



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1040/2009

In the matter between:

JEKE (PTY) LTD

Applicant

vs

SAMUEL SOLOMON NKAMBULE

Respondent

Neutral citation: *Jeke (Pty) Ltd vs Samuel Solomon Nkambule (1040/2009) [SZHC 121] (9 August 2013)*

Coram: **MAPHALALA PJ**

Heard: **3rd June 213**

Delivered: **9th August 2013**

For Applicant: Mr. L. Mamba

For Respondent: Mr. M. Dlamini

Summary: (i) Application for Summary Judgment.
(ii) That the Respondents has not advanced any defence in accordance with the law.

- (iii) The Court finds that the cause of action which finds the Application for Summary Judgment is null and void on a number of grounds. Therefore, the Application for summary judgment is dismissed with costs.

Cases referred to:

- (i) *Supa Swift (Swaziland) (Pty) Ltd vs Guard Alert Security (Ltd) Case No.4328/2009;*
- (ii) *Monscheson and Monscheson vs Mercantile Acceptance Corporation 1959 (3) SA 362 (W);*
- (iii) *Venetian Blind Enterprises (Pty) Ltd vs Venture Cruises Boatel (Pty) Ltd 1973(3) SA 575 (R) at 578;*
- (iv) *Herbstein & van Winsen (2009) The Civil Practice of the High Court of South Africa, 5th Edition Vol. I at page 540.*

JUDGMENT

The Application

- [1] Before court for decision is an Application for Summary Judgment for orders in the following terms:

- “(a) Ejectment of the Defendant and whosoever is in occupation or holding title through the Defendant from portion 224 of Farm Dalriach No.188 District of Hhohho, Swaziland;
- (b) Costs of suit;
- (c) Further and/or alternative relief”.

- [2] On the 24 April, 2009 the Defendant filed an affidavit resisting Summary Judgment setting out a purported defence therein. However, it remains to be seen whether there is a valid defence in accordance with the law.
- [3] The Plaintiff is the registered owner of the immovable property in question under Deed of Transfer No.854/2008.
- [4] The property was previously owned by the Defendant under Deed of Transfer No.120/1997 as shown on the extending clause of the Plaintiff's Title Deed.

The Applicant's arguments

- [5] The nub of the Applicant's case is that occupation is not denied but some other grounds have been advanced to resist the claim for ejectment.
- [6] That the deponent in resisting Summary Judgment acknowledging having defaulted in servicing the loan consistently. He, however, contradicts himself by saying that he has no knowledge of his late father's indebtedness. That he conveniently claims to have already settled the debt without mentioning the relevant date and proof of the alleged payments.

- [7] The attorney for the Applicant contends that it is worth noting that Jabu had “no objection to the judgment granted but the sale consequent thereto” and the reasons, *inter alia*, being that the Defendant had been wrongfully cited as he had passed on during the year 1994. He acknowledges the default in payment and having been served with the writ of attachment.
- [8] That service of all court processes was effected at the *domicilium citandi et executandi* as chosen by the Defendant in accordance with clause 4 of the Mortgage Bond as being the mortgage property, Portion 224 of Farm Dalriach No.188 situate in the Hhohho District.
- [9] The attorney for the Applicant further advanced arguments in paragraph 14, 15, 16, 17 & 18 of his Heads of Arguments to the final submission that Summary Judgment *in casu* is resisted purely on the hope that something may come up on the investigation of the alleged procedural defects and that it is not sufficient reason for refusing to enter Summary Judgment for the Plaintiff. In this regard the court was referred to the case of *National Motor Company Ltd vs Dlamini Moses 1987-1995 SLR 122* at 128-129.
- [10] The court was further referred to the legal authority of *Almer’s Precedents of Pleading* at page 394 to support the argument of the Plaintiff that the Defendant has not advanced a defence recognised in law but stated procedural defects. This legal authority lists the following defences at page 393 thereof:

- “(a) Denial of ownership, which creates no *onus* for the defendant since the plaintiff has to prove ownership.
- (b) Denial of possession, which likewise draws no *onus*.
- (c) The defendant may plead that the plaintiff’s property was returned to the plaintiff. This defence must be specifically alleged and proved. An allegation by a plaintiff that the defendant had failed to return the property is unnecessary and draws no *onus*.

Groenendijk v Tractor & Excavator Spares (Pty) Ltd [1978] 2 All SA 188 (A), 1978 (1) SA 815 (A).

- (d) The *bona fide* disposal of possession is a complete defence.

Leal & Co., v Williams 1906 TS 554;

First National Bank of SA Ltd v Perry NO [2001] 3 All SA 331 (A), 2001 (3) SA 960 (SCA).

A disposal by the defendant with knowledge of the plaintiff’s claim to the property is wrongful and provides no defence. In such an instance, a plaintiff is entitled to damages calculated on the basis of the value of the property at the date of disposal.

Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd [1975] 2 All SA 633 (A), 1975 (2) SA 420 (A).

- (e) Should the defendant wish to rely on a right to possession (by virtue of a lease, for example), the defendant must allege and prove the right.

Woerman NO v Masondo [2002] 2 All SA 53 (A), 2002 (1) SA 822 (SCA).

If the plaintiff concedes this right at any stage of the proceedings, the *onus* is on the plaintiff to prove a valid termination of the right.

Matador Buildings (Pty) Ltd v Harman [1971] 1 All SA 381 (C), 1971 (2) SA 21 (C).

Chetty v Naidoo [1974] 3 All SA 304 (A), 1974 (3) SA 13 (A);
Schnehage v Bezuidenhout [1977] 1 All SA 408 (O), 1977 (1) SA
362 (O).

The *onus* resting on the plaintiff who makes such a concession includes an *onus* to prove the term of the agreement that gives the right of cancellation.

Chetty v Naidoo [1974] 3 All SA 304 (A), 1974 (3) SA 13 (A).

Should the plaintiff allege or concede a right of possession (by virtue of a lease, for example) but the defendant deny that right and rely on another of possession or on another defence, the plaintiff need no longer prove the conceded right or its termination.

Chetty v Naidoo [1974] 3 All SA 304 (A), 1974 (3) SA 13 (A).

From a tactical point of view, it may be advisable for a plaintiff not to concede the right in the particulars of claim but to deal with it, and with its termination, in the replication and then only in the alternative. The duty to begin will at last then rest on the defendant.

- (f) A defendant wishing to rely on *estoppels* must allege and prove:
- (i) a representation by the owner, by conduct or otherwise, that the person who disposed of the property to the defendant was its owner or was entitled to dispose of it;
 - (ii) that the representation was made negligently;
Johaadien v Stanley Porter (Paarl) (Pty) Ltd [1970] 2 All SA 28 (A), 1970 (1) SA 394 (A);
 - (iii) that the defendant relied on the representation in obtaining the property;
 - (iv) that reliance on the representation was the cause of the defendant's detriment;
Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co., (Pty) Ltd 1976 (1) SA 441 (A);

Konstanz Properties (Pty) Ltd v Wm Silhaus en Kie (WP) Bpk [1996] 2 All SA 215 (A), 1996 (3) SA 273 (SCA) 284 Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den [2001] 3 All SA 577 (A), 2001 (3) SA 597 (SCA).

See ESTOPPEL

The Respondent's arguments

[11] The Respondent's attorney also advanced arguments in opposition to the Application for Summary Judgment and filed very comprehensive Heads of Arguments covering a number of topics namely, the introduction in paragraphs 1, 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10 & 2.11. General principles underpinning Summary Judgment proceedings in paragraphs 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.9 & 3.10. Arguments of on Rule 35(5) (a) & (c) in paragraph 4.1, 4.2 of the Heads of Arguments. Lastly the Defendant's defence in paragraphs 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13 & 5.14 is canvassed.

[12] In conclusion the attorney for the Respondent contends that the balance of convenience favours that the Respondent be given an opportunity to rescind the judgment and the subsequent sale because the Plaintiff's title is in fact defective.

[13] The attorney for the Respondent further contended that it would be a gross miscarriage of justice for Summary Judgment to be granted in these circumstances, particularly in view of the apparent flaws in the process embarked upon by the bank being the improper conduct of the Deputy Sheriff to the sale and the apparent acts of trying to snatch at a bargain by the Plaintiff in these proceedings.

[14] The final arguments advanced for the Defendant is that he should be given an opportunity to join the other relevant parties to the matter.

The court's analysis and conclusion thereon

[15] Before this court is an Application for Summary Judgment and in order to resolve the arguments of the parties outlined above one has to look at the general principles underpinning Summary Judgment proceedings in decided cases of this court.

[16] In the Supreme Court case of *Zanele Zwane vs Lewis Stores (Pty) Ltd t/a Best Electric unreported Civil Appeal No.22 of 2007* the court enunciated these principles as follows per *Ramodibedi JA* (as he then was):

“It is well-recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is because it

closes to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no *bona fide* defense and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of the plaintiff's claim against a defendant to which there is clearly no valid defense..."

[17] Furthermore, in the case of *Supa Swift (Swaziland) (Pty) Ltd vs Guard Alert Security Services Ltd, Case No.4328/2009* the court highlighted the characteristics of a judgment in the following legal parlance:

"A summary judgment is one given in favour of a plaintiff without a plenary trial of the action. The normal steps of filing all necessary pleading, hearing evidence of witnesses, and addresses by counsel, thereafter, before the court's judgment are not followed. The procedure by way of summary judgment is resorted to by a plaintiff, where obviously there can be no reasonable doubt that the plaintiff is entitled to judgment and where it is inexpedient to allow the defendant to defend for mere purposes of delay.

It is for the plain and straight forward, not for the devious and crafty. Rather than suffer unnecessary delay and expense which attend a full trial, a plaintiff may therefore apply to the court for instant judgment, if his claim is manifestly unanswerable both in fact and in law. Provided that the claim fall within the purview of classes of claims, envisaged in rule 32(2) i.e. is either upon a liquid document, for liquidated amount in money, for ejection or for delivery of specified movable property.

Summary judgment therefore by its characteristic features, shuts the door of justice in the face of the defendant who may otherwise have a triable defence. Thus, the wise caution which has been sounded in the ears of the courts over the decades, to approach this application with the greatest of trepidation. This is to prevent foreclosing a defendant who mat otherwise has a triable defence from pleading to the plaintiff's case".

[18] It is trite law that Summary Judgment is an extraordinary remedy which should be granted only if there is no doubt that the Plaintiff has an unanswerable case (see *Nathan Benard & Brink, Uniform Rules of Court, 3rd Edition* at page 1190.

[19] In view of the above legal authorities the Defendant contends that all Defendant is required to do is to set only facts, (i.e. conclusions of fact or argumentative matter) which if found by a trial court to be correct would constitute a defence. That the adjudication of a Summary Judgment does not include a decision of factual dispute for this legal proposition the attorney for the Defendant cited the cases of *Mowschenson and Mowschenson vs Meacantile Acceptance Corporation of South Africa Ltd 1959(3) SA 362 (W)* and that of *Venetian Blind Enterprises (Pty) Ltd vs Venture Cruises Boatel (Pty) Ltd 1973(3) SA 575 (R)* at 578.

[20] On the other hand it is contended for the Plaintiff that Summary Judgment *in casu* is resisted purely on the hope that something may come up on the investigation of the alleged procedural defects and that it is not a sufficient reason for refusing to enter Summary Judgment. For this proposition the court was referred to the High Court case of *National Motor Company Ltd vs Dlamini Moses (supra)*.

[21] It is contended for the Plaintiff that the Defendant's defence does not fall in any of the classes mentioned in the above legal authority.

[22] In my assessment of the arguments of the parties and the legal authorities cited by both attorneys I have considered the defence in the Defendant's affidavit resisting summary judgment and I agree with the arguments of the Defendant for the following reasons.

[23] Firstly, I agree with the Defendant that it is permissible for the Defendant to attack the validity of the Application on any proper grounds that this simply means that a Defendant is not limited to the procedures provided for in Rule 32. The Defendant may for example base his defence on the irregularity on any other defence without having to record same in the affidavit and it is open to the Respondent to attack the Application on any aspect including for example, the admissibility of the evidence tendered in the verifying affidavit.

[24] For this proposition I find the decisions in the cases of *Raphael % CO v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C); *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd supra*; *Jagger & Co Ltd v Mohammed*, 1956 (2) SA 736 (C) at 738C-D; *Spice Works and Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd*, 1959 (2) 198 (W) at 200A-C; *Arenda supra* at 413B; *Cape Business Bureau (Pty) Ltd v van Wyk*, 1981 (4) SA 433 (C) at 439 (C)” are opposite to the facts of the present case.

[25] Secondly, Summary Judgment must be refused in the face of any doubt whether or not to grant it. I also agree with the Defendant’s arguments that this rule is founded on the consideration that an erroneous finding in Summary Judgment has more drastic consequences for a Defendant than for the Plaintiff. Any error against the Plaintiff has far less consequences for the Plaintiff at the trial obtain relief and if applicable interest and costs. The cumbersome process and costs inherent in an appeal for a Defendant goes without saying. It has been stated in this regard that even though the success for the Defendant appears unlikely from the Opposing Affidavit, ought to be granted unless he presents a hopeless case.

[26] Thirdly, I agree *in toto* with the Defendant’s arguments outlined in paragraph 4.1, 4.2 of his Heads of Arguments that the present case ought to be decided on the principles of law cited in the decided cases outlined therein.

[27] Fourthly, I agree with Defendant's argument at paragraph 5 of his Heads of Arguments that effectively a writ issued for a defective judgment thereunder is rendered null and void, so too in any sale in execution pursuant to that writ and the subsequent transfer of the property to any buyer, null and void. Further, the non-adherence of the statutory pre-requisites in respect of the sale renders it a nullity hence there can be no transfer of ownership of the property pursuant to such sale. In this regard I find the cases of *Joosub v J 1992 (2) SA 665* apposite.

[28] Fifthly, I also agree with the arguments of the Defendants at paragraph 5.3, 5.4, 5.5 to 5.14 dealing with the non-compliance with rule 46(3) of the attorneys' Heads of Arguments.

[29] Lastly, I agree with the Defendant's final argument that it would be a gross miscarriage of justice for Summary Judgment to be granted in these circumstances particularly in view of the apparent flaws in the process embark upon by the bank and the improper conduct of the Deputy Sheriff with respect to sale and the apparent acts of trying to snatch as a bargain by the Plaintiff in these proceedings. In this regard I find the sentiments in the case of *Supa Swift (Swaziland) (Pty) Ltd vs Guard Alert Security Services Ltd (supra)* reproduced at paragraph [15] of this judgment apposite.

[30] According to the learned authors *Herbstein & van Winsen, (2009) The Civil Practice of the High Court of South Africa, 5th Edition Volume 1* at page 540 that it is clear from sub-rule 32(5) that a court retains a discretion to refuse Summary Judgment even if the requirements of paragraph (a) and (b) of sub-rule (3) are not met by the Defendant. It has been said that while it is not clear in accordance with what criteria this discretion will be exercised, an important factor weighing with the court is the extraordinary and stringent nature of the remedy accorded a Plaintiff by Rule 32 and 17 only when there is no reasonable doubt about Plaintiff's claim that the Application should be accorded to.

[31] On the other hand, it has been held that the discretion should be exercised, not capriciously, or on the basis of mere conjuncture or speculation so as to deprive a Plaintiff of the remedy of Summary Judgment when entitled to it, but upon material before the court from which it appears that a reasonable possibility exist that an injustice may be done if judgment is granted. The court's discretion to refuse Summary Judgement should be exercised only where there is factual basis or relief set only in the affidavit resisting Summary Judgment which enables the court to say there is a reasonable possibility of a defence emerging at the trial.

[32] See also the cases of *Nedperm Bank Ltd vs Verbai Protects CC 1993 (3) SA 214 (W)* at 224D-F. See also *First National Bank of Swaziland vs GRAAP 1990 NR9 (HC)* at 13D-14B.

[33] In the result, for the foregoing reasons the Application for summary judgment refused with costs that the matter proceed to trial.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE