IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 1033/2011**

In the matter between:

TRIBUTE INVESTMENT (PTY) LTD **Plaintiff**

AND

H AND E COMPANY (PTY) LTD **Defendant**

Neutral Citation: ***Tribute Investment (Pty) Ltd v H and E Company*** **(Pty)** ***Ltd*** **(1033/11) [2012] 34**

Coram: **OTA J**

Heard: **23TH FEBRUARY 2012**

Delivered: **28TH FEBRUARY 2012**

Summary: *Summary judgment application in terms of Rule 32 of the Rules of the High Court. Affidavit Resisting summary judgment, raising triable issues. Application dismissed with costs. Parties referred to trial.*

JUDGMENT

OTA J,

[1] By an amended particulars of claim the Plaintiff claimed *inter alia* the following against the Defendant:

1. Payment in the sum of E70,000-00 (seventy Thousand Emalangeni) .
2. Interest at 9% per annum calculated from January 2011 to date of final payment
3. Costs of suit
4. Further and/or alternative relief.

[2] It is on record that the Plaintiff followed up this claim with a summary judgment application which is opposed by the Defendant. The summary judgment application is based on facts in the Plaintiffs pleadings, which are that on or about July 2009, the Plaintiff represented by **Jama Raphael Sihlongonyane** and Defendant represented by **Elizabeth Simelane,** entered a verbal agreement of sale of an embroidery machine described

as:- Mode:- Brother (nine needle, single head) Code No BAS 411.

[3] The Plaintiff alleged that the purchase price was E70,000-00 (Seventy Thousand Emalangeni) That the Defendant gave the Plaintiff a warranty against patent and latent defects and assured Plaintiff that the machine was fully operational. It was also agreed that Plaintiff would take possession of the machine after payment of the full purchase price and Defendant would train Plaintiff's staff members on how to operate the machine.

[4] Plaintiff alleged that it duly paid the sum of E70,000-00 (Seventy Thousand Emalangeni) to the Defendant on the 2nd July 2009, and thereafter took possession of the machine. That upon taking possession of the machine, the Defendant sent its employees to train the Plaintiffs staff members on how to operate the machine. That it was in the course of this training session that it was discovered that the five needles were not functioning.

[5] The Plaintiff further alleged, that this defect was reported by Plaintiffs representative **Jama Sihlongonyane,** to Defendant's representative **Elizabeth Simelane,** on or about August 2009. That the Defendant acknowledged the defect and represented by **Elizabeth Simelane,** Defendant took possession of the machine about October 2009 for repairs. It was agreed that the machine would be returned to the Plaintiff fully operational.

[6] It was further Plaintiff's case, that on or about January 2010, Defendant delivered the machine at Plaintiff's premises. That Plaintiff tested the machine and discovered that its memory was not functioning. That the Plaintiff informed the Defendant of the defect and requested it to remedy same. The Defendant's representative **Elizabeth Simelane,** informed the Plaintiff that the defect had been repaired and invited the Plaintiff to the Defendant's premises to have the machine tested. That the Plaintiff's representative

Jama Sihlongonyane honoured the invitation. That after testing the machine at Defendant's premises, it was discovered that the defect still persisted, thus rendering the merx unsuitable for use by the Plaintiff, for the purpose for which it was bought for it's ordinary use by the Plaintiff.

[7] Plaintiff further alleged, that about January 2011, it gave notice of cancellation of the sale agreement and demanded compliance with same, by way of delivery of a fully functional and operational machine by the Defendant. The Defendant failed to make such delivery. That in view of the Defendant's failure to deliver a fully functional machine, the Plaintiff formally cancelled the agreement and having made restitution of the defective machine, demanded a refund of the purchase price of E70,000-00 (Seventy Thousand Emalangeni). However despite demand, the Defendant has failed to pay.

[8] Now, it is a trite principle of law, one that is universal and hallowed across jurisdictions, that summary judgment is such a radical and stringent measure that it must be handled with extreme caution to prevent it from turning into a weapon of injustice.

[9] This is because by its characteristics, summary judgment shuts the door of Justice in the face of the Defendant, restraining him from proceeding to trial. It is thus the judicial accord, that this remedy be confined to the straight forward and clearest of cases, where it is ineluctable that the Defendant has no defence to the claim, and the appearance to defend is obviously a dilatory venture geared at frustrating the Plaintiff's claim.

See Musa Magongo V First National Bank (Swaziland) Appeal Case No. 38/1999, Busaf (Pty) Ltd V Vusi Emmanuel Khumalo t/a Zimeleni Transport, Civil Case No 2839/08, Zanele Zwane V Lewis Store (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07, Mater Dorolosa High School V

R.J.M. Stationery (Pty) Ltd Appeal Case No. 3/2005 Supa Swift (Swaziland) (Pty) Ltd V Guard Alert Security Services and Another Case No. 432/09, Maharaj V Barclays Bank Ltd 1976 (1) SA 418 AD 236.

[10] I apprehend that it is in a bid to guide the court in the advocated exercise of caution, that Rule 32 (4) (a) requires the court to scrutinize the Defendant's Affidavit resisting summary judgment, to see whether '' *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 of the claim or part thereof---''.*

[11] It is judicially settled that once the court arrives at the conclusion that the Defendants Affidavit discloses a triable issue, it should refuse summary judgment and allow the Defendant plead to the claim. This is to prevent a miscarriage of justice. As the court stated in the case of **Mater Dorolosa High School V R.J.M Stationery (Pty) Ltd, (supra)**

‘‘ It would be more accurate to say that a court will not merely ‘‘be slow’’ to close the door to a defendant, but will infact 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 the Plaintiff’s claim, the court cannot deny him the opportunity of having such an issue tried’’

[12] For the Defendant to satisfy the requirements of Rule 32, he must demonstrate sufficient material facts in his affidavit to enable the court anticipate a triable issue.

[13] As I said in my decision in the case of **Nkonyane Victoria V Thakila Investment (Pty) Ltd at paragraph 22**;

‘‘ I am of the firm view, nothwithstanding the fact that the Defendant is not required at this stage to set out its defence with the precision or exactitude required of a plea, that for the allegation contained in the defendant’s

affidavit to satisfy the requirements of Rule 32 (4) (a), they must be made bonafide must be equivocal, and must contain sufficient material facts upon which the allegations 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''.

[14] What remains to be determined at this juncture is: Does the Defendants Affidavit raise any triable issues?

It is on record that the Defendant filed an Opposing Affidavit of 7 paragraphs to be found on pages 23 to 27 of the book, wherein it alleges that it has a bonafide defence to the Plaintiff's claim and that the notice of intention to defend has not been filed for the purposes of delay. The relevant facts for the exercise at hand are contained in paragraphs 4.1 to 5.5 of the Opposing Affidavit, wherein the Defendant contends as follows:-

'' 4.1 The Defendant denies that it entered into an agreement with the Plaintiff for the sale of the embroidery machine as alleged or at all and the Plaintiff is put to strict proof thereof.

4.2 I state that the machine in question has never been owned by the Defendant. As such the Defendant could not have sold the machine to the Plaintiff.

*4.3 I state that the machine has at all material times belonged to me**, Elizabeth Simelane**, t/a Golden Tree*

*4.4 During July 2009, I was approached by one **Jama Raphael Sihlongonyane** to sell him the machine to which I agreed and we agreed on a purchase price of E70,000-00 (Seventy Thousand Emalangeni).*

*4.5 The agreement of sale was between myself and the said **Jama Raphael Sihlongonyane** in our personal capacities.*

4.6 At no time was the Defendant and/or Plaintiff part of the said agreement.

*4.7 The said **Jama Raphael Sihlongonyane**, had requested that I assist him to service the machine, to which I agreed. I took the machine to Pine Town, Durban where it was serviced and I brought it back, but **Jama Raphael Sihlongonyane** failed to collect the said machine.*

*4.8 I reserve the right to fully set out a defence against an action against **Elizabeth Simelane** at an appropriate time.*

5.1 The Defendant is not indebted to the Plaintiff for the amount claimed or at all.

5.2 I state if at all there is any action to be instituted by the Plaintiff, such an action should have been delivered to me. ***Elizabeth Simelane,*** *t/a Golden Tree not the Defendant.*

5.3 I state that I advised the Plaintiff of the aforesaid position by letter dated the 27th July 2011, a copy of which I enclosed hereto marked Annexure ''SM1''.

5.4 I state that the cheque of E70,000-00 (Seventy Thousand Emalangeni) was made payable to the Defendant as I did not have a bank account.

5.5 The Defendant subsequently paid the sum of E70,000-00 (Seventy Thousand Emalangeni) to me.

[15] It is worthy of note that when this matter served before me for argument on the 23rd of February 2012, that learned defence counsel, **Mr Lukhele** urged a document marked annexure SMI, to amplify the foregoing allegations. It is also on record that the Plaintiff filed a Replying Affidavit of 8 paragraphs, wherein it denied the allegations of fact contained in

the Defendant's Affidavit, decrying them as lacking in *bona fides.*

[16] Now, I have viewed the facts demonstrated in the opposing Affidavit through microscopic lenses, and I come to the ineluctable conclusion, that the Defendant raised triable issues therein, that entitles it to be allowed to proceed to trial.

[17] In the first instance, the Plaintiff's claim is based on an oral agreement which it alleges to have entered with the Defendant, represented by one **Elizabeth Simelane** who happens to be the deponent of the opposing Affidavit. The same deponent of the opposing Affidavit, **Elizabeth Simelane,** who also happens to be a director of the Defendant, categorically averred that not only did the Defendant not enter any oral agreement of the sale of the said machine with the Plaintiff, but that she entered into agreement of the sale of the said machine with one **Jama**

Sihlongonyane, in her personal capacity trading as Golden Tree.

[18] These facts clearly raise a triable issue as to who were actually the parties to the said agreement. Which issue to my mind goes to the subtractum of the Plaintiff's claim and entitles the Defendant to plead to same.

[19] Learned counsel for the Plaintiff decried the opposing Affidavit, especially paragraph 4.8 thereof, as lacking in *bona fides.* Counsel contended that since **Elizabeth Simelane** alleges to have contracted in her personal capacity, she had to do more than she did in her Affidavit, to satisfy the duty imposed upon her by Rule 32.

[20] I am inclined to agree with defence counsel **Mr Lukhele,** that **Elizabeth Simelane** is not a Defenant in these proceedings, thus the submission that she ought to have set out her defence with particularity at this stage is clearly misconceived. I find that her

averments in paragraph 4.8 of the opposing Affidavit are sufficient in these circumstances.

[21] Similary, the contention that Plaintiff's is entitled to summary judgment, because the Defendant failed to file an answer to paragraph 6 of Plaintiff's Replying Affidavit, wherein the Plaintiff alledged that **Elizabeth Simelane** already had a personal bank account at First National Bank which was operational by the 8th of March 2007, in my view lacks sustenance. I say this because these avernments were made in reply to **Elizabeth Simelane's** allegations, that the cheque of E70,000-00 was made payable to the Defendant because at the time of these transactions she had no bank account. It appears to me that these avernments by **Elizabeth Simelane** and the Reply thereto by the Plaintiff, raise a triable issue which can only be resolved at a hearing after they have been well ventilated *vide via viva* evidence.

[22] For this court to proceed on the state of the pleadings to grant summary judgment based purely on the Plaintiffs allegations on this issue, would be to decide this matter on the balance of probabilities. It seems to me that the Plaintiff itself recognized that on the state of the pleadings, this issue resides in the realm of probabilities when it made this averment in paragraph 7 of its Replying Affidavit:-

‘‘ It is again very much, and on a preponderace of probabilities, very much improbable that a businesswoman of the deponents caliber, stature and education allegedly dealing with heavy machinery of such great financial value, would be without a personal bank account as alleged, if at all she intended to contract personally’’

[23] In view of the foregoing, I find a need to stress here, that the principles immortalized by case law is that the balance of probabilities ought not arise in motion proceedings, such as a summary judgment application. This is because motion proceedings are for straight forward cases, not for cases which exude disputes of

fact, that require a weighing on the scale of justice, to determine the balance of probabilities. Such cases will entail an explosion of the issues through *viva voce* evidence, enabling the court come to a decision on the balance of probabilities, after a consideration of the evidence led and the credibility of the witnesses, in the equation. As the learned authors **Herbstein and Van Winsen** put it in the text **Civil Practice of the Supreme Court of South Africa, 4th edition, page 234:-**

> ‘‘ *It is clearly undersirable in cases in which the facts relied upon are disputed to endeavour to settle the dispute of fact on affidavit for the ascertainment of the true facts is effected by the trial judge on consideration not only of probability, which ought not to arise in motion proceedings, but also of credibility of witnesses giving evidence viva voce. In that event, it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and coming to a conclusion’’.*

[24] Similarly, and still on this issue, **Corbett CJ**, declared thus in the case of **Maharaj V Barclays Bank Ltd (supra) at 236:-**

> *'' Accordingly, one of the ways in which a Defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of one party or the other---''*

[25] See **Sandile Zwane V Celiwe Nxumalo and Another Case No. 3809/09, Room Hire Co (Pty) Ltd V Jeppe Street Mansions (Pty) Ltd (supra).**

[26] It is also apparent from the record that the current state of the machine is also in dispute. Whilst the

Plaintiff alleges that the machine is not functional, **Elizabeth Simelane** on the other hand alleges that the machine has been fully repaired, however, the Plaintiff is refusing to take delivery of same. This dispute can only be resolved via oral evidence.

[27] In conclusion, the words of **Zulman J,** in the case of **Nedperm Bank Ltd V Verbin projects CL 1993 (3) SA 214 at 224 D – E** are apposite in these circumstances. His Lordship declared as follows:-

> ‘‘*----but a discretion exercised in appropriate cases where there is some factual basis, or belief set out in the affidavit resisting summary judgment which would enable a court to say that something may emerge at a trial, and there was a reasonable probability of it so emerging, that the Defendant would indeed be able to establish the defences which it puts up in the affidavit and which at the particular time it might*

have difficulty in precisely formulating or in precisely quantifying because of lack of detailed information''.

[28] This is such a case. The Defendant's Affidavit clearly raises triable issues, which must defeat this summary judgment application. The justice of the matter therefore demands that I refer the parties to trial.

[29] In the circumstances, this application fails and I hereby make the following orders:-

1. That the summary judgment application be and is hereby dismissed.
2. That the parties herein be and are hereby referred to trial action.
3. That the Defendant be and is hereby ordered to deliver a plea within 14 days from the date hereof.
4. That this matter be and is hereby referred back to the Registrar of the High Court to take its normal course.
5. Costs in the cause.

For the Plaintiff: Mr T. M. Ndlovu

For the Defendant: Mr Lukhele

DELIVERED IN THE OPEN COURT IN MBABANE ON THIS THE.....DAY OF.....2012

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OTA J

JUDGE OF THE HIGH COURT