



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 1461/2014

In the matter between:

**SWAZILAND DEVELOPMENT FINANCE
CORPORATION**

Plaintiff

And

KUNANI SIPHILA INVESTMENTS (PTY) LTD

1st Defendant

GCINA SCHUSTER SENGWAYO

2nd Defendant

DENNIS DANIEL DENISHA MAHLALELA

3rd Defendant

LUBOMBO ORAL HEALTH SERVICES (PTY) LTD

4th Defendant

Neutral citation: *Swaziland Development Finance Corporation vs Kunani Siphila Investments (Pty) Ltd (1461/2014) [SZH 19]12 February 2016)*

Coram: **MAPHALALA PJ**

Heard: **11 September, 2015**

Delivered: **12 February, 2016**

For Applicant: Me. Z Jele
(from Robinson Bertram)

For Respondents: Mr. S. Dlamini
(from M.S. Dlamini Attorneys)

Summary: Civil Procedure – Application for Summary Judgment – Plaintiff contends that it has fulfilled the contract – Defendant on the other hand pleads impossibility of contract – this court finds on the totality of the facts – that there is a triable issue – dismiss the Application with costs.

JUDGMENT

The Application

[1] Before court is an Application for Summary Judgment filed before this court on the 24th October 2014 for orders in the following terms:

1. **Payment of the sum of E1 879 054.35 (one Million Eight Hundred Seventy Nine Thousand, Fifty Four Emalangeni and thirty five Cents);**
2. **Interest on the aforesaid amount at the rate of prime +4.5% currently at 13.5% per annum calculated from the date to summons to date of final payment;**
3. **An order declaring that Mortgage Bond No. 358:2014, to be executable;**
4. **Costs of suit on the scale as between attorney and own client including collection commission;**
5. **Further and / or alternative relief.**

[2] The Application is supported by the affidavit of one Dumsani Msibi who is Group Managing Director of the Plaintiff company.

[3] In the said affidavit he has outlined the cause of action in support of the Application for Summary Judgment and in paragraph 6 thereof states the following:

I annex hereto, a certificate of balance for the loan account, certifying that the amount that is due, owing and payable, taking into account all amounts that have been advanced and / or disbursed by the Plaintiff to the First Defendant, at the latter's special instance and request. I also annex hereto, a copy of the statement of account, which I certify represents the outstanding balance that is now due owing and payable by the first Defendant.

[4] In paragraph 7 thereof avers that 1st to 3rd Defendants have no **bona fide** defence to the Plaintiff's claim and the Notice of Intention to Defend has been entered solely for purposes of delay.

The Opposition

[5] The Defendants oppose the Application for Summary Judgment and has filed an affidavit resisting Summary Judgment depose to by one Mr. Gcina Schuster Sengwayo who is the 2nd Defendant outlining the Defendant's defence to the Application. In paragraph 6 of the said affidavit the Defendant state that the Plaintiff is not entitled to Summary Judgment as 1st Defendant have a **bona fide** defence in that:

6.1 The plaintiff has created a situation of impossibility on the part of 1st defendant to conduct business.

- 6.2 That plaintiff has failed to abide by the agreement to release money for purchasing equipment for the business.
- 6.3 The plaintiff has caused faulty machinery to be delivered to 1st defendant against the will of defendants.
- 6.4 The 1st defendant has a counter-claim against plaintiff for the release of money for the purchase of a trailer.
- 6.5 The plaintiff has failed to release working capital to 1st defendant.

[6] At paragraphs 5.4 to 5.8 the 1st Defendant avers the following:

- 5.4 I state that the machinery and or equipment supplied by plaintiff to 1st defendant was defective in particular the John Deere 1859 loader and such immensely distracted the flow of the business operations of 1st defendant. I state that the machinery has mechanical faults and needed mechanical attention on its gear box, ignition, fan belts and its engine, and it would be on and off used due to its condition.
 - 5.4.1 I state that the running condition of the tractor was brought to the attention of the plaintiff by 1st defendants attorneys, and 1st defendant proposed that they source their machinery from reputable suppliers without interference. I state that there was no response from the plaintiff to date. Kindly see attached hereto marked “DD” a letter dated 7th July, 2014 and 16th July, 2014.
- 5.5 I state that the plaintiff refused to release payment for E300 000.00 (Three Hundred Thousand) a trailer for the operations of 1st defendant notwithstanding that such had already been identified and approved by plaintiff. I submit that consequent to same 1st defendant fails to meet her target income which results in 1st defendants failure to repay the loan terms as the trailer is the

main machinery in use for 1st defendant operations to generate income.

5.6 In consideration of the above, I deny specifically that I breached the agreement in any manner whatsoever. I mention that it was plaintiff who created a situation of performance impossibility.

5.7 In fact the conduct of the plaintiff of refusing to release the amount of E300 000.00 (Three Hundred Thousand) for the purpose of paying or buying a trailer has stalled the 1st defendants project as it has not been able to service its contracts.

5.8 I humbly state that 1st defendant has a counter claim against plaintiff for the release of the sum of E300 000.00 (Three Hundred Thousand) as per the agreement.

[7] The Defendants applied that the Application for Summary Judgment be dismissed with costs.

The Arguments

(i) For the Plaintiff

[8] The attorney for the Plaintiff Mr. Z. Jele advanced argument for his clients and filed Heads of Arguments. In the said Heads of Arguments outlined at some length the principles of law in Summary Judgment Application appearing from paragraphs 8 to 16 of the said Heads of Arguments.

[9] In paragraph 17 thereof it is contended for the Plaintiff that there are no triable issues in this matter nor is there a defence raised on the pleadings for the following reasons :

- 20.1 The defendants do not deny having received the amounts and / or having given instructions that the amounts be disbursed at their instance and request.**
- 20.2 The plaintiff discharged its obligations in terms of the agreement with respect to the claim and paid out amounts as instructed by the defendants.**
- 20.3 The defendants were in breach of the agreements in respect of both loans, in that they failed to make payment of the instalments as and when they fell due. Clause 11.1.1 of the loan agreement if:**
- “The Borrower fails to pay the instalment owing to Swaziland Development Finance Corporation on due date”.***
- 20.4 The defendants breach the agreement by non payment of the instalments**
- 20.5 It is submitted that the plaintiff is entitled to summary judgment on account that the defendants have not raised a defence on the merits nor have they raised a triable issue and accordingly, judgment should be granted as prayed in the Notice of application.**

[10] Finally, it is contended for the Plaintiff that it is entitled to Summary Judgment on account that the Defendant have not raised a defence on the merits nor have they raised a triable issue and accordingly judgment should be granted as prayed in the Notice of Motion.

(ii) For the Defendant

[11] The attorney for the Defendant advanced arguments for his client filing Heads of Arguments, portion of which I have mentioned in paragraphs [5] and [6] of this judgment.

[12] The essence of the 1st Defendant defence is found in paragraph 3 of such Heads of Arguments to the following:

In the present case the defendants submit that they did enter into a contract with plaintiff and both agreed to deliver as per specifics of the contract. Defendants argue that the conduct of the plaintiff created an impossibility of performance on their part as it interfered with their operations and affected their outputs.

[13] In paragraph 3.1 to 3.6 gave an analysis of the facts on the veracity of the 1st Defendant's case. The court is also referring to a number of decided cases being the case of **Transit Ltd t/a National Ports Authority MV snow Crystal (2008) ZASCA 27 2008 (4) SCA; Mater Dolorosa High School v RJM Stationery, Appeal case no. 3/2005; Fikile Thalitha Mthembu v Standard bank, Appeal case no. 3/2009** and that of **Superswift (Pty) Ltd v Guard Alert Security Services, case no. 4328/2009.**

[14] Finally, the 1st Defendant applies that the Application for Summary Judgment be dismissed with costs.

Courts analysis and conclusions thereof

[15] Having considered the arguments of the attorneys of the parties and papers filed of record it is without question that the 1st Defendant entered into a contract with the Plaintiff and both agreed to delivery according to the specifics of the contract. However, the 1st Defendant contends that the conduct of the Plaintiff created the impossibility of performance on their part as it interfered with the operations and affecting their output.

[16] The only question, that arises, therefore for decision by this court is whether Plaintiff is entitled to Summary Judgment on the contract admitted by both parties on the face of the impossibility of performance pointed out by the 1st Defendant.

[17] In my assessment of all the facts in the affidavits of the parties I am unable to agree with the Plaintiff. In this regard. I find the **dictum** in the **South African case Transit Ltd t/a National Ports Authority (supra)** apposite where **Scot JA** at paragraph 23 stated the following:

“As a general rule impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract but it will not always do so. In each case it is necessary to “look at the nature of the contract, the relation of the parties, the circumstance of the case and the nature of the impossibility invoke by the defendant, to see whether the general rule brought in the particular circumstances to be applied”. The rule will not avail if the impossibility is self-created, nor will it avail the defendant if the impossibility is due to his or her fault.”

[18] In the present case the impossibility of performance was not self-created. In this regard I agree **in toto** with the 1st Defendant arguments at paragraphs 3.3,

3.4, 3.5 and 3.6 of the 1st Defendant's arguments. In my assessment of all the facts in those arguments that there is material dispute of a fact in this matter which call for **viva voce** evidence.

[19] In the result, for the foregoing reasons the Application for Summary Judgment is dismissed with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE