



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case 551/15

In the matter between:

**SAMKELISIWE PETERSON**

**Plaintiff**

And

**LHR (PTY) LTD t/a BITEGO INVESTMENTS**

**Defendant**

**Neutral citation:** *Samkelisiwe Peterson vs LHR (Pty) Ltd t/a Bitego Investments*  
(551/15) [SZH 21] 12 February 2016)

**Coram:** **MAPHALALA PJ**

**Heard:** **9 October, 2015**

**Delivered:** **12 February, 2016**

**For Applicant** **Mrs. Sukati Msibi**

(from Sukati, Msibi attorneys)

**For Respondents**    **Mr. B. G. Mdluli**  
**(from Bongani G. Mdluli & Associates)**

**Summary:**            Civil Procedure – application for Summary Judgment – Defendant contends that an arbitration clause is a condition precedent – court find in favour of Defendant that Plaintiff has approached the court prematurely – dismisses the Application with costs – furthermore, commenting **obiter dictum** Applicant ought to have followed the prescribes of the arbitration clause – Applicant has not shown special circumstances in accordance with the law.

## **JUDGMENT**

### **The Application**

[1]    The Plaintiff filed with the Registrar of this court a Notice of Application for Summary Judgment on the 3<sup>rd</sup> June, 2015 for an order in the following terms:

**That Summary Judgment be entered against the Respondent for:**

- (a)    **Payment of the sum of E1 500 000.00 (One Million Five Hundred Thousand Emalangi).**
- (b)    **Interest thereon at the rate of 9% per annum calculated from date of issue of summons to date of payment.**
- (c)    **Costs of suite.**
- (d)    **Further and / or alternative relief.**

[2] The Plaintiff has also filed an affidavit in support of the Application canvassing the cause of action between the parties as outlined in the Particulars of Claim to the Combined Summons.

[3] The Plaintiff claim the following:

- (a) **Payment of the sum of E1 500 000.00 (One Million Five Hundred Thousand Emalangeni.**
- (b) **Interest thereon at the rate of 9% per annum calculated from date of issue of summons to date of payment.**
- (c) **Costs of suite.**
- (d) **Further and / or alternative relief.**

[4] In the Particulars of Claim the Plaintiff avers the following from paragraphs 4 to 11 thereof:

- 4. **On or about the 2<sup>nd</sup> April 2014, in Matsapha the Plaintiff entered into a written agreement with the Defendant who was duly represented by its Director, namely Gcina Mthethwa (Annexed herein is a copy of the Agreement, marked “SP 1”).**
- 5. **the salient terms of the agreement were that the Plaintiff would invest some money in a project carried out by the Defendant wherein the Defendant would design and develop a township which would be sold and yield a profit for the Plaintiff.**
- 6. **Pursuant to the aforementioned agreement, the Plaintiff invested a sum of E3000 000.00 (Three Hundred Thousand Emalangeni) which the parties agreed would yield profit within a period of 4 (four) months.**

7. The aforementioned amount was paid directly into the Defendant's bank account through a bank cheque on the 22<sup>nd</sup> April 2014 as per clause 3.2 of the agreement (annexed herein is a copy of the bank statement printout reflecting payment thereof and is marked "SP 2").
8. It was material term of the agreement that after a period of (4) four months, the Plaintiff/ investor will be entitled to a sum of E1'5000 000.00 (One Million Five Hundred Thousand Emalangen) being the money invested plus profit.
9. In breach of the contract the Defendant failed to pay the Plaintiff the sum of E1'5000 000.00 (One Million Five Hundred Thousand Emalangen) after the (4) four months which expired in August 2014.
10. Even after the lapse of the (4) four months, the Defendant failed to pay this amount instead they keep coming up with excuses as to why such amount is not paid.
11. To date, Defendant fails/ neglects or refuses to pay Plaintiff the sum of E1'5000 000.00 (One Million Five Hundred Thousand Emalangen) despite lawful demand

### **Opposition**

[5] The Defendant has filed an affidavit resisting Summary Judgment on the 16 June, 2015 with the Registrar of this court. In the said affidavit has raised point a **in limine** and the merits of the Application for Summary Judgment. In paragraph 3 thereof avers as follows:

#### **In limine**

Plaintiff has approached this Honourable Court prematurely, as at this stage, no amount whatsoever is due, owing and payable to her. The payment of dividends was/is dependent upon the completion of phase one

**of the project which is still on-going. Plaintiff's case is therefore doubtful and it does not make a complete cause of action.**

**By virtue of the terms of the contract, it was a condition precedent further that any dispute arising between the parties shall be submitted to and decided by arbitration in terms of the Arbitration Act.**

- [6] On the merits of the Application averments are made in support of the subsequent paragraphs up to paragraph 12 where Defendant avers that Defendant has a **bona fide** defence to Plaintiff's claim and Defendant prays it be allowed to file its plea. That there are triable issues in this matter. That the Application for Summary Judgment be dismissed with costs.

### **The Arguments**

- [7] On the 9<sup>th</sup> October, 2015 the attorneys of the parties advanced arguments before this court and filed Heads of Arguments. I shall in brief outline the salient features of such Heads of Arguments in the following paragraphs.

#### **(i) Defendant's Arguments**

- [8] The attorney for the Defendant Mr. Mdluli commenced arguments on account of the point of law that the Plaintiff ought to have first gone through arbitration as a condition precedent. The attorney for the Defendant further addressed the merits of the case.
- [9] It is contended for the Defendant that the Plaintiff without complying with the terms of the agreement and without any legal justification prematurely brought about these proceedings.

[10] Clause 7.1 of the Deed of Agreement between the parties states the following:

**ARBITRATION**

**7.1 All dispute arising at any time between the partners or any of them in regard to a correction of the financial statements of the partnership in terms of Clause 6 (4) hereof, shall be submitted to and decided by arbitration.**

[11] The nub of the arguments of the Defendant on this point **in limine** is that no special circumstances have been averred by the Plaintiff on why she has not followed the arbitration process in accordance to the above cited clause of the agreement.

[12] In this regard the attorney for the Defendant referred the court to the legal authority in **Herbstein and Van Winsen Civil Practice of the Supreme Court of South at page 262**, the cases of **Wells Ford vs Witson (1873) LR 8 CHD 473 at 480**, in the case of **Davies vs British Insurance Co (1885) 3 SC 416**, **Parekh vs Jehan Cinemas (Pty) Ltd & Others 1980 (1) SA 301 (D) at 305E-H**.

[13] Further arguments are addressed by the attorney for the Defendant at paragraphs 4, 4.2, 4.4.4, 4.4.5 on the subject I shall revert to pertinent averments as I proceed with the judgment in my analysis and conclusions.

[14] On the merits of the case the attorney for the Defendant advanced at great length the merits of the case and relied on the **dictum** in the Supreme Court case of **Mater Dolorosa High School vs R.M.J Stationery Appeal Court case no. 3 of 2005** to the following:

**“that it would be more accurate to say that a court will not merely “be slow” to close the door to a reasonable possibility exists an injustice (my emphasis) 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 case, the court cannot deny him an opportunity of having such an issue tried.”**

[15] The attorney for the Defendant then filed arguments in paragraphs 14 to 15 of his Heads of Arguments that Defendant in the present case has a **bona fide** defence to such and Plaintiff has failed to prove a case to be granted Summary Judgment on the facts of this case.

**(ii) Plaintiff’s arguments**

[16] The attorney for the Plaintiff Mr. Sukati for the Applicant advanced arguments for his client and filed Heads of Arguments for which I am grateful.

[17] In the said Heads of Arguments a number of topics are addressed being the “background” at paragraph 1 to 4, Defendant’s case at paragraph 5 to 6, the points or law at paragraph 6 to 6.5; arguments on the arbitration clause in paragraph 6 and cited decided cases in support of those submissions; in paragraph 8, 8.1, 8.2, 8.3, 8.4, 5, 5.1 dealt with the subject “where is Summary Judgment application citing a number of pertinent decided cases; in paragraph 10. 10.1, 10.2, 10.3, 10.4, 10.5 dealt with the law applicable citing decided cases. In paragraph 11 dealt with an argument that the Defendant has no **bona fide** defence or a triable issue.

[18] The court was referred to a number of decided cases including the case of **Musa Magongo vs First National Bank (Swaziland at page 5, case of Swaziland Development Finance Corporation (FINCORP) vs Mlungisi Oral Mabila t/a Ritehaul and another 988/11.**

[19] Turning to the arguments on the points of law the attorney for the Plaintiff dealt first with the point that the matter was before court prematurely is not correct. That according to the Plaintiff there is an agreement governing the parties which compels them to perform their obligation in a manner required by the terms of the agreement. That **in casu**, it was a material term of the agreement that payment be made after **four (4) months** from the date of investment. In this regard the attorney for the Plaintiff states the following at paragraph 6.2 to 6.3:

**6.2 Even Defendant's contention that payment was subject to completion of the first phase of the project does not hold water since, according to paragraph 4.1 of the agreement page 12 of the book of pleadings payment will be made upon completion of phase one of the project, and paragraph 2.3 of the agreement, page 11 of the book of pleadings stipulates that phase 2 of the project is "construction", this shows that phase one thereof which Plaintiff invested in, has been completed.**

**The Defendant has failed to support his assertion that the first phase is still ongoing, even the article thereto "annexure "A" of Defendant's Affidavit Resisting Summary Judgment" in page 33 of the book of pleadings does not indicate how far the project is but merely says "that the project has been stalled by the seller (being defendant) who requested time to sort out some issues. This does not prove that the project is on-going.**



**6.3 It is Plaintiff's submission that a whole year has passed and payment has been delayed over (8) eight months, thus it is long overdue.**

[20] On the second point raised by the Defendant regarding arbitration being a condition precedent it contended for the Plaintiff that this is not so. The arguments advanced in respect of the Plaintiff in this regard is that the said clause does not completely oust the jurisdiction of this court which has inherent jurisdiction to hear any matter brought before it and the fact that paragraph 7.1 of the argument at page 14 of the Book of Pleadings point out that disputes referred thereto are only with regard **“to correction of the financial statement”** in support of this argument the court was referred to the cases of **Sandile Myalo Dlamini vs Major General Jeffery Tshabalala Civil Case No. 4227/10, Welkom Village Management Board v Leteno 1958 (1) SA 490**, in the case of **Golube vs Oosthuizen and Another 1955(3) S.A (1)** and that of **Charles Dlamini and 3 Others vs The Registrar of Insurance and Retirement Funds and 3 Others Civil Case 32/2012**.

[21] On the merits of the case as I have already outlined in brief the arguments of the Plaintiff in the earlier paragraphs in paragraph 11 contends that in the affidavit resisting Summary Judgment Defendant does not deny that payment was due within a period of four months after investing the sum of E3000 000.00 by Plaintiff, or that such payment has not been made instead sets out an completely new terms which are not embodied in the agreement.

[22] Further, Plaintiff prays that an order be granted in terms of the Application for Summary Judgment.

### **The Court's analysis and conclusions thereof**

[23] Having considered the papers filed by the parties and the arguments of the attorneys of the parties I shall address the examination of the dispute between the parties in two parts. First I shall deal with the two points of law raised by the Defendant. That this Application has been brought prematurely and secondly that the arbitration clause is a condition precedent. If I find against these points I shall proceed to deal with the merits of the Application for Summary Judgment as to whether there is a triable issue in accordance with Rule 32(4) of the High Court Rules. I thus proceed in the following paragraphs of this judgment.

#### **Whether matter before court brought prematurely**

[24] The Defendants contends in this regard that Plaintiff has approached this court prematurely, as at this stage and almost whatsoever is due, owing and payable to her. The payment of dividends was / is dependent upon the completion of phase on the project which is till on going. That Plaintiff case is therefore doubtful and it does not make a complete cause of action.

[25] On the other hand it is contended for the Plaintiff that even Defendant's contention that payment was subject to completion of the first phase of the project does not hold water, according to paragraph 4.1 of the agreement at page 12 of the Book of Pleadings payment will be made upon completion of phase one of the project, and paragraph 2.3 of the agreement at page 11 of the Book of Pleadings stipulates that phase 2 of the project is "construction". That this shows that phase one thereof which Plaintiff invested in, has been completed.

[26] In my assessment of the arguments of the parties in this regard I am inclined to agree with the contentions of the Defendant that phase one has not been completed. I say so because of what is being submitted by the Plaintiff at paragraph 6.2 of his Heads of Arguments citing annexure “A” of the Defendant’s affidavit resisting Summary Judgment at page 33 of the Book of Pleadings where it stated “that the project has been stalled by the seller (being Defendant) who requested time to sort some issue”. It would appear to me based on this phrase it cannot be said that phase one has been completed, but the project is on-going.

[27] In my assessment as stated above it is abundantly clear that Plaintiff has approached this court prematurely, as at this stage no amount whatsoever is due, owing and payable to her. The payment or dividends was / is dependent upon the completion of phase one of the project which is still on-going. Plaintiff’s case is therefore doubtful and does not make a complete cause of action.

[28] In view of my conclusions at paragraphs [26] and [27] this Application falls to be dismissed on this point law. However, for the sake of completeness I shall proceed to consider briefly **obiter dictum** the second point of the arbitration clause as a condition precedent in such agreements.

[29] The answer to this question is found in the legal text book by **Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa at page 262** that a party opting against such a clause should aver special circumstances why he has not followed the arbitration process in accordance with the agreement.

[30] The Applicant at paragraph 6 of her Replying affidavit states the following on the subject:

**Save to admit that it was a term of the agreement that in the event of any disputed thereto the matter shall go for arbitration, the rest of the contents herein are denied.**

**I am advised and verily believe that the clause on dispute resolution does not oust the jurisdiction for the above honourable court.**

[31] On the above the Applicant has not averred any special circumstances in accordance with the legal authority in **Herbstein** (supra).

[32] The Application for Summary Judgment is accordingly dismissed with costs.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**