



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Case No. 2016/11

In the matter between

NEDBANK (SWAZILAND) LIMITED

PLAINTIFF

and

BASLAM INVESTMENTS (PTY) LTD

t/a FAIR PRICE FURNITURES

1ST DEFENDANT

SABELO ELIAS MASINA

2ND DEFENDANT

Neutral citation: *Nedbank (Swaziland) Limited v Baslam Investments (Pty) Ltd t/a Fair Price Furnitures and Another (2016/11)*
20 March 2013 [SZHC] 65

Coram: OTA J.

Heard: 15 March 2013

Delivered: 20 March 2013

Summary: Summary judgment application: triable issues: disputes of fact: sufficient materials available on record to reconcile disputes: application granted.

OTA J.

[1] This is an application for summary judgment wherein the Plaintiff claims the following reliefs:-

1. Payment of the total sum of E49,127.53
2. Interest thereon at the prime plus 30% per annum
3. Costs of suit at attorney and own clients scale.
4. Collection commission
5. Further and / or alternative relief

[2] Let me interpolate and observe here, that when this matter served before me for argument on the 15th of March 2013, learned counsel Mr Mabuza who appeared for the Plaintiff, urged from the bar a Notice of withdrawal of Attorneys of record for Defendants filed on 14 March 2013 by S.P. Mamba Attorneys. Mr Mabuza urged the court to discountenance the said Notice of withdrawal on the premises that leave should have been sought for same, in view of the fact that the matter was set down for argument on the 15th of March 2013 and Notice of set down duly served on the Defendants Attorneys on the 6th of March 2013.

[3] I agree with Mr Mabuza. This matter was set down for argument on the 15th of March 2013 and Notice of set down was served on defence counsel on the 6th of March 2013. It smarks of gross disrespect for the Court for counsel to simply file a Notice of withdrawal the day before argument of the application, without formally seeking for the leave of Court to do so. I do not think that the Court can be subjected to such treatment, more so as the Defendants did not even have the common courtesy of filing the said Notice of withdrawal with the Court. The Court first had sight of said notice in open Court when it was urged upon it by counsel Mr. Mabuza. This is certainly an unacceptable practice worthy of condemnation.

[4] A similar situation as *in casu*, presented in the case of **Silence Gamedze and Others v Thabiso Fakudze, Civil Appeal Case No. 14/2012.**

[5] In that case and in the wake of the Supreme Court session in November 2012, Appellant simply filed a Notice of abandonment of his appeal which had been pending for several months and tendered costs without bothering to appear in Court to tender apologies for his conduct. The notice of abandonment was also not filed with the Court.

[6] The Supreme Court discountenanced the Notice of abandonment, proceeded with the appeal and ordered costs to be paid by the Appellant on the punitive scale of attorney and own clients scale, as a mark of its disapproval of what it termed the egregiousness of Appellants conduct.

[7] *In casu*, it was for the above reasons that I discountenanced the said Notice of withdrawal of Attorney of Record and proceeded with the summary judgment application.

[8] Now, in its declaration, the Plaintiff alleged the following facts:-

That the 1st Defendant Baslam Investment (Pty) Ltd t/a Fair Price Furnitures, is a company with limited liability duly registered and incorporated in terms of the Company Laws of Swaziland, with its principle place of business at shop No. 7, Hatzin Building, Manzini, in the Manzini District.

[9] That 2nd Defendant Sabelo Elias Masina is an adult male director of the 1st Defendant cited in his capacity as Surety and Co-principal debtor with the 1st Defendant whose chosen *domicillium citandi et executandi* is at Mbhuleni, Eteni past Assembles of God Church, in the Manzini, District.

[10] The Plaintiff alleged that on or about 18th April 2009, and at Manzini, the Plaintiff represented by its SME and IBM Manager and the 1st Defendant represented by its director, entered into a written loan agreement which was premised upon the conditions that the purpose was to purchase stock, interest levied thereon at prime plus 3% per annum, the loan would be payable over 24 months and the Plaintiff would charge 1.45% of the facility agreed to.

[11] The Plaintiff further alleged that in securing the loan, the 1st Defendant pledged lien over funds to be placed on call account for E25,000=00 and secured guarantee by Central Bank of Swaziland for E75,000=00, whilst the 2nd Defendant entered into a Deed of suretyship and bound himself in solidum with the 1st Defendants for the due and timeous performance of 1st Defendants contractual obligations.

[12] It was further the Plaintiffs case, that the 2nd Defendant further renounced benefits arising out of the following legal exceptions; *beneficium ordinis seu excussions*, *senates consultum valleianum*, *de authentica si qua mulier* and *beneficium divisionis*.

[13] Plaintiff also alleged that in terms of the Deed of Suretyship, the 2nd Defendant bound himself in an unlimited amount and to pay attorney and client scale costs including collection commission should Plaintiff institute litigation to compel 1st Defendant to discharge its obligation.

[14] Plaintiff contended that it discharged its obligations under the agreement and advanced the money to the 1st Defendant as agreed. However, the Defendants breached the contract in that they failed to make payment of the loan contract on the terms agreed and are indebted to the Plaintiff in the sum of E 49,127.53 as appears in annexure “3” exhibited to the 1st Defendants statement.

[15] The Plaintiff alleged that despite demand the Defendants refused to settle same and it remains owing, due and payable by the Defendants.

[16] Now, it is a well established judicial position that summary judgment is an extra-ordinary, drastic and stringent remedy and should only be awarded in clear cases where the Defendant has no defence and the appearance to defend is not entered *bona fide*, but is a dilatory strategem geared at stultifying the Plaintiffs early dance of victory.

[17] The reason for this sound caution is not far fetched. It stems from the fact that summary judgment is one that is awarded without a plenary trial of the action. Thus the need for circumspection to avoid foreclosing a Defendant who otherwise has a good defence from defending an action, invariably leading to a miscarriage of justice.

[18] It is in a bid to ensure that this procedure is properly utilized, that the rules require a Defendant who is opposed to summary judgment to file an affidavit resisting same. The task of the court in the face of such an affidavit resisting summary judgment, is to scrutinize the affidavit to ascertain whether “*there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part thereof*”

[19] Once the Defendant raises a triable issue or discloses a *bona fide* defence in its affidavit, that should emasculate summary judgment and permit the Defendant proceed to trial. As the court declared in the case of **Mater Dolorosa High School v R.J.M. Stationery (Pty) Ltd, Appeal Case No. 3/2005**

“It would be more accurate to say that a court will not merely ‘be slow’ to close the door to a defendant, but will 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”

See **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07, Supa Swift (Swaziland) (Pty) Ltd v Guard Alert Security Services Ltd, Case No. 4289/09, National Motor Company Ltd v Moses Dlamini 1985-1987 (4) SLR 124.**

[20] The 1st Defendant it is on record failed to file any affidavit resisting this summary judgment application. The consequence therefore is that Plaintiff is entitled to summary judgment against the 1st Defendant.

[21] The 2nd Defendant for its part filed an affidavit of 4 paragraphs resisting summary judgment. The relevant facts for the purposes of this application are circumscribed in paragraphs 3 and 4 of the said affidavit, in the following terms:-

“3 AD PARAGRAPH 1-3

Save to deny that the contents of the affidavit deposed to by the deponent are both true and correct in so far as same are at variance with the contents of this affidavit. Contents herein are noted.

4 AD PARAGRAPH 3

Contents herein are denied and Plaintiff is put to strict proof thereof. I state that I am not the director of the Plaintiff having resigned in 2009. I never participated in the application for the loan agreement. I deny ever signing the suretyship agreement since I was no longer a director”

- [22] The question is do the foregoing allegations of fact raise triable issues? Triable issues are said to be raised where the material facts upon which the claim is premised, and which are contained in the affidavits serving before court are in irreconcilable conflict. That is when the application is said not to be proper by way of motion, and in that case, the court may make an order for *viva voce* evidence to be led in a trial action for its resolution on a balance of probabilities, in accordance with Rule 6 (17) of the High Court Rules which provides:-

“where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision”

- [23] In the case of **Nokuthula N. Dlamini v Goodwill Tsela Appeal Case No. 11/2012, Agim JA** adumbrating on the question of disputes of fact *vis a vis* motion proceedings, declared as follows:-

“

[28] *It is for the court to decide whether such application can properly be decided on the affidavits. The Rules do not provide guidelines on how to determine this question. There is nothing in the rules prescribing situations that indicate when application proceedings cannot properly be decided on the affidavits filed by the parties. The absence of such guidelines in the rules, leaves the Court with a wide discretion to decide when such a matter cannot properly be decided on the affidavits.*

[29] *The established and trite judicial practice which now determines the approach of the Courts world wide, to be founded in a long line of cases across jurisdictions, is that a court cannot decide an application on the basis of opposing affidavits that are irreconcilably in conflict on material facts. So where the facts material to the issue to be determined are not disputed, the application can properly be determined on the affidavits. It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the affidavits. The Court has a duty to*

carefully scrutinize the nature of the dispute with microscopic lense to find out –

- (i) If the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it in a way, that the determination of such issue is dependent on or influenced by it.*
- (ii) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the terms of the affidavits.*
- (iii) If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits.*
- (iv) If the dispute as to a material fact is genuine or real dispute.*

[30] A fact is material or relevant where the determination of a claim is dependent on or influenced fundamentally by it. Not all facts in a case are material. So it is only those that have a bearing on the primary claim or issue for determination in a way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application

can be decided on affidavits. If the conflict or dispute is not on a material fact, the application can be decided on the affidavits. If the dispute or conflict is on a material fact but the dispute is of such a nature that it is reconcilable or resolvable on the affidavits, then the application can be decided on the affidavits. If the dispute on a material fact is of such a nature that it cannot prevent the proper determination of the application on the affidavits, then the court will decide the application on the affidavits. If the dispute on a material fact is not genuine or real, then the application can be determined on the affidavit. This can arise where the denial of fact is vague, evasive or barren or made in a bad faith to abuse the process of court and vex or oppress the other party. A frivolous denial raised for the purpose of preventing a determination of the application on the affidavits or to instigate a dismissal of the application or cause a trial by oral or other evidence thereby delaying and protracting the trial as a stratagem to discourage or frustrate the applicant is a gross abuse of process. We cannot close our eyes to the high incidence of abuse of court processes. Parties often times do not show a readiness to admit liability even when

it is obvious that they have no defence to an application or a claim. Such a party, if he or she is a defendant or respondent, tries to foist on the plaintiff or applicant and the court a wasteful trial process or a dismissal of the application through frivolous denials. The objective of rule 6 is to avoid a full trial when there is no basis for it and avoid delayed and protracted trials in such cases. It is the duty of a court to ensure that a law meant to facilitate quicker access to justice through the expeditious and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claims.

[31] *In the South African Cases of Frank v Ohlossons Cape Breweries Ltd 1924 AD 289, Botha v Englebrech 1910 TPD 853, Ex parte Potgieter (1905) 225C and Arnold v Viljoen 1954 (3) SA 322 (C) at 329 Pr - A, it has been restated that an application can properly be decided on affidavits in the absence of a real or genuine dispute of fact. The correct judicial approach is well laid out by the Court in Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634L-635B as follows:-*

“[W] here is proceedings on notice of motion disputes of fact have arisen on the affidavit, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... If in such a case the respondent has not availed himself of his right for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court... and the Court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include the fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks...”

[24] In the face of the foregoing, it appears to me that there is much force in Mr Mabuza’s contention that the allegations of fact contained in the 2nd Defendants affidavit, raise no triable issues that would require *viva voce* evidence.

[25] In the first place is the allegation in paragraph 4 of the said affidavit to wit

“I state that I am not the director of Plaintiff having resigned in 2009. I never participated in the application for the loan agreement”

[26] This is a vague and general statement of fact which does not address the Plaintiff’s allegation that the 2nd Defendant as director of 1st Defendant entered into a Deed of suretyship and bound himself in solidum with the 1st Defendant. I say this because, and as rightly contended by Mr Mabuza, what the 2nd Defendant appears to be saying by the allegation ante, is that he is no longer the Plaintiffs director having resigned in 2009. The supposition would be that since he has resigned from the directorship he is no longer bound by the suretyship. This does not answer the Plaintiffs case.

[27] The 2nd Defendant also failed to take the court into his confidence by showing when in 2009 he allegedly resigned as 1st Defendant’s director, in view of the fact that the Plaintiff alleges that these transactions all took place in 2009. The allegation does not therefore disclose a defence. It is a vague and bare allegation which resides in the realm of surmise. It is thus not competent to defeat summary judgment.

[28] As I stated in my decision in the case of **Mfaniseni Lyford Mkhaliphi v Somageba Investments (Pty) Ltd Civil Case No. 1044/11 paragraph 24.**

“ The Defendant has failed to meet this test. It’s affidavit amounts to nothing as it is nebulous, evasive and resides in the realm of surmise. I find a need to stress here, that the court is not clairvoyant . It is not a soothsayer with the ability to gaze into a crystall ball to discover what constitutes the defence. The onus lies on the Defendant to demonstrate that defence. If it fails to do so, as in this case, leaving same in the province of speculation, then he is not entitled to the court’s discretion allowing him to proceed to trial”

[29] Similarly, the second leg of the 2nd Defendants allegation in paragraph 4 of his affidavit to wit:-

“I deny ever signing the suretyship agreement since I was no longer a director” must also fail.

[30] I say so because in the first place and as I already stated, the 2nd Defendant failed to demonstrated to the court when he ceased to be a director of the 1st Defendant in 2009 to enable the court anticipate a defence, in view of the fact that the Plaintiffs case is that the transaction between the parties took place on the 18th of April 2009. To my mind therefore, the 2nd Defendant was clearly vague and evasive in this regard which cannot aid his cause.

[31] Secondly, by alleging that he was no longer the director of the 1st Defendant and that he did not sign the suretyship agreement, the 2nd Defendant is alleging that the signature on the Deed of Suretyship is not his own, even though he has again failed to clearly allege this fact as is required.

[32] It becomes necessary to determine if the signature is his own. Mr Mabuza has drawn my attention to 2nd Defendants signature which appears in his affidavit on page 29 of the book, and has urged me to compare it with the signature of the surety on the Deed of Suretyship as appears on page 20 of the book.

[33] What Mr Mabuza is saying by his posture, is that there is enough material to try and reconcile the issue of the signature of the 2nd Defendant on the papers, without the necessity of further evidence.

[34] In my opinion I agree with Mr Mabuza, since the 2nd Defendants signature appears on another document which I can compare with the signature on the suretyship.

[35] This is because it is trite, that where the signature on a document is in issue in the sense that the person who is alleged to have made it is denying making it, the court can compare that signature with his signature on another document which he has admitted making to resolve the dispute.

[36] I have thus carefully looked at the 2 signatures and in my opinion they are similar. I am inclined to believe that the 2nd Defendant made the signature on the suretyship. Therefore, he was the 1st Defendants director as at the time the Deed of suretyship was made and he signed the Deed of suretyship.

[37] In conclusion, I find that the 2nd Defendant has failed to raise any triable issue or issues in his affidavit sufficient to defeat summary judgment. The whole defence to my mind, is a desperate dilatory move to protract the trial and frustrate the Plaintiff.

[38] On these premises, this application succeeds.

[39] I order as follows

1. Summary judgment is entered against the 1st and 2nd Defendants jointly and severally the one paying the other to be absolved, as follows:-

(a) Payment of the sum of E49, 127.53

(b) Interest thereon at prime + 3% per annum

2. Collection commission

3. Costs of suit at attorney and own clients scale.

For the Plaintiff:

Mr N.V. Mabuza

For the Defendants:

No representation

DELIVERED IN THE OPEN COURT IN MBABANE ON THIS

THEDAY OF2013

OTA J.

JUDGE OF THE HIGH COURT

