclays Bank Ltd 1976 (1) SA, Corbett CJ** (as he then was) demonstrated the responsibility imposed upon the defendant in these circumstances as follows:-

"Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in the 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 one or the other. All that the court enquires into is (a) whether the defendant has fully disclosed the nature and grounds for his defence and the material facts upon which it is founded and(b) whether on the facts so disclose the defendant appears to have, as to either the whole or part of the claim, a defence that is bonafide and good in law. If satisfied on these matters the court must refuse summary judgment either wholly or in part, as the case may be —"

[9] Now, the defendant herein filed an affidavit resisting this summary judgment application, which appears on pages 21 to 23 of

the book of pleadings and to which are exhibited annexures A, B and C respectively. In paragraphs 3.2 to 4.6 of the said Affidavit, the defendant contends that he has a bonafide defence to the plaintiffs claim. That the written agreement between the parties which founds the cause of action for the plaintiffs claim was cancelled because of plaintiffs breach of clause 8.1.2 pursuant to which the plaintiff was to furnish the defendant with the landlord's written consent to cede the lease agreement it had with the plaintiff in respect of the premises rented for the butchery. That by a letter dated 11th June 2009, annexure A, the plaintiff was given 7 days to remedy it's breach failing which the agreement would be cancelled. That the plaintiff did not remedy the breach and the contract was accordingly cancelled. That the cancellation was confirmed by plaintiff through her Attorney's Hlabangana and Associates, in a letter dated 10th July 2009, exhibited herein as annexure B. That by a letter dated 23rd July, 2009, annexure C, the defendant confirmed the cancellation of the agreement and demanded a refund of the deposit of E50,000=00 paid on this transaction.

[10] It appears to me beyond dispute that the defendant raised a triable issue via the said affidavit. I say this because the allegation of the cancellation of the written agreement upon which the plaintiffs cause of action is founded, which allegation is supported by annexures A, B and C to my mind is an issue fit for trial. The defendant I find has not just made a bare allegation but has disclosed sufficient material particulars in support of his allegation for this matter to be referred to trial. I say this because the defendant is not required to formulate his defence with the precision of a plea, all he is required to do is to show that a reasonable possibility exists that an injustice may be done if judgment is granted summarily. In fact the plaintiffs replying affidavit further buttresses my conviction on this subject matter. This is because in her Replying affidavit she denied the alleged cancellation of the agreement contending that she did get the deed of cession albeit for 3 years, which was refused by the defendant, who insisted on one for a period of not less than four years.

[11] I find a need however to point out that the Plaintiff by her allegation of fraud on the part of the defendant, as well as her

allegation that the defendant secured a lease for herself from the landlord in the name of her company -Moonstruck Investments (Pty) Ltd, in an effort to hide behind the veil of the said company to avoid payment to the plaintiff, seeks to make out a different case from that in her particulars of claim. It is trite law that parties are bound by their pleadings. Since this course was not disclosed by the plaintiff in her pleadings, I will discountenance it.

[12] It is my considered view therefore from the totality of the foregoing, that the alleged cancellation of the written agreement is one that must of necessity be referred to trial for it to be well ventilated by viva voce evidence.

Thus enabling the court come to a decision on the balance of probabilities after a consideration of the totality of the evidence, as well as, the credibility of witnesses. On these premises, I make the following orders:-

- 1) The parties herein be and are hereby ordered to trial.

- 2) The defendant be and is hereby ordered to deliver a plea and a counter claim if any within 14 days of the date hereof.
- 3) Costs to be in the cause.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 6th DAY
OF April 2011**

**OTA J.
JUDGE OF THE HIGH COURT**