IN THE HIGH COURT OF SWAZILAND

Case no. 1751/2012

In the matter between:-

JUNE McKENZIE **Plaintiff**

and

SERA NCONGWANE **1st Defendants**

TRU REALITY CO. (PTY) LTD **2nd Defendants**

Neutral citation: *June Mckenzie v Sera Ncongwane and another* (1751/12) [2013] SZHC14 (07th February 2013)

Coram: HLOPHE J

For the Plaintiff: Mrs. J. Currie

For the Defendants: Mr. Z. Magagula

Heard: 30/01/2013

Delivered: 07th February 2013

Summary:

Summary Judgment application – Drastic nature of relief –Considerations on whether or not to grant relief – Plaintiff claiming payment of total amount due to it arising from an acknowledgment of Debt signed by or on behalf of the

parties following the application of an accellertion clause as a result of Defendants' alleged failure to pay the outstanding amount – Defendant alleged that the installment in question (September 2012 installment) was paid – No further details given as to where, when, how and by whom payment made – Plaintiff insisting on Summary Judgment, contending no bona fide defence has been disclosed – Defendants contending that a triable issue disclosed – Court of the view no bona fide or triable issue disclosed as the allegations supposedly disclosing defence are bald or bare and do not disclose nature and grounds for it – Summary Judgment granted as prayed.

JUDGMENT

[1] The parties hereto signed an Acknowledgment of Debt on the 12th September 2012, in terms of which the Defendants acknowledged themselves to be jointly and severally liable to the Plaintiff for payment of a sum of E600 000.00 (debt) in agreed terms. These terms were that the debt was to be payable in installments agreed to be a sum of E120 000.00 on or before the 31st August 2012 and a sum of E160 000.00 by the 30th September 2012, after which there was to be paid monthly installments in the sum of E100 000.00 per month until the full amount would have been paid.

[2] In clause 4 of the Acknowledgment of Debt aforesaid, the parties agreed on an accelleration clause which provided that in the event of failure to pay an installment due, then the entire balance outstanding at the time was to be regarded as immediately due and payable and the Plaintiff was to be entitled to institute summons for its recovery. It was

also provided that in the event of breach of the said agreement and the Plaintiff having instituted action proceedings for the recovery of such outstanding sums then the Plaintiff would be entitled to recover costs at attorney and own client scale.

[3] The parties further agreed that a certificate signed by the creditor or his agent authorized by him, confirming the outstanding amount at a time shall be *prima facie* proof of the outstanding amount. In keeping with this provision the Plaintiff prepared and signed such a certificate confirming the amount outstanding as of September 2012 and annexed it to her summons.

[4] It is alleged by the Plaintiff that when the September 2012 installment fell due, the Defendants failed to pay same. The Plaintiff alleges, it was as a result of this failure that she instituted action proceedings claiming the entire outstanding sum, then amounting to E480 000.00, interest thereon at 9% per annum calculated from date of service of summons and costs of suit at attorney and own client scale, including collection commission.

[5] After a notice of Intention to Defend had been served and filed by the Defendants, the Plaintiff instituted Summary Judgment proceedings in terms of which it was contended that the Defendants had no *bona fide* defence to the proceedings and that the notice of intention to defend had been filed only for purposes of delay.

[6] In its affidavit resisting summary judgment the first Defendant contended *inter alia* that Plaintiff's claim was not properly conceived as the

amounts claimed were not due. This it says was because the September 2012 installment which triggered the application of the accelleration clause had been paid, which means that there was no basis for applying the accelleration clause and by extension to claim the amounts sought in the particulars. This turns out to be the Defendant's defence. I must add that there is no substantiation of the allegation by the Defendants as to when, where, how and by whom the September Installment concerned was paid.

[7] By means of a replying affidavit, the Applicant contended that the Defendants had not disclosed a *bona fide* defence. It was contended that what they alleged to be a defence was a bare and or bald assertion which was not substantiated. It was contended that unsubstantiated averments cannot amount to a *bona fide* defence.

[8] The question for decision by this court is whether a triable issue or a *bona fide* defence has been disclosed such that if it has been disclosed, then Summary Judgment would not succeed with the converse being true that if same has not been disclosed it should be granted.

[9] Before answering this question I must start from acknowledging the existence of numerous judgments of this court, and the Supreme Court which warn a court seized with a summary Judgment application not to readily close the door on the face of a litigant by granting summary judgment if a reasonable possibility exists that an injustice may be done in the process. See for instance ***Shelton Mandla Tsabedze vs Standard Bank Swaziland Appeal case no. 4/2006 at page 3 thereof***. I therefore approach this matter, with this fact being uppermost in my mind.

[10] It seems to me that an injustice would be done in a case where a *bona fide* defence or even a triable issue is disclosed in the affidavit resisting summary judgment but the court ignores same and grants the relief sought. This would in my view occur in a case where the facts alleging the defence fully particularize it or set out the ground and nature of the defence.

[11] In ***Chambers vs Jenker 1952(4) SA 634 (C)***, as cited in Moses Motsa T/A Evukuzenzele Wholesalers High Court case no. 3578/2009, the position was stated as follows at page 637:-

> *"A bona fide defence does not necessarily mean anything more than the substantiation of facts which, if proved would give rise to a valid defence".*

[12] Numerous judgments talk of the need for a defendant to disclose the nature and ground of the defence. I have in mind the cases of ***Eisenberg OFS v Textile Distributors (PTY) LTD 1949 (3) SA 1047*** and that of ***Lombard v Wan der Westhuizen 1953 (4) SA 84***.

[13] In ***Eisenberg OFS v Textile Distributors (PTY) LTD*** (Supra) at page 1055 it was stated by Horwitz J, that "…if the affidavit discloses the nature and ground of the defence, that is sufficient, provided that it is a bona fide defence".

[14] In ***Lombard v Wan der Westhuizen*** (Supra), De Villiers JP stated the same words at page 88 and goes on to say:-

> *"In the first place all that the Plaintiff has to do is to verify his claim, and what the Defendant has to do is disclose in his affidavit fully the nature and ground of his defence, and also allege that it is bona fide."*

[15] The point herein being made is that whilst I agree that the court does not have to investigate at this stage whether the defence will succeed during the trial, it still has to be satisfied that the nature and ground for the defence has been established or disclosed fully.

[16] Considering the matter at hand, can it be said that a bona fide defence has been established or put differently have the facts relied upon been raised with sufficient substantiation or has the nature and grounds for the defence been fully disclosed?

[17] Considering that the Defendants merely say that they paid the September 2012 installment without saying more, in a case where the parties agreed that a certificate by the creditor would be *prima facie* proof of the outstanding amount, it seems to me that in such a case they are only disclosing the nature of their defence without disclosing the ground for it. In other words, the allegations are not substantiated or the defence is not fully disclosed. A bald assertion claiming to have paid without more in a case like the present would not suffice in my view to establish a *bona fide* defence or even a triable issue.

[18] That being the case I cannot see how a grant of Summary can be avoided. Consequently I grant Summary Judgment in terms of prayers (a), (b) and (c) of the particulars of claim except that (c) does not include collection commission, which in my view cannot possibly be

claimed together with costs and where the agreement allows it such agreement is to that extent unconscionable in my view.

Delivered in open court on this the …..day of February 2013.

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N. J. HLOPHE

JUDGE