IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1011/2015

In the matter between

BENEDICT VUSI KUNENE	**Plaintiff**
and	
MDUDUZI JUSTICE MDZINISO	**1st Defendant**
CLEOPATRA VILAKATI t/a CLEOPATRA PROPERTIES	**2nd Defendant**

Neutral citation:	*Benedict Vusi Kunene v Mduduzi Justice Mdziniso & Another* (1011/2015) [2016] SZHC 40 (12 February 2016)
Coram:	**MAMBA J**
Heard:	**12 February, 2016**
Granted:	**12 February, 2016**

[1] Civil Law and Procedure – Application for Summary judgment – what defendant needs to allege to successfully resist such application: a triable issue or that for some other reason the matter must be referred to trial – as per rule 32(5) of the rules of this court.

[2] Civil law – Law of agency – seller signing Deed of sale with the plaintiff. Purchase price paid to seller's agent, after agency agreement or mandate terminated but before the plaintiff became aware of such termination of mandate. Seller refusing to transfer the property to the plaintiff citing termination of agency agreement and non-receipt of the purchase price. Such not a defence or triable issue to plaintiff's claim for refund of purchase price. Summary judgement granted.

[1] This is an application for summary judgment that has been made by the plaintiff herein. After hearing argument on the matter on 12 February, 2016 I immediately granted the application and indicated then that my written reasons for doing so shall follow in due course. What follows below are those reasons.

[2] The first defendant is the registered owner of vacant immovable property described as Plot 965 at Msunduza Location in the District of Hhohho. It measures $400m^2$. (Hereinafter referred to as the property) The second defendant operates a business as an Estate Agent under the style Cleopatra Properties.

[3] On 04 December 2013 and at or near Mbabane, the plaintiff and the first defendant entered into a written deed of sale whereby the plaintiff purchased the property from the first defendant for a sum of E130,000-00 which was 'payable in cash against registration of transfer' of the property into the name of the plaintiff. I observe, however, that, it is common cause that the full purchase price plus a sum of E10 037-72 was paid to the seller's agent, the 2nd defendant on 07 December 2013. This additional sum was for or in respect of transfer costs or fees. The relevant receipt in this regard has been annexed to the summons as annexure B.

[4] Again, it is common cause that when the second defendant received the said sum of money, she was acting for and on behalf of the first defendant and was duly authorized by the latter to so act. It is common cause further that, unbeknown to the plaintiff, the first defendant terminated the agency agreement or mandate granted to the second defendant to sell the property. This was after the signing of the Deed of Sale. There is plainly no evidence that either of the defendants brought this fact to the knowledge and attention of the plaintiff.

[5] It is to be noted and observed that another deed of sale executed by and between the parties on the 04th day of December, 2013, reflects the purchase price as a sum of E120,000. However, in respect of that agreement, the first defendant is referred to as holding the property in terms of a lease agreement dated 14 December 2010. He is not referred to as the owner thereof and it is also stated therein that what the plaintiff was buying from the first defendant were the latter's "rights, title and interest in the lease agreement". It is noteworthy also that this is not the agreement that the plaintiff relies on in this action. Further, the sum claimed in these proceedings was not paid pursuant to this document but pursuant to the deed of sale I have already referred to above.

[6] Notwithstanding payment of the monies aforesaid by the plaintiff to the first defendant through his agent, the second defendant, the first defendant refuses to pass transfer of the property into the name of the plaintiff. As a result, the plaintiff has cancelled the Deed of sale and now claims for a refund of the sum of E140 037.72, plus costs of suit at attorney and client scale.

[7] The prayer for punitive costs has not been motivated or justified by the plaintiff and therefore cannot succeed.

[8] The second defendant has not filed any papers in opposition of these proceedings and has also not denied having received the sum of E140 037.72 from the plaintiff on behalf of the first defendant. For his part, the first defendant denies having received the said amount. He states further that

'…the second defendant was at all material times defrauding the first defendant. The plaintiff is fully aware of same but has deliberately failed to bring this to the fore.

….

6.5 The first defendant upon realizing that the 2nd defendant intended to defraud him by signing of two different Deeds of sale terminated the 2nd defendant's mandate.

6.6 The 1st defendant cancelled the 2nd defendant's mandate to sell the property to the plaintiff and 1st defendant obtained another buyer.'

6.7 I submit that is upon the above ground that the application to dismiss the claim will be made on behalf of the 1st defendant since they raise triable issues."

I cannot agree.

[9] The circumstances or grounds upon which summary judgment may be granted or refused are well known in this jurisdiction. In **Swaziland Flooring and Allied Industries Limited v WSL Construction (Pty) Ltd (24/2014) [2015] SZHC 08 (05 January 2015)** this court stated the following:

'[12] In **Swaziland Tyre Services (Pty) ltd t/a Max T. Solutions v Sharp Freight (Swaziland) (pty) Ltd (381/2012) [2014] SZHC 74 (01 April 2014),** this court stated as follows:

'[6] In *Swaziland Livestock Technical Services v Swaziland Government and Another,* judgment delivered on 19 April 2012 Ota J said:

"…in the case of **Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007.**

"It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial … it

is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far…"

See Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3830/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.

The rules have therefore laid down certain requirements to act as checks and balances to the summary judgment procedure, in an effort to prevent it from working a miscarriage of justice. Thus, Rule 32 (5) requires a Defendant who is opposed to summary judgment, to file an affidavit resisting same, and by rule 32 (4) (a) the court is obligated to scrutinize such an opposing affidavit to ascertain for itself 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 that claim or part thereof".**

It is now the judicial accord, that the existence of a triable issue or issues or the disclosure of a *bona fide* defence in the opposing affidavit, emasculates summary judgment, and entitles the Defendant to proceed to trial. As the court stated in **Mater Dolorosa High School v RJM Stationery (Pty) Ltd (supra)**

"It would be more accurate to say that a court will not merely "be slow" to close the door to a defendant, but will in fact 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."

Case law is also agreed, that for the Defendant to be said to have raised triable issues, he must have set out material facts of his defence in his affidavit, though not in an exhaustive fashion. The defence must be clear, unequivocal and valid."

Again in **SINKHWA SEMASWATI t/a MISTER BREAD BAKERY AND CONFECTIONARY v PSB ENTERPRISES (PTY) LTD** judgment delivered in February 2011 (unreported) I had occasion to say:

> "[3] In terms of Rule 32 (5) (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgment "… 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." In the present case the defendant has filed an affidavit. In showing cause rules 32 (4)(a) requires the defendant to satisfy the court "…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 thereof." I observe here that before these rules were amended by Legal Notice Number 38 of 1990, rule 32 (3)(b) required the defendant's affidavit or evidence to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the former or old rule, a defendant was specifically required to show or "disclose fully the nature and grounds of his defence and the material facts relied upon therefor", whereas under the present rule, he is required to satisfy the court 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 on the whole claim or part thereof. The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.
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> [4] A close examination or reading of the case law on both the old and present rule, shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under the present rule, the primary obligation for the defendant is to satisfy the court that there is a triable issue or question, or that for some other reason there ought to be a trial. This, I think, is wider than merely satisfying the court that the defendant has a bona fide defence to the action as provided in the former

rule. See **VARIETY INVESTMENTS (PTY) LTD v MOTSA, 1982-1986 SLR 77 at 80-81** and **BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER**, 1982-1986 SLR 406 at page 406H-407E which all refer to a defendant satisfying the court that he has a bona fide defence to the action and fully disclosing its nature and the material facts relied upon therefor. I would also add that where there is a dispute of fact a court would be entitled to refuse an application for summary judgment. Under the present rule, the defendant is not confined or restricted to satisfying the court that he has a bona fide defence to the action or to complain of procedural irregularities.

[5] In **MILES v BULL [1969] 1QB258; [1968]3 ALL ER 632**, the court pointed out that the words "that there ought for some other reason to be a trial" of the claim or part thereof, are wider in their scope than those used in the former rule referred to above. "It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial. …
Circumstances which might afford "some other reason for trial" might be, where, eg the defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in full light of publicity.""

See also *First National Bank of Swaziland Limited t/a Wesbank v Rodgers Mabhoyane du Pont, case 4356/09* delivered on 08 June 2012 where I pointed out that:

"[7] In **Sinkhwa Semaswati** *(supra)* I referred to the differences between our current rule and the old rule on this topic and I do not find it necessary to repeat that here, suffice to say that the old rule required the defendant to disclose fully the nature and grounds of his or her defence and the material facts relied upon therefor. Emphasis was placed on a defence to the action.

> The current rule entitles a defendant to satisfy the court "…that there is an issue or question in dispute which ought to be tried" or that for some other reason the matter should be referred to trial."

These remarks are applicable in this case.

[10] Whilst it is apparent from the letter of demand by the second defendant to the first defendant that the disagreement between them occurred on or before 05 December 2013, there is no evidence that when the plaintiff paid the relevant money to the second defendant he was aware or at least ought to have been aware that the 2nd defendant's mandate to act as the agent of the first defendant had been terminated. Having signed the Deed of sale, the first defendant was obliged to notify the plaintiff of this termination. He did not do so. Having failed to do so, he cannot be heard at this stage to allege or contend that he did not receive the money and that, in any event, he had terminated the agency agreement between him and the second defendant. He is bound by the actions or deeds of his duly appointed agent. The saying *qui facet per alium facet per se* (he who acts through another person is deemed to act in person) or, *qui per alium facit, per seipsum facere videtur* (He who does anything by another is deemed to have done it himself or herself) is applicable in this case.

[11] The first defendant has offered no information to suggest that the plaintiff was involved or complicit in the fraud that he alleges was being

perpetrated on him by the second defendant. He has offered no triable issue herein or has not tendered any other reason why the matter should be referred to trial. He has not suggested or submitted any sustainable reason why he should not be ordered to refund the money paid to him through his agent by the plaintiff.

[12] This then, are my reasons for granting the application for summary judgment.

MAMBA J

For the Plaintiff: Ndlangamandla

For the first defendant: S. Dlamini