



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1550/2011

In the matter between:

SWAZI WIRE INDUSTRIES (PTY) LTD

Plaintiff

And

**PROTRONICS NETWORKING
CORPORATION**

1ST Defendant

SANDILE DLAMINI

2nd Defendant

Neutral Citation: Swazi Wire Industries v Protronics Networking Corporation
& Another 1550/2011) [2012] SZHC 207 (14th September 2012)

Coram: Dlamini J.

Heard: 3rd July 2012

Delivered: 14th September 2012

Summary judgment application – defendant relying on technical points – court to eschew the same – that term of contract – company distinct – obligations of surety – subscribers to memorandum.

Summary: The plaintiff and 1st defendant entered into a contract of sale. The plaintiff agreed to supply defendant certain steel wires upon order and to receive payment after 30 days of delivery for each consignment. 1st Defendant made various purchases between the period August 2007 and June 2008. The total payment was for E75,215.79. There was an agreed interest rate which totaled E10,434.35. However, defendant failed to honour its side of the bargain in terms of the contract. Despite demand, defendant did not pay. The plaintiff sued 1st defendant and 2nd defendant who stood as surety in terms of the combined summons. Having filed a Notice of Intention to Defend, plaintiff moved by way of summary judgment application.

[1] Summary judgment applications are, as the process connotes, partly governed by principles applicable to applications generally: Where there is a material dispute of fact or the litigant ought to reasonably in the circumstances, foresee such an irresolvable dispute of fact, summary judgment application cannot be adopted or granted. Needless to point out that the said real issue should be on the merits of the case and must be *bona fide*.

[2] **Murray A.J.P. in Room Hire Co. (Pty) Ltd. v Jeppe Street Mansion (Pty) Ltd. 1949 (3) SA 1155 at 1159** summarised as follows:

“.... a person claiming relief acts at his peril in proceeding by motion, and not adopting the normal course of instituting action: he cannot by electing to proceed by motion deprive his opponent of a number of procedural advantages instanced in the judgment referred to, viz., the right to plead without prematurely disclosing his evidence, the right to make tactical denials in order to force his opponent into the witness box, the right to raise alternative defences of possible inconsistency.”

[3] It is for this reason therefore, that it has been held that:

“Summary judgment therefore by its characteristic features, shut the door of justice in the face of a defendant who may otherwise have a triable defence.”

(Ota J. in Supa Swift (Swaziland) (Pty) Ltd v Guard Alert Security Services Ltd, case No. 4328/09).

[4] This short, expedient and less expensive form of obtaining judgment is in line with the dictates of business in that a litigant who is already out of pocket by the conduct of his opponent, need not incur further delays and expenses.

[5] It is my considered view that the plaintiff has established his cause of action on the basis of his founding affidavit and particulars of claim presented.

[6] I now turn to defendant’s affidavit resisting summary judgment with the view of ascertaining whether the requirements as laid down in **Tribute Investments (Pty) Ltd v H and E Company (Pty) Ltd 1033/11** by the learned Judge Ota J. that the averments by defendant should be:

“made bona fide must be equivocal and must contain sufficient material facts upon which the allegation are based to enable the court to reach the conclusion that a triable issue is raised or that there ought for some other reason to be a trial of the claim or part of it.”
have been established.

[7] I am conscious that at this stage I am not called upon to:

“judge the probabilities or truthfulness of the allegations”

as per **Beck J. A.** in **Mater Dolorosa High School v R.M. J. Stationery (Pty) Ltd Civil Appeal Case No. 3/2005**, and further am alive that the defendant has to disclose fully his defence. However, the word “fully” connotes only that:

“the statement of material facts be sufficiently full to persuade the court that what the defendant has alleged if proved at the trial, will constitute a defence to the plaintiff’s claim.” (**Breitenbach v Fiat S.A. (Edms) Bpk 1979 (2) S.A. 226 at 228.**

and not that the defendant is required:

“to deal exhaustively with the details of his defence” as highlighted in **Mater Dolorosa High School op cit.**

[8] *In casu* the defendant avers:

“4. *I submit that the contract sued upon, that is the “Credit Facility” agreement, is null and void and as such no rights or obligations can be derived or accrue there from, on the following grounds:*

4.1 *The contract was entered into between Sandile F. Dlamini as the applicant and the plaintiff, not between Protronics Networking as appears on page 2 of annexure “A”.*

4.2 *This also means that the Deed of Suretyship is also null and void and of no force and effect if the contract to which is relates to is also null and void.*

4.3 *The term of agreement on interest, of 2% per month, at page 9 of annexure “A”, is contrary to the Money-Lending and Credit financing Act, thereby rendering the agreement null and void and unenforceable.*

4.4 *The contract also provides that the credit facility was for E40,000.00 (Forty Thousand Emalangen) and the plaintiff does not state how the limit was exceeded and why, and on whose authority.*

4.5 *The plaintiff has to prove that the goods claimed to have been purchased were dispatched from its premises and delivered to the 1st defendant as the invoices reflect that the items were never dispatched from plaintiff’s premises.”*

[9] It is glaring that the defendant does not say much, if anything at all, about the merits of the case. He merely raises technical points.

[10] One can therefore safely conclude that defendant does not challenge the material evidence such as that he purchased the goods, and he failed to pay for the same when the debt fell due. He does not deny further that he is the director of plaintiff but seeks to escape liability by relying on an obvious error in the forms which he does not dispute to have signed. Annexure “A” reads:

“The signatory of this document is duly authorized by the applicant to sign this document on the applicant’s behalf and to bind the applicant hereto:

[11] The space where it reflects applicant bears the photograph of 2nd defendant. He does not dispute that this is his photograph.

[12] He relies on a technical point on number 9 of the application which reads:

[13] He contends that that is the plaintiff and not 1st defendant. Ironically, he does not tender payment although he argues that the plaintiff as per the form is not 1st defendant but 2nd defendant.

[14] He does not dispute that he received goods totaling the amount claimed but argue that the contract was for supplying goods to the total value of E40,000.00 and not E75,000.00. Again it is not clear how respondent hopes to succeed in this point as he does not dispute that he received the goods to the total tune of E75,000.00.

[15] I draw an analogy from the case of **Van den Berg v Tenner 1975 (2) A.A. 268**. In that case, the parties had concluded a contract of sale. subsequently, by agreement between the parties the contract was cancelled. However, the other party had performed in terms of the contract by delivering certain goods to the other. The contract was resiled before the other could pay for the goods delivered. The court held that although the parties had not applied their minds, it was an implied term of the contract that should one perform, the other was also bound to discharge his corresponding duty. The court then laid down a principle in the following manner:

“The test for reading an implied term into a contract does not necessarily require that the parties to the agreement should consciously have had in mind the situation which would later arise and the need to provide therefore. The test does not require that the parties should actually have intended the implied term. It is sufficient if it appears

clearly that had the parties, in the light of the express terms of the agreement and the surrounding circumstances actually contemplated the situation which later arose, they would have provided therefore in the obvious manner and the parties must therefore be deemed to have intended the implied term.” (words underlined, my emphasis)

[16] **Ellison Khan, “Contract and Mercantile Law” 2nd Ed. Vol. 1** comments on the above at page 6 as follows:

“It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in business sense to give efficacy to the contract. ...it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.”

[17] *Fortiori, in casu* the plausible reasonable inference that can be drawn from the conduct of both parties is that the initial contract of a credit facility of E40,000 was tacitly changed to E75,000. This accords well with business efficacy and it is not uncommon in conducting business.

[18] However, it would be remiss of me not to adjudge the position of 2nd defendant as surety.

[19] In law the 1st defendant stands as a full *legal persona* with rights and obligations completely divorced from its directors and members as decided in **Dadoo Ltd & Others v Krugersdorp Municipal Council 1920 AD 530** at 550:

“It is a legal person entirely distinct from members who compose it”

[20] **Solomon v Solomon & Co. Ltd. [1897] A.C. 22 HL** at 51-52 the court articulated the position of a company with precision as follows:

“The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trusted for them. Nor are the subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act... Any member of a company, acting in good faith, is as much entitled to take hold of the company’s debentures as any outside creditor”

[21] Similarly in the present case, the 2nd defendant as surety is completely separate from the 1st defendant although a director of 1st defendant.

[22] On that note, it is not in dispute that the goods were delivered at the instance of 1st defendant. The 2nd defendant had stood as surety for the sum of E40,000 and not of E75,000. Plaintiff supplied the goods to the 1st defendant and not to the 2nd defendant although it could be said the hands of 2nd defendant received the goods. However, because of the distinct character of 1st defendant and 2nd defendant, 2nd defendant was only bound as surety to 1st defendant for the amount he stood surety of. Unless it can be shown that the 2nd defendant conducted himself in such a manner as to tacitly extend the surety, he cannot be held liable for the increased sum of E75,00.00.

[23] The next query is whether this is an appropriate case of piecing the veil. **Corbett C. J. in Shipping Corporation of India Ltd v Edomon Corporation 1994 (1) S.A. 550** at 556 states:

“It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a simple entity and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where, the circumstances justify ‘piecing’ or ‘lifting’ the corporate veil. ... Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.”

[24] In **Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd 1995 4 S.A. 790 (A) at 802 (F)-803, Sinalburger J. A.** held the same view by stating:

“It is trite law that a registered company is a legal persona distinct from the members who compose it ... Equally trite is the fact that a court would be justified in certain circumstances in disregarding a company’s separate personality in order to fix liability elsewhere for what are ostensibly acts of the company. This is generally referred to as lifting or piercing the corporate veil. ... The focus then shifts from the company to the natural persona behind it (or in control of its activities) as if there was no dichotomy between such person and the company. ... In that way personal liability is attributed to someone who misuses or abuses the principle of corporate personality. There already appears to have been recognised that proof of fraud or dishonesty might justify the separate personality of a company being disregarded ... and over the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.”

[25] Applying the above principles *in casu*, there are no averments touching upon fraud, dishonest act or any improper conduct of the company or its directors that would warrant the piercing of corporate veil.

[26] In the above analysis, the 2nd defendant is liable to pay in the event 1st defendant fails to pay the sum insured plus agreed interest and costs of suit.

[27] The defendant has also contended that the agreement is null and void in that it violates section 3 (1) of the Money Lending and Credit Financing Act. The section reads:

“where in respect of any money-lending or credit transaction the principal debt exceeds E500 or such amount as may be prescribed from time to time, no lender shall charge an annual interest rate of more than 8 percent points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time by the Central Bank under section 38 of the Central Bank of Swaziland Order 1974.”

[28] In their submission defendants state that because the agreement refers to 2% per month that is tantamount to 24% per annum.

[29] By any stretch of imagination, I do not agree with the defendants. On mere calculation, the interest claimed is E10,434.35. This cannot be 24% of E75,000 by simple arithmetic. At any rate the section refers to not above 8% above discounts, rediscounts and advances as announced from time to time by the Central Bank.

[30] I have dismissed the effect of this provision and the cited case of **Reckson Mawelela** fully in the case of **Swaziland Development Finance Corporation v Olive Mhlobiso Sikhondze t/a Mntimandze Flats and Another 219/2010 [2012] SZSC**.

[31] Defendant in the absence of advancing the discounts, rediscounts or advances applicable herein cannot simply make a blanket statement to the effect that the interest charged offends section 3 (1) (b) of the Act. Defendants render their defence open to conjecture and therefore cannot be held to have disclosed fully its defence. At any rate following the spirit of **Reckson Mawelela v M. B. Association of Money Lenders & Another, case o. 43/1999**, (unreported) the entire contract cannot be held to be null and void but that the contract could be voidable in so far as it violates the Act. *In casu*, I hold that it does not.

[32] In conclusion, the technical points raised by defendant cannot hold.

[33] **Terbutt J. A. in Shell Oil Swaziland (Pty) Ltd., v Motor World (Pty) Ltd., t/a Sir Motors 23/2006** held:

“.....is now well recognized and firmly established viz. not to allow technical objections to less than perfect procedural aspect to interfere in the expeditious and if possible inexpensive decision of cases on their real merits.”

[34] In **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) S.A. 81 (SE) at 95 F – 96A** par 40 as cited in **Nelson Mandela supra**, the court held:

“The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions on matters on their real merits, so avoiding the incurrance of unnecessary delays and costs.”

[35] In the foregoing, the following orders are entered in favour of plaintiff:

1. Summary judgment application is granted.
2. The 1st defendant is ordered to pay the sum of E75,215.79.
 - 2.2 Interest for the sum of E10,434.35
3. 2nd defendant is ordered to pay 3.1 the sum of E40,000.00.
 - 3.2 Interest at the rate of 2% per month
4. 1st defendant and 2nd defendant are ordered to pay:
 - 4.1 Costs of suit.

M. DLAMINI
JUDGE

For Plaintiff : **W. Maseko**
For Defendant : **N. Manzini**