**IN THE HIGH COURT OF SWAZILAND**

**Case No. 443/2017**

**HELD AT MBABANE**

**In the matter between:**

**MBHILIBHI (PTY) LTD** **Plaintiff**

**And**

**KUKHANYA CIVIL ENGINEERING CONSTRACTORS** **Defendant**

**Neutral citation:** *Mbhilibhi (PTY) LTD v Kukhanya Civil Engineering Constractors (PTY) LTD. (443/17)[2018]SZHC 23(2018)*

**Coram : Maphanga C.**

**Heard : 10/08/2017**

**Delivered : 16/03/2018**

Summary:

[1] *Civil Law and Procedure – Application for summary Judgment – what defendant needs to allege to successfully resist such application: a friable 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 – claim for payment of certain sums pursuant to an alleged oral agreement for the hire and supply of civil heavy plant hire and equipment left disputing liability for sums claimed and raising certain issues *ex facie the* plaintiffs statement of the particulars of claim against certain inconsistencies with invoices, order forms and statements of account whether defendants affidavit summary judgment allowing cause in terms of the Rules – disparities and discrepancies between the requisition or some other reasons why the ought to be trial.**

[3] **Summary judgment application dismissed with costs.**

**JUDGMENT**

[1] This is an application for summary judgment brought by the Plaintiff pursuant to delivery of its particulars of claim and appearance to contest this claim by the defendants.

[2] The Plaintiff is a company which specializes in the operation and provision of heavy civil plant and equipment based in eZulwini Valley in the Kingdom. I shall alternately refer to the Plaintiff as Mbhilibhi or Plaintiff and the Defendant as 'Kukhanya' as may be convenient from time to time.

[3] The Defendant is a prominent civil engineering works contractor also registered and operating in the kingdom.

[4] Plaintiff's case is that during 2016 it entered into an oral agreement with the Defendant in terms whereof it would hire out heavy road – construction plant and equipment to the latter. In its statement Plaintiff alleged the following as material terms of the agreement or agreed mode of conduct of business between the parties:

4.1 that the Defendant would issue an order to the Plaintiff specifying the type of the equipment and also when such equipment or plant would be required.;

4.2 that the Defendant would accordingly supply such equipment as specified at into prevailing daily rates; and

4.3 the Defendant would pay for the said equipment on demand.

[5] Plaintiff alleges that in accordance with this agreement the Defendant ordered certain heavy plant and machinery from Mbhilibhi and this covered a course of such transactions between the 13th June 2016 to the 17th November 2016 when from time to time the Defendant issued various orders or requisitions for required plant and machinery.

[6] There are, however only two such requisition orders that the Plaintiff has produced as annexures to its declaration in this regard. These are marked M1 and M2. The form and content of these requisitions call for brief comment .

[7] The 2 documents in question appear to bear the Defendant's logo and the title "Purchase Order (s)" followed by some designated reference number. Both caption the particulars of the transactions listed therein as being the "hire of Roller", the duration as well as giving details of the project site or description in the headings of the document. One can surmise from these that this was the standard form adopted by the parties for equipment hire.

7.1 The first requisition order M1 bears the reference number KC 13886 and describes the transaction as "hire of Roller 2 months – Nhlangano Sicunusa JV" in its heading

7.2 A remarkable feature is that the first of the orders is addressed or directed to AJ Van Wyk (Pty)Ltd bearing name code AOV001. The Purchase order date is 10th June 2016 and indicates the equipment date required to the 13th June 2016.

7.3 The 1st order is for the hire of equipment described as a Pad Foot Roller 18 ton and a paematic (tyre) Roller for a total fee of E1,450,080 inclusive of VAT.

7.4 The second of these bears similar features as regards the headings. Materially this purchase order differs from the first in so far as it was directed to the Plaintiff for the hire of another type of Roller described

as a 18-ton Pad Foot Roller for a period of 2 months for a total sum of E362,520.00 (inclusive).

[8] These are crucial documents in so far as they have been pleaded and attached as evidence of the purchase order or requisitions allegedly pledged by the Defendant pursuant to the hire agreement. They are foundational in that the Plaintiff case is that it was on this basis that it supplied certain equipment and plant and accordingly issued invoices to the Defendant for payment. These invoices have also been attached to the particulars and claim as Annexes 3-17.

[9] Finally the Plaintiff as part of its statement and claim, has attached 2 statements and account to demonstrate the history of conduct of transactions in the Defendant's account with the Plaintiff pertaining to the hire of certain specified equipment in the conduct and course of dealings between the two parties.

[10] I shall return to the significance of these documents as they are pertinent to the issues that emerge in this summary judgement application.

[11] The Defendant in its affidavit summary judgment has raised a series of questions disputing the applicants claim in certain specified respects. It must be said that none of these issues or depositions in the affidavit constitute factual matter projecting a defence on the substance of the claim on the merits.

[12] In its defence, the Managing Director, one Fungai Matahwa, has deposed an affidavit to contest the summary judgment the thrust which is to deny and refute the Plaintiffs claim as unfound. Firstly he has taken a preliminary point against the Plaintiff's claim challenging the authority of one Jonathan Van Wyk to institute the action and prosecute this application on behalf of the plaintiff.

[13] It must be said that this is a technical point in regard to which this court as indeed the Supreme Court has expressed its disapproval in a number of judgments. In my view it is taken purely as a dilatory point and has no merit in that it does not raise a genuine issue of law that advances the matter in any way.

[14] Defendant further denies that it ever entered into an oral agreement with the Plaintiff as alleged in as much it contends all its agreements are invariably in

writing. To this end it has disavowed and calls into question the authenticity of all the requisitions or purchase orders relied on by the Plaintiff tendered in support of its claim to show the transactional history for the alleged equipment hire. In essence the Defendants disputes that it issued the said requisitions and calls into question their validity in specific respects including the allegation that the said purchase order forms bear no signature and that the Plaintiff has failed to identify the person or persons who transacted the hiring of the equipment of the equipment on behalf of the defendant.

[15] Finally the Defendant denies taking delivery of the machinery in regard to which the Plaintiff's claims are made. In sum the thrust of the Defendants case is that Plaintiffs claim is not properly articulated, that it is lacking in several material respects.

*The Principles and Application of the Rule on Summary Judgments*

[16] Now it was contended on behalf of the Plaintiff firstly that the Defendants averments in affidavit constitute a bare or vague denial. In the main it is Plaintiffs' contention that the Defendants' affidavit resisting summary judgement falls short by the threshold required to

successfully repel summary judgment in that it is alleged the said affidavit does not either disclose a defence or set out any material facts with the requisite particularity and completeness to disclose the existence of a bona fide defence.

*The Applicable Rule and Principles on Summary Judgment*

[17] In this regard we were referred to the case ***of Malan Dlamini v Peter Mahlobo High Court case No. 1962/2010*** and specifically to the remarks of the Learned Justice T. Masuku at pages 5 – 6 therein of that judgment. In that case the Court commenting on the rule said the following:

***'In resisting summary judgment the Defendant ….must disclose what his defence is and set out the material facts upon which it is based and while he need not deal exhaustively with the facts and evidence relied upon to substantiate his defence or with the detail or precision required of a pleading, he must set them out with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence or not……***

***The Affidavit must not lack the 'forthrightness as well as the particularity that a candid disclosure of a defence should embody' ..it has also ben held that 'if the statements of fact are equivocal or ambiguous or contradictory or fail to canvas matters essential to the defence raised, then the affidavit does not comply with the rule…..it is not an onerous task to file an affidavit which meets the requirements of the rule. On the contrary it is a simple matter where a bona fide defence is available to the Defendant. If he does not do so, the Court will be entitled to grant summary judgment and not only where the Plaintiff's case is an unanswerable one"***

[18] I must respectfully make mention that while the excerpts in the Courts remarks in the Malan Dlamini case referred to quoted above correctly summarized the principles and test to be applied in contests to summary judgment applications under the old rule, this Court has had to revise and reset the threshold test on a proper interpretation of the new rule as pertains conduct of summary judgment proceedings and the requirements a defendant must meet to successfully repel summary judgment. (*See Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Court Case No. 3/2005; Sinkhwa Semaswati Ltd v Mista Bread and Confectionery v BSB Enterprises*

*(Pty) Ltd Case No 30/2009 and also Benedict Kunene v MWM Justice Mdziniso*

[19] For historical reasons concerning the often similarity in the evolution of our procedural rules here and in South Africa, until recently it has been tempting to follow the approach espoused in the offence the remarks of Corbett CJ (as he then was) in the South African case of ***Maharaj v Barclays Bank Ltd 1976(1) SA 418 (AD) at 236*** in applying our rule. They bear restating.

*"Where the defence is based upon facts, in the sense that material facts as alleged by the Plaintiff in the summons, combined are disputed, or new facts are alleged constitutes a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one or the other. All the court enquires into is:*

> *a) Whether the defendant had 'fully' disclosed the nature and grounds 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 bona fide and good in law. If it is satisfied on these matters the Court must refuse summary judgment, either wholly or in part as the cause may be…"*

[20] This proposition may have been the correct test under the old rule governing summary judgments in our jurisdiction. However that position has since changed with the advent of the revised Rule 32 and the proper scope of application of that rule. The provisions of the sub-rule bear reference in order to have fuller regard to its wording and its requirements.

[21] Rule 32 (4) (a) provides as follows:

**"Unless at the hearing of an application under sub-rule (1) either the court dismisses the application or the defendants satisfies the court to the claim, or the part of the claim, to which the application <u>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</u> court may give such judgment for the Plaintiff against that**

**defendant on that claim or part as may wish having regard to the nature of the remedy or relief claimed"**

[22] It is necessary to set out the restatement of the law recently emerging in our case law and in this regard I find **Justice Mamba's** remarks in the case of **Benedict Kunene** cited above to comprehensively expose and trace the development on the applicable standards. This is what he says:

"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:

'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:

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."

[23] Again in **SINKHWA SEMASWATI t/a MISTER BREAD BAKERY AND CONFECTIONARY v PSB ENTERPRISES (PTY) LTD** judgment delivered in February 2011 (unreported) THR the learned Justice Mamba had occasion to say this:

"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.

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.

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."

[24] In light of the above it would therefore be an overstatement to say the defendant must invariably set out a *bona fide* defence or such material as would disclose or ground a finding of such a defence as the Plaintiff asserts. If the efedndant does it is so very well as clearly where a defence to the action is disclosed then summary judgment obviously could not be obtained. But a defendant need not go so far.

[25] Thus on the emerging consensus as to the proper construction of our rule on summary judgment it has been said often times that the threshold test is much lower than has been expressed in the past.

[26] In summary this Court has distilled the essence of the sub-rule on the threshold requirements to successfully defeat summary judgment to a simple

test which calls on a defendant to show:

(a) that there exists a triable issue, or[1]

[1] Elicited from remarks by Mamba J Paragraph 9 at pages 5-10 of the Judgment in Benedict Vusi Kunene v Mduduzi Justice Mdziniso Another (1011/2015) [2016] SZHC 40 (12 February 2016)

(b) that there is some other reason to be a trial of that claim or part thereof.

[27] Turning to the facts of this case as indicated other than raising specific questions on the basis of which the Plaintiff's claim is disputed turning on the authenticity of the documents relied on by the Plaintiff for its claim and the requisite particulars as to representation and authority of the parties who allegedly transacted the business the Applicant has not shown its hand in terms of a defence on the merits.

[28] When the matter was argued before me the main questions robustly raised by the Defendant had to do with certain inconsistencies arising from the Plaintiff's particulars of claim as viewed against documents attached in support of the said particulars. I intend to deal with these main points as follows:

28.1 Firstly emerging from the papers there is an issue or question as regards patent disparities or inconsistencies between the particulars of the claim when seen against the transactional record attached in the annexures by the plaintiff in support of the claims in question. One of these relate to the requisitions or purchase orders relied on by the applicant as evidence of orders allegedly placed by the defendant to the plaintiff

pursuant to an alleged oral agreement for the hire of certain equipment.

**The Purchase Orders and Requisitions**

28.2 The Plaintiff's allegation at paragraph 5 of the Particulars of Claim is that:

> **'Pursuant to the conclusion of the agreement (for plant hire) the Defendant, through its duly authorized employee, filed and /or issued requisition orders to the Plaintiff for the hire of heavy plant machinery on diverse occasions during the period between 13th June 2016 to the 17th November 2016.**
>
> ***Find attached hereto a requisition Orders placed by Defendant to the Plaintiff marked as annexure "M1" and "M2" respectively"(sic)***
>
> ***(added parenthesis)***

28.3 The Plaintiff has attached copies of two documents as the requisition orders. On the face of the documents there are two remarkable features that the Defendant has called into question. The first is the

Annexure M1 appears on its face to be addressed and directed to a company named as A J Van Wyk (Pty) Ltd. This stands in contradistinction to the allegation that the agreement was between the plaintiff (Mbhilibhi) and defendant.

28.4 I am alive to the explanation that the Plaintiff has preferred in the Replying Affidavit upon being confronted with this question in the defendant's affidavit resisting summary judgment. The explanation itself raises more questions than answers. In the replying affidavit the plaintiff states:

> "I wish to clarify that A J Van Wyk (Pty) Ltd is a company under the directorship of Adrian Jacobus Van Wyk who is also the director in the Plaintiff. A J van Wyk Ltd is in the business of hiring and letting out immovable property as a landlord. A J van Wyk (Pty) Ltd does not own any plant machinery and is in fact not in that business. Only the Plaintiff herein is in the business of plant hire services.
>
> The defendant is being hopelessly opportunistic herein. The insertion of A J van Wyk (Pty) Ltd in the requisition order can

be best explained as a typographical error or an error common in the carrying on of business. What is the key in my submission is that the order was placed with the Plaintiff and directed specifically to myself. I wish to underling that I have absolutely no relationship with A.J. Van Wyk (Pty) Ltd but only with Mbhilibhi (Pty) Ltd. Further the requisition was placed after the conclusion of the oral agreement between the parties. As far as I am aware there is no agreement between the defendant and AJ Van Wyk (Pty) Ltd nor has the Defendant alleged one"

28.5 The inescapable fact is that it is the Plaintiff that has attached and seeks to rely on the flawed requisition form in order to found its claim and has referred to this document as forming part of its particulars of claim and by extension if forms a part of the claim for which summary judgment is prayed. It contradicts the basic premis in the claim that there was an agreement between plaintiff and the defendant in so far as ex facie this document it points to a different entity altogether. The particular are admittedly defective in light of the obvious defect in this documents. Plaintiff's explanation of the

disparities are out of turn and can only amount to evidence extrinsic to the document. There lies the first difficulty.

28.6 The second aspect of the disparities emerging from the plaintiffs papers that the defendant has seized on in resisting summary judgment relate to various invoices attached to the particulars of plaintiff's claim. These are attached in support of the Plaintiff's basic allegation in its statement of claim to the effect that as part of the material terms of the oral agreement between the parties it was agreed that the plaintiff would deliver the hired plant and machinery to various locations as ordered and directed by the defendant.

28.7 The alleged modus operandi of the business was that pursuant to the orders for equipment the defendant would provide the said equipment on credit terms at plaintiff's standard rates charged on a daily basis and would invoice the defendant whereupon the latter would pay against these invoices on demand. The plaintiff has attached certain copies of invoices in a series Marked M3-M19 as evidence of the transacted business for the equipment allegedly hired out to the defendant. Further a document attached as a summary ledger

statement of account in respect of the history of these invoices and the account of the defendant is attached as Annexure M20.

28.8 Notably none of these invoices issued cite A J van Wyk (Pty) Ltd. There is however another element of disparity or inconsistency that was raised by the Defendant's attorney at the hearing of this application. It amounts to this: it is the defendant's case that the applicant's claim is disputed and that the various sums claimed against these invoices as sought to be summarized in the statement of account annexed as M 20 relate to previous business dealings or transactions between the plaintiff and defendant and do not form a part of the present cause of action.

28.9 An issue that leaps to the attention of a person considering the invoices as seen against the requisitions is that a further inconsistency in the particularity of the claim arises in the description of the equipment allegedly hired. Although this is not contained in the affidavit, in the parties submissions it emerged that in the attached REQUISITIONS M1 and M2 the equipment is described as PAD FOOT ROLLER and PNEUMATIC ROLLER some of the invoices attached as M3-M19 in the captioned description refer to the

equipment as SMOOTH DRUM ROLLER (c.f. M5, M10, M13, M16 and M17 pages 12,15,17,20,23 and 25 of the book). That is a stark element, which stands in contradistinction from the clear items listed as PAD FOOT ROLLER AND PNEUMATIC ROLLER.

28.1.1 I need restate the obvious here that the defences resistance of summary judgment so far is not based material disputes of fact or on facts for that matter. It is not absolutely necessary for the rules envisage that it could raise certain questions in regard to the integrity of the plaintiff's claim in regard to which there ought to be a trial or entitle it to the ventilation of the issues in pleadings.

[29] In the Benedict Kunene case Justice Mamba gives the following illustrative example of the nature of the question that would warrant the refusal of summary judgment:

**"Circumstances which might afford "some other reason for trial" might be, where, e.g. 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."

[30] In my view the questions surfaced in these summary judgment proceedings are sufficient to meet the test that some reason does exist for the matter to go to trial at the very least enabling the plaintiff to prove its claim.

For this reason summary judgment is dismissed. I hereby order and direct that the plaintiff files its plea within 7 days from date hereof.

**MAPHANGA J**

**Appearances:** **Mr M Tsambokhulu: for the Plaintiff**

**Mr F. Tengbeh: for Defendant**