IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 250/14

In the matter between:

GDI CONCEPTS & PROJECTS Applicant

vs

NDO MDLALOSE Respondent

Neutral citation: *GDI Concepts & Projects Pty Ltd v Ndo Mdlalose (250/2014) [2015] SZHC 186 (27 October 2015)*

Coram: **FAKUDZE, J**

Heard: 19 October 2015

Delivered: 27 October 2015

Summary: ***Judgement granted by Magistrate in favour of the Respondent. Court a quo ruled that Appellant not entitled to summary judgment because there are triable issues – The basis for the appeal is that the Magistrate court erred in refusing granting summary judgement in Case No 250/14 - held if sufficient primary facts are given from which if true would give rise to a***

defence then there is a triable issue - application for summary judgement should be denied – held further that in this case there are triable issues which did not warrant the granting of summary judgement. The court a quo was justified in refusing summary judgement. The appeal is dismissed with costs.

JUDGEMENT

INTRODUCTION

[1] This an appeal in Civil Case 250/14 from the Manzini Magistrate Court. The facts are that Appellant instituted action proceedings in which he claimed-

> **(a) Payment of the sum of E18,322.50 (Eighteen Thousand Three Hundred and twenty Two Emalangeni Fifty Cents) being in respect of professional services rendered by Appellant to the Respondent at the latters special instance and request.**
>
> **(b) Interest on the aforesaid sum of E18,322.50 (Eighteen Thousand Three Hundred Two Emalangeni Fifty Cents) at the rate of 9% per annum calculated from date of issue of summons to date of final payment.**
>
> **(c) Further and/or alternative relief**

[2] Respondent entered a Notice of Intention to defend the action and consequently the Appellant filed an application for summary judgment. The Respondent then filed an affidavit resisting summary judgment. Appellant filed a reply.

[3] The summary judgment application was set for argument and the magistrate in the *court a quo* ruled that Respondent has a bona fide defence and that there are triable issues.

NOTING OF APPEAL

[4] On the 12th December 2014 Appellant noted an appeal wherein the following issues were raised-

(a) **The *court a quo* erred in law and in fact in finding that the conduct of the appellant in launching the summary judgment application amounts to acts of deceit, unfair and unscriptiousness;**

(b) **The *court a quo* erred in law that the Respondent's affidavit met the standard of defeating summary judgment as Appellant had not submitted the plans to municipality for approval;**

(c) **The *court a quo* erred in law and in fact in granting costs of a punitive scale against the Appellant as there is no justification or reasoning for same and it was never prayed for nor motivated by the Respondent.**

[5] When the matter appeared before this Court on the 19th October 2015, Mr. Mabuza for the Appellant withdrew the first ground of appeal on the basis that it is covered in the second ground. He also clarified that ground number three was not motivated by Respondent in the *court a quo.* It should therefore be quashed. Mr. Phiri for Respondent agreed with what Mr. Mabuza said by the consent, ground three remains quashed.

[6] The only ground remaining for this court's consideration is whether or not the court a quo erred in law when it ruled that Respondent's affidavit resisting summary judgment met the standard for defeating same.

THE REVELANT PRINCIPLES OF LAW

[7] In terms of order XIV of the Magistrate Court which is similar to rule 32 of the High Court Rules a Plaintiff can apply for summary judgment if a claim is on a liquid document, for a liquidated amount in money, for delivery of specified movable property or ejectment.

[8] The rule relating to summary judgment is ably described by **Mamba J in Sinkhwa seMaswati Ltd t/a Mister bread v P.S.B Enterprises Civil Case No 3839/09** page 8 where the learned Judge says -

> ***"The rule relating to summary judgment….was designed to prevent a plaintiff's claim based upon certain causes of action from being delayed by what amounts to an abuse of the process of the court. In certain circumstances therefore the law allows the plaintiff after the defendant has entered appearance, to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court."***

[9] The Learned Judge further observed that -

> ***"The remedy provided by the rule is extra ordinary and a very stringent one in that it permits a judgment to be given without a trial. It closes the door of the court to the defendant. Consequently it should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence on the other hand it is reluctant to deprive the defendant of his normal right to defend except in a clear case."***

[10] In **CS Group of Companies v Construction Associates (Pty) Ltd Civil Appeal Case No. 41/2008** the Learned Chief Justice Banda, as he then was, equally observed in page 14 that -

> ***"It has also been held that courts should be slow to close the door to the defendant if a reasonable possibility of a defence exists to avoid an injustice being occasioned."***

ISSUES FOR DETERMINATION

[11] The scope for determination by this court was ably described by Appellant's counsel when he said that this court must determine if Respondent has a bona fide and valid defence in law. The defence must be "fully" disclosed and should not be bald, vague or

sketchy. The other aspect of the enquiry or determination is whether there are triable issues in Respondent's affidavit resisting the granting of summary judgment.

BONA FIDE DEFENCE

[12] Appellant's argument is that Respondent's application resisting summary judgment falls far too short the set standard for defeating summary judgment. Appellant's counsel alleges that the affidavit resisting summary judgment must state the nature, grounds of the defence, the material facts upon which the defence is based. It is not sufficient just to say that you have a good defence without stating the material basis for it. In support of this proposition Appellant quotes **Dunn J in National Motor Company Ltd V Moses Dlamini SLR 1987-1995 Vol 4** Pages 126 to 129 where the Learned Judge said

> ***"Where the defence is based upon facts in the sense that material facts alleged by the plaintiff in the summons or in the combined summons are allegedly constituting a defence the court does not attempt to decide the issues or determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court enquires into is (a) whether the Defendant has fully disclosed the nature and the ground 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. The word "fully" connotes in my view that while the Defendant need not deal exhaustively with the facts and 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."***

The observation by Dunn J is quoted with approval by **Ota J in MTN Swaziland V ZBK Services and Another Case No. 3279/2011.**

[13] Currently our honourable courts have formulated the requirement for defeating the summary judgment in the form of two questions (a) whether the Defendant has raised a

triable issue in his affidavit resisting summary judgment and (b) if the Defendant in his affidavit has disclosed a *bona fide* defence.

[14] Appellant goes on to state that Respondent relies on paragraphs 5 and 6 of the affidavit resisting summary judgment which paragraphs simply state that Appellant did not fully perform as per contract and was therefore not entitled to the payment of the remaining sum. These paragraphs further establish the fact that failure on the part of Appellant to perform led to Respondent engaging other service providers. Appellant alleges that Respondent should have provided all the details pertaining to other service providers including the cost of the exercise and the identity of these service providers.

[15] Respondent's response to the issue of full disclosure is that an affidavit resisting summary judgment must disclose sufficient facts to enable the Respondent to defend generally. It is not required at this stage to disclose the defence with mathematical precisions of a plea. The authority for Respondent's proposition is the case of **Michael Zodlane Mkhonta V Thulani Ndzabandzaba Civil Case 1373/11** where her Ladyship Ota J stated that -

> "***it is now also the overwhelming judicial consensus that for Defendant to be said to have disclosed a bona fide defence or triable issues, 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."***

[16] The question that must be asked and answered in this appeal is did the Defendant file an answering affidavit resisting the summary judgment application and if she did, does the affidavit disclose a *bona fide* defence? The Defendant filed an affidavit resisting the summary judgment and it appears on page 25 of the Record of Proceedings in the *court a quo*. Paragraphs 5, 5.1 and 5.2 are relevant for our purposes. The Defendant avers that -

5. I am advised and verily believe that I am not indebted to the Plaintiff in any amount whatsoever in that:

5.1 The written contract had terms to which the Plaintiff failed to adhere to being:

(a) Dimension detailing and acceptance.

(b) **Site plan for proposed development and second stage presentations and approval.**

(c) **Costs estimate of project and final approval of final plans by the local municipalities and engineers.**

5.2 The terms thereof then led to the payment structure which structure was conditional to the happening and/or performance of certain terms of the contract which terms were not performed thus no payment thereafter flows.

[17] On the issue of Paragraph 6, Respondent argues that it is sufficient to disclose that another contractor was engaged and there is need to give the specifics because that is a matter for trial.

[18] On the issue of whether Respondent "fully" disclosed her defence this court holds the view that there was full disclosure of the defence. I am therefore inclined to agree with Respondent that you need not disclose the defence with the mathematical precision required of a plea. All that Respondent says is that there was partial performance of the task assigned to Appellant and is therefore in breach of contract. The breach does not warrant payment by Respondent. In the Sinkhwa SeMaswati matter which I referred to earlier, Mamba J. ably summarises this point when He says –

> ***"Again I am mindful of the fact that the defendant is not in such proceedings required to formulate his defence with the precision or exactitude that would be required in a plea. The defendant must nonetheless state its defence with a sufficient degree of clarity to enable the court to ascertain whether or not this is a triable issue – That would constitute a defence at trial ."***

[19] **TRIABLE ISSUES**

Appellant alleges that there are no triable issues because he performed as per terms of the contract. Plaintiff submits that the parties entered into a valid contract as enunciated from the Declaration and the contract annexed to the court papers in the *court a quo.* Services were rendered accordingly and as expected by Defendant. Appellant submits that following the completion of the project an invoice dated 13th November 2013 was sent to Defendant. A call to

pay the outstanding fees was made by Appellant by means of an e-mail dated 15th November 2013 captioned

> *"Outstanding Designing Fees." The contents of the e-mail are worth noting. They say "Find attached herewith our invoice for the outstanding designing fees I need you to settle or make arrangement regarding outstanding fees before we submit plans to local council."*

[20] Appellant's counsel argued from the bar that the e-mail was two pronged. It was calling upon Respondent to settle the outstanding fees because the work had been completed and also calling upon Respondent to pay the fees that are necessary for the plans to be submitted to the local municipality. The Court's attention was drawn to the fact in the agreement there is note captioned "NB! No structural and electrical engineers, quantity surveyor fees and municipality approval fees are allowed for in this proposal." Appellant therefore contends that all that he wanted was payment of the outstanding fees and fees for lodging the plans. Respondent was therefore obliged to pay for Appellant's services and also to make available the fees for lodging the plans. Appellant is therefore not responsible for the filing of the plans out of time.

[21] Respondent argues on the contrary that Appellant's invoice for the outstanding fees was unjustified because he had not submitted the plans to the local municipality. He was therefore not entitled to same. Respondent contends that failure to submit the plans before placing a demand for the payment of the outstanding fees constitute triable issues that should defeat the granting of summary judgment. Respondent further contends that the triable issues are the following:

> **(a) Did the Appellant perform in terms of the contract thus prompting payment in terms of the contract?**
>
> **(b) Did the failure to perform by Appellant prompt the Respondent to make the remaining payment of 50% as per the contract?**
>
> **(c) Was the Appellant, if it alleges it did perform still performed in terms of the contract or was it on the frolic of its own?**

(d) Did the Appellant perform in accordance with the contract and if it did, are the plans produced furnished or afforded to the municipality and engineers in terms of the contract, or to the Respondent having included the project?

[22] In my humble view, there are indeed triable issues in this case. Respondent is therefore correct in submitting that there are triable issues. The Court's view is further solidified by Mamba J's observation in the Sinkhwa SeMaswati Case (Supra). The Learned Judge observed that

> ***"I would also add that where there is dispute of fact a court would be entitled to refuse an application for summary judgment."***

[23] It is this court's considered view that there are disputes of facts in this matter that is before this Court and the *court a quo* was correct in ruling that there are triable issues which constitute a good base for the refusal of the granting of summary judgment. That being the case I dismiss this appeal with costs.

M.R. FAKUDZE

JUDGE OF THE HIGH COURT

Appellant: **N. Mabuza**

Respondent: **Mr. Phiri**