IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No1837/2011

In the matter between

MISI ADAM ALI **Applicant**

And

FATHOOS INVESTMENTS (PTY) LIMITED **1st Respondent**
ALI HAMISU **2nd Respondent**
NOKUTHULA HEZEERA **3rd Respondent**

Neutral Citation: Misi Adam Ali v Fathoos Investments & Others (1837/2011) [2012] SZHC 127 (18th June 2012)

Coram: Dlamini J.

Heard: 8th May 2012

Delivered: 18th June 2012

Summary judgment application – essential requirements in an affidavit resisting summary judgment - duty of the court to assess defence in order to determine bona fide characteristics – where defence is attended by contradiction, court will presume mala fide – defence of set-off discussed.

[1] The defendants were served with combined summons in respect of two claims *viz.* for payment of E90.000 00 and E80.000 00

respectively together with interest thereof and costs of suit. They filed notice of intention to defend. Plaintiff served an application for summary judgment. By affidavits, the defendants strenuously oppose the plaintiff's application.

[2] The particulars of claim indicate that plaintiff, 2nd and 3rd defendants formed a company by the name of the 1st defendant. By agreement between the parties, Plaintiff was removed and resigned as director of 1st defendant. The agreement provided that plaintiff be paid 20% of his shares and directors fees which was to the tune of E80 000 00. The amount would be paid in installments of E10 000 00 per month commencing December 2010. It was further an express term of the contract that 2nd defendant will pay plaintiff the said amount on behalf of 1st defendant. Annexure A3 indicated that 3rd defendant was present and a party to this agreement. She too appended her signature in annexure A3.

[3] Claim two arises from a loan of E90 000 00 advanced by plaintiff to the defendants. 2nd and 3rd defendants signed a deed of surety. From the face of the deed of surety, the agreement was entered into and signed on 10th January 2011. On the 12th January 2011 the parties proceeded to a commissioner of oaths to commission the document.

[4] In their affidavit resisting summary judgment, the defendant raised points in *limine* in that plaintiff's application fell short of the requirements as set out in Rule of 18 in that it failed to allege whether the agreement was written, where and when it was concluded.

[5] I do not see any merit in defendant's objection. The plaintiff explicitly states in his particulars of claim at paragraph 9 that the

parties drew and executed a deed of surety and annex a copy of the same and this was in Manzini on or about 2009 in respect of claim 1. In relation to claim 2 the plaintiff informs that a deed of settlement was drawn and the agreement was entered on 10th January 2011 in Manzini as fully appears at paragraphs 10.2 and 10.3 of his particulars claim and the deed of settlement is attached as annexure A2.

[6] It is not clear why the defendant decided to waste the court's time on allegations which are glaring on the plaintiff particulars of claim.

[7] On merits, the defendants aver:

> *"I never applied for and receive a loan from Plaintiff in the sum of E90 000 00. No one of the defendant ever received such loan. Plaintiff was employed by the company and at no point in time during his presence at Fathoos did he have such money such that we could apply for such loan from him. Plaintiff was the one who was lent and advancement money and not the other way round.*
>
> *I challenge plaintiff to produce proof of where and how he sourced the sum of E90 000 00 which he claims to have lent me in cash form. If he collected same from a bank or any other institution, such is easily traced. I cannot understand how in business dealings one can simply hand over E90 000 00 without signing a document. No such document is produced because there is no such loan made to us by plaintiff.*
>
> *I do not deny that I and other Defendant signed the deed of Suretyship and deed of settlement. These documents were*

drawn by Attorney Mthokozisi Dlamini and Plaintiff brought them to us for signature in the company of police officer Magongo from Manzini Police Station. Magongo and Plaintiff threatened us with arrest if we refused to sign the document and we signed the documents because of the threats that were issued by the two men. We were not trading and were waiting for a license renewal and Plaintiff, as one of the directors was refusing to sign the application for renewal of the licensed is criminal offence and we were definitely going to be arrested as we were violating the Law.

Plaintiff refused to give me time to read the documents before I signed. I could not therefore take legal advice on the contents of the documents. His main concern was that I should append my signature and nothing else.

Apart from these threats, Plaintiff had lodge a complaint with the Fraud and Vice Squad Manzini and I was fetched by two police officers to answer his fraud allegations against me at Manzini Regional Headquarter. Though they released me it became clear and I was told that I could be arrested at anytime. It was immediately after that Plaintiff and Magongo came to threatened me once more with arrest and I signed the documents for fear of being arrested and of losing my business in which I had invested a lot of money. Plaintiff, it was clear to me, could be able to manipulate the system to cause me to be arrested as evidence by the fraud and Vice Squad.

Contrary to what appears ex facie, the deed of Settlement and Deed of Suretyship were signed at Fathoos Investment being 67 Louw Street Manzini and not at the Manzini police station. One

of the person who was present was Tweneboa-Kwasi whose supporting affidavit is attached. As is apparent from the supporting affidavit of Mthokozisi Dlamini the deed of settlement prepared by him and he does not know the other witnesses save Plaintiff. How Plaintiff got Sergeant Vincent Bhembe to sign as Commissioner of Oaths on the deed of settlement, it is clear indication of the access that Plaintiff has to the police service. It then is clear that Plaintiff was going from door to door and causing people to resign singularly on the document and thereby purport to witness for one another which, in itself is irregular.

I signed documents for fear of the arrest and that of losing my investments in Fathoos Investments as I would no longer lawfully trade with Plaintiff refusing to renew the licence application.

CLAIM 2

2.3 AD BACKGROUND

I do accept that I signed the agreement which is the subject matter of this claim. But it must be clarified that plaintiff is not entitled to any money at all. When I met Plaintiff at the Manzini Mosque, he had nothing and was actually sleeping at the Mosque and had nowhere to sleep. For sometime plaintiff was sleeping at the Mosque until the elders at the Mosque complained. It is then that I then got him a place to put at Casa Minha flats and at my own expense as a brother Muslim, a faith I share.

I paid for everything including water and electricity. Plaintiff then started helping me out at the shop but he could not lawfully work as he had no work permit and I then put him as a director at Fathoos Investment in order to legalize his stay and working. Plaintiff was paid a monthly salary for his services at Fathoos Investments.

2.4 Plaintiff cannot prove evidence of any money which he paid for him to be a 20% share holder because he had none and was entirely dependant upon me for sustenance.

2.5 When the agreement was made at Mosque that I pay him the E80 000 00 it was based on the fact that in order to legalise Plaintiff's stay he had to be a director and share holder at Fathoos Investment.

2.6 Plaintiff cannot produce proof of money which he or anyone on his behalf paid in order to get the 20% share holding. When the agreement was made that I pay him E80 000.00 I paid him the sum of E10 000 .00 through Twebenoa-Kodua Kwasi whom I sent.

2.6 Throughout Plaintiff's stay with us he promised to repay all the money which we paid as rent, water and electricity, when he stabilizes. To date he has not repaid any of the money I spent on him despite the fact that it is due and payable.

28 I attach a copy of the lease agreement I entered into on behalf of Plaintiff and marked it "A" whilst the water

statement is marked "B" the electricity statement is marked "C", the fridge statement is marked "D" and the computers receipt is marked "E".

2.9 Even if plaintiff is in fact entitled to the E80 000.00which is not the case, the sum total of moneys that plaintiff owes to the Defendants should be set off against what he is purportedly owed and if my calculations are good plaintiff is not owed at end of the day

2.10 Plaintiff's application for Summary Judgment is ill conceived and misplaced and should be dismissed with costs.

[8] My brother **Maphalala M. C. B. J.** as he then was, in **Lindiwe Dlamini v Mxolisi Matsebula 2496/11** at page 12 in his wisdom comments as follows in relation to summary judgment applications:

"*This remedy is available to a party who can satisfy the requirements set out in Rule 32; it enables a party to obtain judgment without the necessity of going to trial as long as he can show that the defendant has no bona fide defence to the claim. Admittedly, this remedy is extra-ordinary stringent and very drastic because it denies the defendant the opportunity to present his defence during the trial; it is for this reason that courts have declared that it must be granted only on those cases where plaintiff has a clear and unanswerable case".*

[9] Motivating a motion for the promulgation of this procedure in the House of Lords, **Lord Hatherely** sets out the rationale for the short form procedure as cited in **John Wallingford v The Director of**

Mutual Society and Another (1880) 5 A.C. 685 (H.L) at **699-700** as follows:

> *"…has been to prevent unreasonable delay, a duty which was very prejudicial to the creditors and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of Justice as much as possible, is not an end for which we can conceive the legislature Acts. If a man really has no defence, it is better for him as well as his creditors and for all the parties concerned, that the matter should be brought to an issue as speedily as possible"*

[10] It would seem to me that this provision which is expedient in nature accords well with business efficacy: to continue putting out of pocket a man who has a clear right by subjecting him to long tedious procedures is inconceivable when considering that the man is already disadvantaged by the act of the debtor or *lessee* as the case may be.

Lord Blackburn in **JohnWallington** *supra* propounded:

> "*A defendant may oppose summary judgment not only by satisfying the judge that he has a good defence but also disclosing such facts as may be deemed sufficient to entitle him to defend the action generally. He need thus not necessarily show a defence*".

[11] **Ota J.** in **Tribute Investment (Pty) Ltd v H and E Company (Pty) Ltd (1033) [2012] 34** at 7, articulates:

"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 exist 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 the Plaintiff's claim the court cannot deny him the opportunity of having such an issue tried."

[12] In **Mabuza Masina Property Consultants (Pty) Ltd v The Hub (Pty) Ltd2781/10, Her Ladyship Ota J.** hit the nail on the head when she drew an extract from **National Motor Company Ltd v Dlamini Moses Case No. 1363/93:**

"*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 determined whether or not there is a balance of probabilities in favour of the party or the other. All that the court enquires into is (a) whether the defendant has fully disclosed the nature and ground 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 both bona fide and good in law".*

[13] She continues to quote in relation to the extent of the defence:

> *"The word fully connotes in my view that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court decide whether the affidavit discloses a bona fide defence."*

[14] It is against this backdrop that I now turn to consider both the applicant's application and the defendant's affidavit resisting the application.

[15] In support of his claim; plaintiff attached a deed of surety as annexure "A2". This is a five page document. The signatories thereto wrote their initials and/ or names in each and every page at the lower end and appended their signatures in the last two pages. I must mention that page 4 of the deed was signed fully and page 5 was similarly signed with the inclusion of the Commissioner of Oaths.

[16] As can be deduced from the defendants' preceding averments and confirmed by defendants in their *viva voce* submissions, this court is called upon to disregard the deed of surety because it was obtained through coercion and further refer the matter for oral evidence.

[17] In determining whether this court can safely treat the deed of surety as *pro non scripto* and whether there are any material disputes of facts which calls for trial, I refer to the averments by defendants.

[18] In considering the affidavit resisting summary judgment, this court asks: have the defendants disclosed material facts with sufficient

particularity and completeness so as to enable the court to decide that the defendant's affidavit discloses a *bona fide* defence. In so disclosing their defence, have they done so, "*with honest and unequivocal?"*

[19] In their paragraph 2.2 *supra* defendants allege at page 39 of the book of pleadings;

"*plaintiff was employed by the company"*

[20] At the same time defendants at page 40 under the same paragraph state:

"and plaintiff as one of the directors"

[21] This is a glaring contraction to the status of plaintiff as alleged by the defendants and the court can safely draw the conclusion that defendant's defence is equivocal. I draw this conclusion well alive to the duty of this court that at this stage of the proceedings, the court is not called upon to ascertain whether the defence as raised shall stand or is plausible but whether the defendants have disclosed a *bona fide* defence.

[22] The defendant continue to aver:

> "*plaintiff is the one who was lent and advanced money and not the other way round"*

[23] The question is then, if it is plaintiff who is owing the defendants, where is a counter claim application and how much was this

amount? Is it the same less or higher amount? This renders defendants' defence incomplete and open to conjecture.

[24] In **Mabuza Masina** *supra* at page 8, **Her Lordship** stated in much clear language:

> *"it follows therefore that if the allegations in the defendants' affidavit relative to those factors are equivocal incomplete or open to conjecture, then the requirements of the Rule in question have not been complied with…."*

[25] At page 40 paragraph 2.2 defendants aver:

> *"we were not trading and were waiting for a licence renewal and plaintiff as one of the directors was refusing to sign the application for renewal of the licence if we did not sign the documents. Trading without a valid licence is a criminal offence and we were definitely going to be arrested as we were violating the law*".

[26] Again this paragraph is infested with contradictions: The defendants state that they were not trading as they were waiting for licence renewal. At the same time, the plaintiff had refused to sign for the licence renewal. The question then is: which is this licence they were waiting for?

[27] The defendants contend further that they were not trading and in the same vain state that they were subject to arrest because trading without a licence is a criminal offence. Again this renders the averments equivocal as in one instance, they were not trading

because they were waiting for renewal of licence and in another they were trading without a licence and they feared arrest.

[28] Defendants submit further that:

"*I signed the documents for fear of arrest and that of losing my investments in Fathoos Investment as I would no longer lawfully trade with Plaintiff refusing to renew the licence application."*

[29] From annexure A3, deed of settlement in respect of 20% share, a document which defendants acknowledged to have signed on the date reflected, one can deduce that it was signed on 28th December 2010 while the deed of surety was entered into in January, 2011. It is therefore clear that the plaintiff was no longer a director of 1st defendant when the money was advanced in respect of claim 1. How then can it be averred that defendants feared losing business because plaintiff refused to append his signature on the forms for renewal of 1st defendant's trading licence?

[30] In the light of the above, it is untenable to hold that the defendants have alleged material facts reflecting a *bona fide* defence. In fact this is no defence at all, as it is attended by material contradictions and forged averments.

[31] In **Swaziland Polypack (Pty) Ltd v The Swaziland Government and Another (44/11) [2012] SZSC 30** deciding on a summary judgment application as in *casu* their Lordships held at page 19:

"*It is the duty of the court in every case where a dispute of fact is alleged to examine the allege dispute of fact on the papers without resort to oral evidence. This is to guard against the tendency of*

respondents raising the fictitious issues of fact with a view to delay the hearing of the matter to the prejudice of the plaintiff. In order for the alleged dispute of fact to require oral evidence, it must be real, genuine and bona fide…".

[32] The defendants in the same paragraph 2.2 at page 40 advance another reason for signing the deed of surety. They state that the plaintiff caused the 2nd defendant to sign as plaintiff had lodged a complaint about fraud allegations where he was threatened with arrest. They further state that plaintiff is "*able to manipulate the police system to course me to be arrested*". These are very serious averments not only against the plaintiff but also the police who are not party to these proceedings. Why defendant chose not to apply for their joinder is not clear except that the consequence thereof is for such averment to be struck out by reason of being vague and embarrassing and thereby not constituting a *bona fide* defence. I reach this conclusion by drawing analongy from the case of **Polypack** *supra* where their Lordships at page 20 stated:

> *"the glaring omissions referred to the above render the appellant's defence vague and embarrassing and not constituting a bona fide defence in law"*

[33] In the totality of the above, the purported defence in respect of claim 1 must fail. I have considered whether the plaintiff has established in the combined. summons a cause of action narrating orders as prayed. My determination is that he has and therefore this claim should succeed.

[34] I now turn to consider claim 2. Plaintiff claim the sum of E80 000 .00 in respect of "cancellation of plaintiff's 20% share in the 1st

defendant'. Again as proof of the oral agreement, plaintiff has attached annexure A3, a deed of settlement signed by 2nd and 3rd defendants.

[35] In contesting the claim defendant state:

> "*I do accept that I signed the agreement which is the subject matter of this claim. But it must be clarified that plaintiff is not entitled to any money at all. When I met Plaintiff at the Manzini Mosque, he had nothing and was actually sleeping at the Mosque until the elders at the Mosque complained. It is then that I then got him a place to put at casa Minha flats and at my own expense as a brother Muslim, a faith I share.*
>
> *I paid for everything including water and electricity. Plaintiff then started helping me out at the shop but he could not lawfully work as he had no work permit and I then put him as a director at Fathoos Investment in order to legalize his stay and working. Plaintiff was paid a monthly salary for his services at Fathoos Investments*".

[36] Again a clear contradiction as appears in paragraph 2.3 and 2.6. At paragraph 2.3 it is averred:

> *"but it must be clarified that plaintiff is not entitled to any money at all."*

[37] At paragraph 2.6

" when the agreement was made that I pay him E80 000.00 I paid him the sum of E10 000.00 through Twebenoa-Kodua Kwasi whom I sent"

[38] It is not clear how defendant can say in court that plaintiff is not entitled to any money and at the same time under the same claim pay him E10,000-00. It is further not clear how under an agreement which he acknowledges to be for payment of E80,000-00 but decide *mero motu* to pay E10,000-00. How he arrived at that sum of E10,000-00 to be entitled by plaintiff and not the full amount is somehow confusing.

[39] Defendant further alleges that plaintiff owes him a sum of E101,660-78 being in respect of overheads incurred by plaintiff in a rented flat by the defendant on behalf of plaintiff.

[40] It is worth noting that there is no counter-claim filed in this court nor any evidence of such in another court. Neither have defendants alleged any counter claim in the affidavit resisting summary judgment except to state that there should be a set off. In that regard, defendant cannot raise such defence in the absence of a counterclaim lodged in a court of law. This position was held in **Polypack** *op. cit.* where their where their Lordships propounded at page 21:

"A counter-claim is separate action and is brought together with the claim for purposes of convenience".

[41] Further there is no demand made to plaintiff by defendant in order to put the plaintiff in *mora*. In **Standard Bank v S. a. Fire Equipment, 1984 (2) S.A. 693 AT 696 F-H** held:

"It seems reasonably clear that the defence of compensation or set-off is a defence "in rem", since set-off is similar to payment and results in the discharge, in whole or part, of a debt. Set-off occurs, or may be invoked, only when two persons have incurred indebtedness each to the other, from whatever cause or causes and both debts are for liquidated amount in money due and payable at one and the same time. When this situation arises each debt, or claim compensates the other, each is written off against the other and a balance is struck whereby both debts, if equal in amount, are discharged just as if both have been paid. If the one debt is greater than the other, of course, the lesser debt is discharged and the greater is reduced by the amount of the lesser. Such being the nature of set-off, it is not a defence in personam, but a defence in rem, since it extinguishes the debt whoever may be the debtor."

[42] The defendant's denials are "*so far-fetched or clearly untenable*" and therefore must be "rejected merely on paper" as held in **Associated South African Bakeries (Pty) Ltd v Oryx & Vereingte Backereien (Pty) Ltd en Andere 1982 (3) S.A. 893** at **924 (A).**

[43] The Defendant also informed the court that the deed of surety should be dismissed because it was signed on 10th of January and commissioned on 12th of January, 2012.

[44] This is a matter which is highly technical in nature. This court will not hold it as it was so decided in **Shell Oil Swaziland (Pty) Ltd and Motor World (Pty) Ltd T/A Sir Motors** where the Appellant deposed to an affidavit on behalf of the company and the following day a resolution by the directors for the deponent to institute proceedings was obtained.

[45] In the totality of the above it is my considered view as held in **Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) LTD. 1949 (3) S.A. 1155** that the defendant's denial of facts alleged by plaintiff does not "*raise a real, genuine or bona fide dispute of fact*" and in fact defendants defence is spurious as demonstrated above.

[46] I therefore order that:

1. Applicant's application is upheld.
2. Defendants are ordered to pay plaintiff the sum of E90,000-00 and E80,000-00.
3. Interest at 9% *tempere morae.*
4. Cost of suit.
5. Defendants are ordered to pay plaintiff the above jointly and severally, each party absolving the other.

M. DLAMINI
JUDGE

For Applicant: **Mr. M. S. Dlamini**

For: Respondent: **Mr. B. J. Simelane**