



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No: 338/12

In the appeal between:

**FIDELITY SECURITY SERVICES  
SWAZILAND (Pty) Ltd**

**PLAINTIFF**

**AND**

**NHLANGANO CASINO HOTEL**

**DEFENDANT**

Neutral citation: *Fidelity Security Services Swaziland (Pty) Ltd vs Nhlangano Casino Hotel (338/2012) [2013] SZHC176 (9 August 2013)*

**CORAM: M.C.B. MAPHALALA, J**

**Summary**

Contract to provide security services – plaintiff sues for arrear payment – defendant pleads that it is not in arrears but fails to furnish evidence of payment – held that the onus to prove payment of a debt lies with the debtor – held further that the defendant has failed to discharge the said onus – requisites for summary judgment discussed – application granted with costs..

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**JUDGMENT  
9 AUGUST 2013**

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[1] The parties concluded a verbal contract sometime in 2008 in terms of which the plaintiff was to provide security services at the defendant's premises in Nhlangano. The plaintiff contends that the expressed, alternatively, implied terms of the contract between the parties were that the defendant would remunerate the plaintiff for services rendered at the plaintiff's usual and customary rate, that the defendant would give the plaintiff one month notice of termination of the agreement failing which the defendant would be liable for the month in respect of which provision for the daily services were rendered; and, that the fees for the monthly services rendered would be paid in advance, and, that any arrears would attract interest at the prime rate prevailing at the time of 9% plus 2% totalling 11% per annum.

[2] The plaintiff contends that it provided the said security services between 1<sup>st</sup> February 2011 to the end of September 2011; and, that it duly delivered the invoices to the defendant reflecting the plaintiff's usual and customary rates. The plaintiff's invoices are captured in the plaintiff's Statement annexed to the Summons together with the individual invoices.

[3] The plaintiff further contends that the defendant, in breach of the contract, has failed to pay for the security services rendered from 1<sup>st</sup> February 2011 to the end of September 2011 in the sum of E64 361.44 (sixty four thousand three hundred and sixty one emalangenani forty four cents) notwithstanding demand. It is common cause between the parties that the defendant by letter dated 26<sup>th</sup> September 2011 and addressed to the plaintiff terminated their services as of 30<sup>th</sup> September 2011. The

plaintiff argues that the amount claimed is the amount of E26 210.83 (twenty six thousand two hundred and ten emalangeneni eighty three cents) is in respect of arrears which have accumulated over the period between 1<sup>st</sup> February 2011 to September 2011.

[4] The defendant has filed a Notice of Intention to Defend, and, the plaintiff has in turn filed an Application for Summary Judgment; the basis of the application is that the defendant has no *bona fide* defence to the plaintiff's claim, and, that the Notice of Intention to Defend has been entered solely for the purpose of delaying the action. The defendant, instead of filing an Affidavit Resisting Summary Judgment, filed the 'Defendant's Answering Affidavit'.

[5] The defendant doesn't dispute the existence of the contract with the plaintiff; however, it denies that the parties had agreed that the arrear amount would attract an interest of 11% per annum. In addition the defendant argues that it effected various electronic payments on various months from the 28<sup>th</sup> February 2011 to the 2<sup>nd</sup> September 2011 amounting to E198 041.50 (one hundred and ninety eight thousand and forty one emalangeneni fifty cents). The defendant doesn't deny that the amount payable was the plaintiff's usual and customary rate which would be reviewed upwards annually. Each invoices annexed to the summons states that the service is subject to the Standard Terms and Conditions, when no signed contract is available. The invoices further state that the interest would be prime plus 2% charged on

accounts in arrears; hence, this defence relating to interest falls away. Seemingly, this is the only defence raised by the defendant.

[6] The defendant doesn't dispute or challenge any of the invoices issued on the basis that security services were not rendered. Similarly, the defendant doesn't challenge the amount charged on each invoice as being inaccurate. It was expected of the defendant to state which invoices were paid given that the contractual period was about three years; and, the alleged payment of E198 041.50 (one hundred and ninety eight thousand and forty one emalangeni fifty cents) does not indicate the invoices which were paid. Similarly, the defendant has failed to disclose the balance of the debt when the payments were made and the extent to which the payments reduced its liabilities.

[7] It is a trite principle of our law that the onus of proving payment of a debt rests upon the debtor *Davis A.J.A. in Pillay v. Krishna and Another* 1946 AD 946 at 955. *His Lordship Olivier JA in Nedperm Bank Ltd v. Lavarak and Others* 1996 (4) sa 30 AD at pp 46-47 said:

**“Under the Common Law, a debt cannot be paid by instalments without special agreement. It follows that a debtor is not entitled to pay instalments on account against the wish of the creditor unless in accordance with the terms of the agreement to that effect. See *Bernitz v. Euvrard* 1943 AD 595 at 602-603.**

**This rule accords with the basic point of departure that payment of a debt is a bilateral juristic act, requiring consensus between the creditor and the debtor ....**

**It is also trite law that the onus to prove valid payment rests on the debtor: Pillay v Krishna and Another 1946 AD 946 at 955.**

**From these basic principles of law it follows logically, in my view, that where there are two obligations to be fulfilled by a debtor, he bears the onus of proving, not simply that a payment was made, but also of proving the necessary consensus regarding which debt was paid.”**

[8] His Lordship further approved the formulation of this principle by *Viljoen AJ* in *Italtile Products (Pty) Ltd V. Touch of Class* 1982 (1) SA 288 (O) at 290 where the learned judge said:

**“Although I have myself also not found authority to dealing with a case such as the present, where payment is admitted but there is dispute regarding the debt for which it was intended, I have no doubt that the onus of proving, not only that payment was made, but that the debt in question was paid, rests upon the debtor. This is accordance with the principle that it is the party making a positive averment who bears the onus of proof. Moreover, it seems to me that the very requirement that a debtor should prove of a debt, in itself necessitates proof that the debt in question has been paid and not simply proof that a payment has been made to the creditor.”**

[9] The defendant has not shown that there is an issue or question in dispute which ought to be tried; in addition it has not shown that it has a bona fide defence to the claim. Rule 32 (4) (a) and (5) provide:

**“32. (4) (a) Unless on the hearing of an application under sub-rule (1) either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of the claim, to which the application relates that there is**

**an issue which ought to be tried or that there ought for some other reasons to be a trial of that claim or part, that Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”**

....

**(5) (a) A defendant may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the Court, and, with the leave of the Court, the plaintiff may deliver an affidavit in reply.**

....

**(c) the Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.”**

[10] *Corbett JA* giving a unanimous judgment of the Appellate Division in the case of *Maharaj v. Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 426 said the following:

**“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 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 these issues or to determine whether or not there is a balance of probabilities in favour of the one party or other. All that the Court enquires into is (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have as to either the whole or part of the claim, a**

**defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word ‘fully’, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence... at the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.”**

[13] I am satisfied that the defendant has not discharged the onus of showing that he has a *bona fide* defence to the claim. Accordingly, the application for summary judgment is granted in the amount of E64 361.44 (sixty four thousand three hundred and sixty one emalangenzi forty four cents) together with interest of 11% per annum as well as costs of suit.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Plaintiff  
For Defendant

Attorney Sabela Dlamini  
Attorney Marissa Smith