



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1391/2013

In the matter between:

EXPROP INVESTMENT

PLAINTIFF

AND

**THE TRADE UNION CONGRESS
SWAZILAND (TUCOSWA**

1ST DEFENDANT

**SWAZILAND NATIONAL ASSOCIATION
OF TEACHERS**

2ND DEFENDANT

**SWAZILAND NATIONAL ASSOCIATION
OF CIVIL SERVANTS**

3RD DEFENDANT

**NATIONAL ASSOCIATION OF PUBLIC
SERVANTS ALLIED WORKERS UNION**

4TH DEFENDANT

**SWAZILAND HEALTH INSTITUTIONS AND
ALLIED WORKERS UNION
DEFENDANT**

5TH

**SWAZILAND COMMERCIAL AND
ALLIED WORKERS UNION
DEFENDANT**

6TH

**MEDIA WORKERS UNION OF
SWAZILAND**

7TH DEFENDANT

**INSURANCE ALLIED UNDERTAKING
WORKERS UNION**

8TH DEFENDANT

SWAZILAND UNION OF FINANCIAL INSTITUTIONS ALLIED WORKERS SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION DEFENDANT	9TH DEFENDANT
SWAZILAND CONSERVATION WORKERS UNION DEFENDANT	10TH
SWAZILAND TRANSPORT AND ALLIED WORKERS UNION	11TH
SWAZILAND AMALGAMATED TRADE UNIONS	12TH DEFENDANT
SWAZILAND WATER SERVICES AND ALLIED WORKERS UNION DEFENDANT	13TH DEFENDANT
SWAZILAND PROCESSING AND ALLIED WORKERS UNION DEFENDANT	14TH
SWAZILAND ELECTRICITY SUPPLY MAINTENANCE AND ALLIED WORKERS UNION	15TH
SWAZILAND AGRICULTURAL PLANTATION AND ALLIED WORKERS UNION	16TH DEFENDANT
SWAZILAND HOTEL AND CATERING ALLIED WORKERS UNION DEFENDANT	17TH DEFENDANT
SWAZILAND DEMOCRATIC NURSES UNION	18TH
MINE WORKERS UNION OF SWAZILAND	19TH DEFENDANT
20TH DEFENDANT	

Neutral citation: Exprop Investments v. Trade Union Congress of Swaziland (TUCOSWA) & 19 Others (1391/2013) [2014] SZHC198 (8th August 2014)

Coram : **MBUSO E. SIMELANE, AJ**

Heard : **7th August 2014**

Delivered : **8th August 2014**

Summary

Summary judgment application - 2nd defendant acknowledge a debt to third party -2nd defendant denying authority of signatory without disclosing material facts in support - untruthful affidavit - non registered entity in terms of the laws of the country not capable of being sued and to sue - misjoinder - a portion of claim held to be liquidated and the balance referred to trial for hearing - leave to defend granted.

JUDGMENT
8th AUGUST 2014

- [1] The Plaintiff seeks payment of E850,000.00 in respect of 5000 T-shirts sold and delivered to the defendants.
- [2] The plaintiff further seeks 9% interest per annum, 10% collection commission and costs of suit.

[3] From the onset, may I mention that you cannot claim both collection commission and costs at the same time through court process (**Gigi A. Reid Attorneys v Swaziland Law Society Disciplinary Tribunal & Two Others (2039/2012 [2012] SZHC 21)**).

[4] The Plaintiff which initially sued the first three (3) defendants herein joined 17 more defendants on the basis that they are affiliates of the 1st defendant commonly known as TUCOSWA.

[5] In the simple summons the said TUCOSWA, which is the first defendant is described as:

“a company duly registered under the company laws of Swaziland having its principal place of business in Manzini.”

[6] In the Declaration the said TUCOSWA is described, without amendment of the simple summons, as:

“a trade union whose affiliates are the defendants which are not legally registered according to the company laws of Swaziland having its principal place of business in Manzini, in the Manzini region”.

[7] The true correct position is that TUCOSWA does not exist anymore. I was advised by Counsel that 4th to 20th Defendants are legally registered in the Kingdom of Swaziland.

- [8] The Industrial Court in the matter of **The Minister for Labour and the Attorney General v The Labour Advisory Board and TUCOSWA (342/12) [2012] SZIC 2** in a judgment delivered on 26th February 2013 held that the federation (TUCOSWA) is “not a workers federation”.
- [9] In the premise TUCOSWA does not exist in law. It cannot be sued or sue. It cannot be granted costs and no costs can be levied against it. It cannot even raise a Rule 30 application.
- [10] I raised the *locus standi* of TUCOSWA in court and all counsel agreed that TUCOSWA does not exist in law in the Kingdom of Swaziland. However, it was in existence when the T-shirts were sold to it.
- [11] During arguments Mr. Lukhele raised the misjoinder of 4th to 20th Defendants for he claims that they cannot be brought to court as affiliates of TUCOSWA. In fact if TUCOSWA was in existence it would be like you are suing the Principal and the Agent for a same relief at the same time which is irregular.
- [12] In the premise I hold that there is misjoinder of the 4th to 20th Respondents. The Plaintiff is lucky because the said Defendants did not instruct attorneys to represent them. There is no order for costs against the Plaintiff.
- [13] This ultimately leaves the 2nd and 3rd Defendants which are allegedly owing Plaintiff.

[14] On the **24th of April 2012** the 2nd Defendant wrote the following letter:

*“The Manager
FINCORP
P. O. Box 6099
Mbabane, H100.*

Dear Sir/Madam

**RE:CONFIRMATION OF ORDER AND CEEDING
PAYMENT**

The above matter refers.

This letter serves to confirm that SNAT has forwarded an order for 5000 T-shirts to EXPROP Investments.

We also confirm that SNAT will pay an amount of E150,000 to FINCORP at the of May 2012.

Thanking you in advance for your assistance in this regard.

Yours sincerely

***Muzi Mhlanga
(Secretary General)”***

[15] When you read the letter it is clear that the 2nd Defendant was notifying FINCORP that it has ordered 5000 T-shirts from Plaintiff and was to pay E150,000.00 (One Hundred and Fifty Thousand Emalangeneni) in May 2012. This is a liquidated amount and an acknowledgment of debt to a third party.

[16] Indeed 5000 T-shirts were ordered and were delivered at TUCOSWA premises when it existed. The T-shirts were to be utilized for the 2012 May 1 workers' day.

[17] The author of the letter is **Muzi Mhlanga**, the Secretary General of 2nd Defendant.

[18] It is not material whether the Secretary General had authority to bind the 2nd Defendant for no counter application has been moved to challenge the Secretary General's authority to bind the Union. The fact of the matter is that the 2nd Defendant participated in the transaction and it ought to pay.

[19] I hold that the contents of the affidavits of LINDIWE MABUZA are untruthful or highly improbable and do not advance the 2nd Defendant's defence because of the following:

a) She says she was a Director and shareholder of the Plaintiff. The Registrar of Companies **Mr. Msebe Malinga** refutes that assertion by deposing to an affidavit that at no stage was the said LINDIWE MABUZA a member of Plaintiff. Even Lindiwe's brother Khanyakwezwe Mabuza denies that she was a member of Plaintiff.

b) Lindiwe's brother even refutes that Lindiwe is the one who dealt with the defunct TUCOSWA or obtained the tender of T-shirts.

- c) Lindiwe goes on to state that on the 25th of April 2012 she approached the Secretary General of 2nd Defendant and asked him to write a letter to FINCORP so that the Plaintiff could get funding and that the Secretary General initially refused to write the letter because he had no mandate from the National Executive of SNAT. She further avers that her brother joined them where her brother begged Mhlanga to write the letter which the latter did.
- d) From the evidence before me, the letter that was written to FINCORP, was written prior to the meeting of the 25th April 2012 and the Secretary General of 2nd Defendant has not corroborated the deponent. In fact Lindiwe's brother submitted that the deal had long been concluded before the 25th of April 2012.
- e) Lindiwe does not state as to what she did with the money she received from the sales of the T-shirts totaling E36,500.00.

[20] The affidavit of Lindiwe Mabuza brought in by Sibongile Mazibuko seems to be like a ploy by 2nd Defendant to wiggle itself out from the debt of E150,000.00 which advantage cannot be granted to it.

- [21] From the Declaration it is averred that the goods were ordered by Mduduzi Gina, the Secretary General of 3rd Defendant and Muzi Mhlanga the General Secretary of 2nd Defendant whilst Plaintiff was represented by Mr. Khanya Mabuza at or around the 5th April 2012 and the goods were kept at the premises of TUCOSWA whilst it existed.
- [22] The President (Sibongile Mazibuko) of 2nd Defendant cannot be heard to deny a transaction that was confirmed through a letter of 2nd Defendant. There is an unequivocal admission of ordering 5000 T-shirts and to pay E150,000.00 in May 2012. The President has not submitted that the said Muzi Mhlanga stole the letter head of the 2nd Defendant.
- [23] I however agree with Mr. Lukhele that the 2nd Defendant from the papers of record cannot be held to have bound itself to the sum of E850,000.00. There is a dispute therein which cannot be resolved on paper.
- [24] I hold that there is a triable issue in relation to the balance of E700,000.00.
- [25] The Supreme Court in the case of **Dulux Printers v Appolo Printers (72/12 [2013] SZSC 19** held as follows:

“[10] From the foregoing it is clear that the summons does disclose a cause of action. In addition the claim is for a liquidated amount of money as

envisaged by Rule 32 (2) (b). A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment: superior court practice B1 - 210; **Harms: Civil Procedure in the Supreme Court p. 315. Herbstein and Van Winsen; the Civil Practice of the Supreme Court of South Africa**, 4th edition, Van Winsen et al, Juta Publishers, 1997 at pp 435-436 defines a liquidated amount as an amount based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation. There is no doubt that the calculation of the amount in Annexure "A" is capable of speedy and prompt ascertainment. The next question for consideration is whether the appellant has a bona fide defence to the action. Rule 32 (4) (a) provides the following:

"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 part of the claim, to which the application relates that 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 that claim or part, the court may give such judgment or 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."

[11] *The purpose of the summary judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. See **Herbstein and Winsen** (supra) at pp 435-436. This is understandable because*

*the remedy is final in nature and closes the door to the defendant without trial. Ramodibedi JA, as he then was, in the case of **Zanele Zwane v. Lewis Stores (PTY) Ltd t/a Best Electric Civil Appeal No. 22/2007** stated the following:*

*“8. It is well-recognised that summary judgment is an extra-ordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the Courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff’s claim against a defendant to which there is clearly no valid defence: see for example **Maharaj v. Barclays National Bank Ltd***

1976 (1) SA 418 (A), David Chester v. Central Bank of Swaziland CA 50/03.

Each case must obviously be judged in the light of its own merits, bearing in mind always that the court has a judicial discretion whether or not to grant summary judgment. Such a discretion must be exercised upon a consideration of all the relevant factors. It is as such not an arbitration discretion."

[17] *Dunn AJ*, as the then was, in the case of the **Bank of Credit and Commerce International (Swaziland) Ltd v. Swaziland Consolidated Investment Corporation Ltd and Another 1982-1986 SLR 406 (HC)** at p. 407 stated:

"It is not enough for a defendant simply to allege that he has a bona fide defence to the plaintiff's action. He must allege the facts upon which he relies to establish his defence. When this has been done, it is for the court to decide whether such facts, if proved would in law constitute a defence to the plaintiff's claim and also whether they

satisfy the court that the defendant is alleging such facts to acting bona fide.”

[19] *Over the years the Courts have warned that the remedy for summary judgment is stringent and extraordinary since it closes the doors of the courts to the defendant and permit a judgment to the given without a trial. The courts have insisted that the remedy should be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defence has been made solely for the purpose of delay. The courts have further warned that this remedy has the potential to become a weapon of injustice unless it is properly handled. See the cases of **Zanele Zwane v. Lewis Store (PTY) Ltd t/a Best Electric Civil Appeal No. 22/2007, Fikile Mthembu v. Standard Bank Swaziland Ltd Civil Appeal No. 3/2009, Shelton Mandla Tsabedze v. Standard Bank of Swaziland Civil Appeal No. 4/2006, Mater Dolorosa High School v. P.M.J. Stationery***

(PTY) Ltd Civil Appeal No. 50/2003; Musa Magongo v. First National Bank (Swaziland) Appeal No. 38/1999 and David Chester v. Central Bank of Swaziland Civil Appeal No. 50/2003

[20] *A closer look at Rule 32 shows that the remedy for summary judgment is not a weapon for injustice because it does not close the doors to a defendant issue who can show that there is an issue or question in dispute which ought to be tried of that reason to be a trial of that claim. Courts should not be sceptical of this remedy when considering that its purpose is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim.*

[21] *Justice Navsa in **Joob Joob Investments (PTY) Ltd v. Stocks Mavundla Zek Joint Venture 2009 (5) SA (1) SCA** at para 32-33 does*

expostulate the view that this remedy does not close the doors to a defendant with a triable issue and who can show that he has a bona fide defence to the action. At para 32-33 His Lordship stated the following:

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his or her day in court. After almost a century of successful applications in our courts, summary judgement proceedings can hardly continue to be described as extraordinary. Our courts, both first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out....Having regard to its purpose and its proper application, summary judgment proceedings only hold terror and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule as set out with customary clarity and elegance by

Corbett JA in the Maharaj case at 425-426 E.”

[26] Upon considering the foregoing I hereby make an order as follows:

- a) Summary judgment in the sum of E150,000.00 is granted against 2nd Defendant;
- b) Interest thereon at the rate of 9% per annum;
- c) Costs;
- d) The remaining balance of E700,000.00 is referred to trial for determination;
- e) The 2nd and 3rd Defendants are to file their plea within the next 15 days.

**MBUSO E. SIMELANE
ACTING JUDGE**

For Plaintiff : S. Simelane
For 1st Defendant : M. Mkhwanazi
For 2, 3 & 4 Defendants : A. Lukhele