



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 2111//2007

In the matter between

**SWAZILAND LIFE STOCK TECHNICAL
SERVICES**

Plaintiff

and

SWAZILAND GOVERNMENT

1ST Defendant

ATTORNEY GENERAL

2ND Defendant

Neutral citation: *Swaziland Livestock Technical Services v Swaziland Government & Attorney General (2111/2007) [2012] SZSC 81 (April 2012)*

Coram: OTA J

Heard: 16th April 2012

Delivered: 19th April 2012

Summary: **summary judgment application: opposing affidavit discloses triable issues: Application dismissed. Parties referred to trial**

JUDGMENT

[1] This is a case which the Plaintiff commenced by way of simple summons. After the Defendants delivered a notice of intention to defend the Plaintiff filed a Declaration which it followed up with a summary judgment application, dated the 2nd of October 2007; for the following:

- (1) Payment of the sum of E 886, 400.00
- (2) Interest at 9% per annum a *temporae morae*
- (3) Costs of suit
- (4) Further or alternative relief

[2] A resume of the facts on which this application is premised, can be found in the Plaintiff's Declaration which is as follows:

That on the 19th January 2006, the Plaintiff and Defendants entered into a written contract in terms of which the Plaintiff was to train and/or undertake, at the instance of the Defendants, capacity building of all Swazi businessmen and prospective Swazi businessmen at Maseyisini Inkhundla. Plaintiff alleged that it was by the terms of the contract, to render its services at the rate of E200, per trainee per day. That the Defendants would pay to the Plaintiff at the

said rate within a reasonable time or soon after completion of the exercise. That the Plaintiff duly rendered the services and furnished the Defendants with the invoices and list of all people trained upon completion of the exercise. That the Defendants have failed to pay the amounts owed in these transactions despite several demands.

- [3] It is also on record that the Plaintiff filed a replying affidavit to the Defendants affidavit resisting summary judgment. The Plaintiff also filed written submissions, and tendered oral argument through Counsel, Mr. Mkhwanazi, when this matter served before me for argument on the 16th of April 2012.
- [4] The Defendants neither filed submissions nor did they attend the hearing on the 16th of April 2012, notwithstanding the fact that notice of set down for the said hearing, dated the 5th of March 2012, which was duly served on the office of the 2nd Defendant, the Attorney General, enures in these proceedings. Since the Defendants filed an opposing affidavit, I will proceed to a determination of this case based on all the processes serving before court.
- [5] Now, it is opposite for me , before dabbling into the merits or demerits of this application, to arm myself with the now familiar warning, that summary judgment is an extraordinary and stringent remedy, and must only be acceded to where the Plaintiff's case is and clear. This is to prevent the ill of turning

this procedure into a weapon of injustice, by shutting the door of justice in the face of a Defendant in a defended action, thus preventing him from proceeding to trial.

As the court stated in the case of **Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007.**

“It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial ... it is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far...”

See Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3839/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater Dorolosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.

[6] The rules have therefore laid down certain requirements to act as checks and balances to the summary judgment procedure, in an effort to prevent it from working a miscarriage of justice. Thus, Rule 32 (5) requires a Defendant who is opposed to summary judgment, to file an affidavit resisting same, and by rule 32 (4) (a) the court is obligated to scrutinize such an opposing affidavit to ascertain for itself 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 that claim or part thereof**”.

[7] It is now the judicial accord, that the existence of a triable issue or issues or the disclosure of a *bona fide* defence in the opposing affidavit, emasculates summary judgment, and entitles the Defendant to proceed to trial. As the court stated in **Mater Dolorosa High School v RJM 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 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 the Plaintiff’s claim, the Court cannot deny him the opportunity of having such an issue tried”.

Case law is also agreed, that for the Defendant to be said to have raised triable issues, he must have set out material facts of his defence in his affidavit,

though not in an exhaustive fashion. The defence must be clear, unequivocal and valid.

[8] The Defendants who are opposed to this summary judgment application have filed an opposing affidavit in honour of the rules. This affidavit appears on pages 21 to 23 of the book of pleadings. The only question that remains to be answered at this juncture is “whether the Defendants affidavit raises any triable issue?”

[9] It is the Plaintiffs view both in its written submissions and oral argument via Counsel, that the Defendants admitted liability for part of the claim in the sum of E 240,000.00 as appears in paragraph 4.4 of the opposing affidavit. The Plaintiff therefore, prays for judgment in this sum, whilst the balance, which the Plaintiff concedes as a triable issue, be referred to trial.

[10] Now in paragraph 4 of the opposing affidavit, the Defendants allege the following:

“4.1 The contents of this paragraph are denied. The Plaintiff has misconstrued the provisions of the contract between him and the Government of Swaziland.

4.2 The material terms of the Contract are that

(a) *At each training session the Plaintiff should train a maximum of thirty (30) participants for a period not exceeding five (5) days at a cost of E 200.00 per person per day.*

(b) *The Plaintiff was obliged to furnish, inter alia, a list containing the names of the persons trained within two weeks after the end of each training session.*

4.3 *The plaintiff alleges that it conducted training at eight (8) centres within the Inkhundla, Plaintiff was contracted for. In the light of paragraph 4.2 (a) above the Plaintiff was obliged to train a maximum of two hundred and forty (240) people. In breach of the Contract, the Plaintiff claims to have trained a maximum of four hundred and eighty five (485) people.*

4.4 *In the event that the Defendant can be liable it cannot be for more than Two Hundred and Forty Thousand Emalangenzi (E240,000.00) computed as follows:-*

Costs per head = E 200.00

Maximum possible number of participants = 240 x no. of days (5) = E240,000.00". (underline mine)

[11] Now an admission arises where the statement of defence admits an alleged fact in the statement of claim. In its simplest form an admission is often expressed as follows

“The defendant admits the fact or facts alleged in paragraph of the statement of claim, or simply that “the defendant admits paragraph ...of the statement of claim”.

[12] An admission can also be by necessary implication, therefore, where the Defendant fails to traverse a material allegation in the Plaintiff’s pleading, he is deemed to have admitted such allegation. The effect of an admission is that the allegation admitted is thus taken as established and does not have to be proved. Therefore, the court can proceed to judgment on an admitted part of a claim without the necessity of further evidence in proof of same. That is exactly what the Plaintiff in *casu*, prays for in relation to paragraph 4.4 of the affidavit, on its supposition that the averments contained therein, constitute an admission of the sum of E240,000.00 by the Defendants.

[13] I do not however think that the deposition in paragraph 4.4 ante, constitutes an admission by the Defendants of the sum of E 240,000.00 as the Plaintiff was wont for the court to concluded.

[14] What the Defendants are clearly saying by that avernment, is that per adventure they are liable, they cannot be liable for more than E240,000.00 which is the sum that will translate to the training of 240 participants for 5

days, at the cost of E200.00 per head a day, which is the term which the Defendants allege in paragraph 4.2 (a), binds the parties

[15] The Defendants have not admitted that the Plaintiff trained 240 participants on those terms. They have not admitted owing E 240,000.00, neither have they been adjudged to owe this sum by the Court. All they are saying is “we do not owe the amount claimed for the training of 485 people. What we agreed to was the training of 240 people which will translate to E 240,000.00. That is the amount that would be in contention by the terms of the contract and even if w could be held liable , it would be for this amount not more.”

[16] It is on record that the Plaintiff filed a Replying affidavit, wherein it contended that it was not obligated to train only 240 participants as alleged by the Defendants. Plaintiff contended that it was constrained to accommodate all the participants who were brought by the Defendants and with the approval of the Defendants. Plaintiff urged exhibit A, a letter of Commendation from the Defendants for a job well done, as well as exhibit B, report of the Commission of enquiry held into these transactions as well as a host of others.

[17] It appears to me at the end of the day, that whilst the Defendants do not dispute that the Plaintiff trained some personal on their behalf, however, the

number of persons actually trained and the amounts owing in respect of said training, are vehemently disputed . This dispute clearly raise triable issues constituting a possible defence at the trial. This state of affairs defeats summarily judgment entitling the Defendants to proceed to trial.

[18] It is by reason of the totality of the foregoing, that I hereby make the following orders:-

1. That this summary judgment application be and is hereby dismissed.
2. That the parties herein be and are hereby referred to trial.
3. That Defendants be and are hereby ordered to deliver a plea within 14 days from the date hereof.
4. That this matter be and is hereby referred to the Registrar of the High Court for allocation of a trial date.
5. Costs.

For Plaintiff : **Mr Mkhwanazi**

For Defendant : **No appearance**

OTA J.
JUDGE OF THE HIGH COURT