



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Case No. 58/13

In the matter between

CEDZINDZABA NGQOTHENI

PLAINTIFF

and

DESERT CHARM (PTY) LTD

t/a PHANGISA TRANSPORT

DEFENDANT

Neutral citation: *Cedzinzaba Ngqotheni vs Desert Charm (Pty) Ltd t/a Phangisa Transport (58/13) June 2013 [SZHC] 125*

Coram: OTA J.

Heard: 24 JUNE 2013

Delivered: 1 JULY 2013

Summary: **Summary judgment application: No triable issues raised in opposing affidavit: Summary judgment granted.**

OTA J.

[1] The facts of this case are as follows:- In the month of May 2010 in Mbabane, the Plaintiff and Defendant entered an oral agreement wherein the Plaintiff leased to Defendant motor vehicles for conducting courier services between Swaziland and South Africa. The Plaintiff was to be paid the sum of E1,000.00 (One Thousand Emalangeni), daily for each vehicle leased to the Defendant. Subsequent to this agreement, the Directors of the Defendant company resigned and the company was taken over by Linda Vilakati, Gugu Dlamini and Sarah Simons who continued to honour the terms of the agreement between the parties for a period. The Defendant however subsequently defaulted in payment of a total sum of E30,421.00 (Thirty Thousand four Hundred and Twenty One Emalangeni) in respect of which the Defendant's Directors Sarah Sulman and Gugu Dlamini, signed an acknowledgement of debt agreement with the Plaintiff which is exhibited in these proceeding as annexure C1. The Defendant also failed to pay Plaintiff for rentals for 27 December 2012 as well as 3, 7, 8, 10, 11, 14 and 15 January 2013, which when the sum of E2 719 which the Defendant spent at the brake shop to fix the motor vehicles is deducted, brings the total

amount owing by the Defendant to the sum of E35,702.00. The Defendant failed to pay this amount despite demand.

- [2] It is against a backdrop of the foregoing facts that the Plaintiff took out simple summons against the Defendant claiming for the said sum of E35,702.00, 9 % interest rate per annum a tempore morae, costs of suit at attorney and own client scale as well as further and / or alternative relief.
- [3] The Defendant filed a notice of intention to defend. The Plaintiff thereafter launched his declaration simultaneously with a summary judgment application in which he claimed for the said sum of E35,702.00, interest and costs of suit. The Defendant for its part reacted by filing an affidavit resisting summary judgment.
- [4] It is a well established jurisprudential position that summary judgment is a stringent and extraordinary remedy which must be approached with extreme caution in order not to foreclose a defendant with a bona fide defence from defending the action.

[5] Rule 32 thus requires the Court when faced with a summary judgment application, to scrutinize the affidavit resisting summary judgment to see if it raises a triable issue or issues that will emasculate summary judgment. Once the Court comes to the conclusion that a triable issue is raised, it must deny summary judgment and allow the parties proceed to trial. See **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07, Mater Dolorosa High School v R.J.M. Stationery (Pty) Ltd, Appeal Case No. 3/2005, Protronics Networking Corporation and Another v Swazi Wire Industries (Pty) Ltd and Another Civil Case No 74/2012, Nedbank (Swaziland) Ltd v Baslam Investments (Pty) Ltd and Another civil Case No. 2016/11.**

[6] I have in compliance with the requisites of this procedure carefully considered the affidavit resisting summary judgment which is launched by the Defendant and I see no triable issue raised therein that can disable this application.

[7] This is because the Defendant admitted liability for the sum claimed in paragraph [8] of the said affidavit in the following words:-

“8.1 The Defendant does not deny that it is indebted to the Plaintiff in the sum of E35,702.00 (Thirty five Thousand Seven Hundred and Two Emalangani) but denies that the said amount is now due, owing and payable. The Defendant avers that the Plaintiff was in the employs of the defendant as a Manager on a contract basis and same expired on the 15th January 2013. The Defendant did not renew the contract because of financial difficulties which the Plaintiff is clearly aware of and duly informed the Plaintiff of same. The Plaintiff was informed that the monies owed to him would be paid in course and in installments as in the past he had been receiving his payments in installments.-----”

[8] When this matter was heard, Ms Ndlangamandla who appeared for the Defendant conceded that the foregoing admission is justification for the grant of summary judgment and that whatever mode of installmental payment the parties had negotiated and were still negotiating cannot defeat the application.

[9] Now, learned counsel for the Plaintiff Mr Manzini seeks punitive costs on the attorney and own client scale on the basis that the whole opposition to the application is a dilatory stratagem geared at stultifying the Plaintiff's early dance of victory. Ms Ndlangamandla is opposed to this application on the grounds that the Respondent has all along admitted liability and the

matter only came to Court because the parties failed to agree on the installements payable.

[10] I am persuaded by Ms Ndlangamandla's entreaties. There is clearly no denial of liability as I have already found, to warrant such punitive costs. This case is easily distinguishable from the case of **Protronics Networking Corporation and Another v Swazi Wire Industrial (Pty) Ltd**, urged by Mr Manzini. In that case the Defendant entered a notice of intention to defend and urged frivolous defences even though the Plaintiff's case was clearly unanswerable. The Court *a quo* granted summary judgment for the Plaintiff. The Defendant launched an appeal against the decision. In upholding the decision *a quo* the Supreme Court imposed punitive costs against the Defendant who was Appellant as a mark of its disapproval for his dilatory stratagem. This is however not such a case.

[11] On these premises, this application succeeds. I make the following orders:-

1. Summary judgment is entered for the Plaintiff in the sum of E35,702.00.
2. Interest thereon at the rate of 9% per annum at tempore morae

3. Costs of suit.

For the Plaintiff:

N. Manzini

For the Defendant:

N. Ndlangamandla

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE DAY OF2013

OTA. J

JUDGE OF THE HIGH COURT

