



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Civil Case No. 1373/11

In the matter between

MICHAEL ZODLANI MKHONTA

PLAINTIFF

And

THULANI NDZABANDZABA

DEFENDANT

Neutral citation

Michael Zodlani Mkhonta vs Thulani Ndzabandzaba
(1373/11) 10 October 2013 [SZHC] 225

Coram:

Ota J.

Heard:

4th October 2013

Delivered:

10th October 2013

Summary:

Civil procedure: summary judgment; triable issues raised; application refused.

OTA J.

[1] The Plaintiff *in casu* took out combined summons claiming for several reliefs against the Defendant. After the Defendant entered a notice of intention to defend, the Plaintiff commenced a summary judgment application claiming for the following reliefs:-

- “(1) The agreement of sale between the parties be cancelled.**
- (2) Payment of the sum of E90,000=00 in respect of the purchase price.**
- (3) Interest thereon at the rate of 9% per annum calculated from the date of issue of summons to date of settlement of same.**
- (4) Costs of suit.”**

[2] The Plaintiff’s case as is borne out of the particulars of claim filed of record, is that on or about the 23rd of October 2010, the parties entered into an agreement of sale of a business trading as Newz and Giggles Bar, situated at Msunduzi Mbabane. The material terms of the agreement were that the business was sold to the Plaintiff by the Defendant as a going concern. The purchase price was fixed at E90,000=00. The sale was subject to the following conditions as appear in paragraph 7 of the particulars of claim namely:-

- “7.1 The purchaser obtaining either a lease or sublease of the premise upon the same terms and conditions as are contained in the seller’s**

lease provided however that the purchaser shall be liable for all rent in respect of the premises from the effective date notwithstanding the date of commencement of any new lease or sublease.

7.2 The seller taking all necessary action to ensure that the purchaser obtains a lease or sublease of the premises aforesaid.

7.3 The satisfactory transfer of all the licences relating to the said business into the name of the purchaser within a reasonable time the costs of which transfer to be borne by the purchaser.”

[3] The Plaintiff alleged that on or about the 23rd of October 2010 he paid the purchase price of E90,000=00 to the Defendant by bank cheque. That the Defendant in breach of the agreement between the parties has failed to transfer any or all the licences relating to the business into the name of the Plaintiff within a reasonable time. Such that ever since the sale agreement the Plaintiff has not conducted business.

[4] Plaintiff further alleged that the Defendant's failure to transfer all the licences relating to the business constitutes a material breach of the agreement and / or repudiation of the agreement which entitles the Plaintiff

to cancel the agreement, alternatively, which repudiation the Plaintiff accepts and cancels.

[5] It is further the Plaintiff's case that as a result of the cancellation, he is entitled to repayment of the sum of E90,000=00 he paid to the Defendant, which amount is now due, owing and payable but which the Defendant has failed to pay despite several demands.

[6] Now, the principles that must guide the Court in dealing with summary judgment is firmly entrenched in our jurisprudence and need no elaborate exhortation. Suffice it to say that it is a remedy that case law recognizes as capable of turning into a weapon of injustice if not properly handled. Thus, the jurisprudential accord that it must be handled with great care and caution. It should only be awarded in very clear cases where the Plaintiff's case is unanswerable and the intention to defend entered by the Defendant is a dilatory stratagem aimed at poking a spoke into the Plaintiff's wheel of success. See for example **Zanele Zwane vs Lewis Stores (Pty) Ltd Appeal Case No 22/2007, Fikile Thalitha Mthembu vs Standard Bank Swaziland Ltd Appeal Case No. 3/2009, MTN Swaziland vs ZBK Services and Bonginkosi Dlamini Civil Case No 3279/2011, Supa Swift**

(Swaziland) (Pty) Ltd vs Guard Alert Security Services Ltd Case No. 4328/09.

- [7] It appears to me that this need for caution informs the detailed procedure laid down for this relief by Rule 32 of the Rules of the High Court. That Rule of Court mandates a Defendant wishing to resist summary judgment to file an affidavit resisting same and for the Court to scrutinize the said affidavit to ascertain if it discloses a *bona fide* defence or triable issue or if for any other reason there ought to be a trial of the action or any part of it.
- [8] Once the Court comes to the conclusion that a *bona fide* defence or triable issue exists, it should refuse summary judgment and allow the Defendant enter into his defence.
- [9] It is now also the overwhelming judicial consensus that for the Defendant to be said to have disclosed a *bona fide* defence or triable issue, the affidavit resisting summary judgment must disclose such facts as may be deemed sufficient to enable him defend generally, though he is not required at this stage to disclose his defence with the mathematical precision required of a

plea. Therefore, the mere filing of an affidavit resisting summary judgment is not a *sine qua non* to the refusal of the application.

[10] The question loaming large at this juncture is, did the Defendant *in casu* file an affidavit resisting this summary judgment application and if he did, does the affidavit disclose a *bona fide* defence or any triable issue?

[11] The Defendant filed an affidavit resisting this summary judgment application which appears on pages 28 to 31 of the book. The relevant portion of the affidavit for the purposes of the exercise at hand are paragraphs 4.1 to 4.8 (page 30 of the book), where the Defendant avers as follows:-

“4.1 I deny that I have no bona fide defence on the action.

4.2 I state plaintiff created a situation of impossibility of performance by changing the business premises without notice to myself.

4.3 I state further that when the plaintiff changed the business premises he was well aware that trading licences for bars are awarded with regard to specific premises and any new premises needed to under go another process.

- 4.4 I state further that it was agreed between the parties that prior to an application for the transfer of licence plaintiff had to obtain a lease agreement of the premises into his name, which same was facilitated by myself. I humbly state the plaintiff delayed the process of obtaining the lease into his name in that ever since he took over the business he defaulted in paying rentals in time hence the landlord was reluctant to give him the lease agreement.**
- 4.5 In consideration of the above, I state that it was still within a reasonable period in particular because the delays were caused by the plaintiff.**
- 4.6 I state further that the plaintiff was operating the business ever since November 2010 until such time that he changed premises and he operated same for his account. As such there was no prejudice suffered by him by the delay which was also his cause.**
- 4.7 I further state that the plaintiff aims at benefiting twice in that he does not make a tender for the delivery of the business back to me upon payment of the purchase price. He further does not disclose any profits, that have been made by himself in operating the business.**
- 4.8 I deny specifically that I breached the agreement in any manner whatsoever.”**

[12] Mr Ncgamphalala who appeared for the Plaintiff condemned the foregoing averments as not disclosing a *bona fide* defence or raising any triable issue. Counsel submitted that the Defendant failed to fully disclose the nature and grounds of his defence, which state of affairs renders the averments general

in character thus raising no triable issues. It was further Mr Ncamphalala's contention that the defence urged invites the Court to go outside the terms of the agreement between the parties to canvass other issues not contained in the said agreement which is against the parole evidence rule. This, he says is because no clause in the agreement between the parties conditions the transfer of the business licence by the Defendant to the Plaintiff on the Plaintiff first obtaining a lease agreement for the business premises.

[13] Mr Dlamini who appeared for the Defendant for his part argued that the affidavit resisting summary judgment clearly raises triable issues which should entitle the Defendant to defend the action. I agree with him.

[14] To my mind, the affidavit resisting summary judgment can hardly be said to convey allegations in general terms. It clearly raises the following triable issues:-

1. Whether or not the Plaintiff created a situation of impossibility or performance by changing the business premises without notice to the Defendant since the parties specifically contracted, as recognized by the Plaintiff in paragraph 7.1 of his answering affidavit reproduced

above, that the sale is subject to the purchaser (Plaintiff) obtaining either a lease or sublease of the premises upon the same terms and conditions as are contained in the sellers (Defendant's) lease.

2. In view of the fact that the Plaintiff allegedly changed business premises, whether or not he was well aware that trading licences for bars are awarded with regard to specific premises and any new premises needed to undergo another process.
3. What effect if any did the alleged change of business premises have on the obligation of the Defendant to transfer the trading licence to the Plaintiff in terms of their agreement.
4. Whether or not prior to the change of business premises the Plaintiff delayed the process of obtaining the lease agreement into his name by defaulting in payment of rentals, thus stultifying the transfer of the trading licence to him.
5. Whether or not the delays were caused by the Plaintiff therefore the transfer of the trading licence was still within a reasonable period.

[15] Contrary to Mr Ncgamphalala's contention, the foregoing issues flow directly from the agreement between the parties which subjected the sale of the business to the Plaintiff obtaining a lease or sublease of the business premises; the Defendant taking all necessary action to ensure that the Plaintiff obtains a lease or sublease of the premises and the satisfactory transfer of the business licence by the Defendant to the Plaintiff. Since the Defendant clearly alleges that obtaining the lease of the property in Plaintiff's name and his ability to transfer the business licence into the Plaintiff's name are interrelated, the alleged breach by the Plaintiff of his obligation to secure a lease or sublease of the business premises and changing business premises, thus allegedly rendering impossible the transfer of the business licence into his name, is an issue which ought to be tried. I cannot therefore subscribe to Mr Ncgamphalala's proposition that these issues are extrinsic the agreement between the parties and ought not be countenanced. By so proposing Mr Ncgamphalala appears to be suggesting that the Court should isolate the issue of the transfer of the business licence from the other factors upon which the sale was conditioned. This course is certainly not tenable. In my view the peculiar circumstances of the agreement between the parties requires that these conditions be taken

wholistically not in isolation. It would violate the terms of the agreement between the parties to hold otherwise.

[16] The issues I detailed in paragraph [14] are issues which cannot be resolved on the papers filed of record. They require viva voce evidence from all competent witnesses in order to aid the Court to a just decision on a balance of probabilities

[17] In light of the totality of the foregoing, I come to the inescapable conclusion, that the Defendant has indeed raised triable issues that should convey him to trial. As the Court observed in **Mater Dolorosa High School vs R.J.M. Stationery (Pty) Ltd Appeal Case No. 3/2005.**

“It would be accurate to say that a Court will not merely be slow to close the door to a defendant, but infact 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”

[18] In conclusion I make the following order:-

(1) The summary judgment application be and is hereby dismissed.

- (2) The parties be and are hereby referred to trial.
- (3) The Defendant be and is hereby ordered to file a plea within 14 days from the date hereof.
- (4) Costs to follow the event.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THEDAY OF 2013**

OTA J.

JUDGE OF THE HIGH COURT

For the Plaintiff:

B. Ncgamphalala

For the Defendant:

M.S. Dlamini