



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 16/19

In the matter between:

SWAZILAND INDUSTRIAL AGENCIES (Pty) Ltd

t/a BUILDERS DISCOUNT CENTRE

PLAINTIFF

AND

JULUKA CONSTRUCTION (Pty) Ltd

1st DEFENDANT

NHLONIPHO DLAMINI

2nd DEFENDANT

MAKHAMLANE GAMEDZE

3rd DEFENDANT

Neutral citation: *Swaziland Industrial Agencies (Pty) Ltd t/a Builders Discount Centre vs Juluka Construction & 2 Others [16/19] [2019] SZHC 176 (18th September, 2019)*

Coram: FAKUDZE, J

Heard: 16th August, 2019

Delivered: 18th September, 2019

Summary: *Civil Procedure – Application under Rule 32 – Triable issues found – Application for Summary Judgment dismissed with costs at ordinary scale.*

JUDGMENT

BACKGROUND

[1] On or about November 2007 at Matsapha in the Manzini District, the Plaintiff entered into a written credit facility agreement with the 1st Defendant. The Plaintiff was represented by its Director, one Shane Groening and the 1st Defendant was represented by the Managing Director, one Nhlonipho Dlamini. Nhlonipho and Makhamlane Gamedze are the sureties in accordance with the credit facility agreement.

[2] In terms of the Agreement, the Plaintiff was to sell goods and materials to the 1st Defendant at its usual price. The 1st Defendant would place an order from the Plaintiff for the requested supply of the product which the Plaintiff would thereafter deliver at a place directed by the Defendant. The Plaintiff would issue an invoice for the delivered product, which invoice would be attended to by the 1st Defendant within a period of thirty (30) days from date

of issue. Pursuant to that, the authorised employees of the Defendant would sign on the invoice to acknowledge delivery of goods in good condition.

[3] The Plaintiff states that it carried out its obligations in terms of the agreement and thereafter issued invoices. In breach of the agreement, the 1st Defendant failed to make payments of specific invoices issued by the Plaintiff. The Defendant is therefore liable to the Plaintiff in the amount of E1,326,058.57 (One Million Three Hundred and Twenty Six Thousand, and Fifty Eight Emalangeni, Fifty Seven Cents).

[4] The Plaintiff instituted Action Proceedings against the Defendant for the recovery of the sum of E1,326,058.57 (One Million Three Hundred and Twenty Six Thousand and Fifty Eight Emalangeni, Fifty Seven Cents). The Defendant filed its Notice to Defend on the 25th January, 2019. The Plaintiff thereafter filed its Declaration on the 5th March, 2019 together with an Application for Summary Judgment. The Defendants thereafter filed their Affidavit Resisting Summary Judgment. This court is asked to determine this Summary Judgment Application.

Summary Judgment Application

The Plaintiff's case

[5] The Plaintiff states that goods to the sum of E384,669.68 (Three Hundred and Eighty Four Thousand, Six Hundred and Sixty Nine Emalangeni Sixty

Eight Cents) were delivered to the Defendant based on the credit agreement. The total sum claimed includes the interest as per the credit facility agreement.

The Defendant's case

- [6] The Defendant states that there are inconsistencies in the Plaintiff's claim in that the invoices add up to the sum of E384,669.68 (Three Hundred and Eighty Four Thousand Six Hundred and Sixty Nine Emalangi and Sixty Nine Emalangi Sixty Eight Cents), and yet in terms of the Plaintiff's statement of account, the principal amount owed is the sum of E284,669.68 (Two Hundred and Eighty Four Thousand Six Hundred and Sixty Nine Emalangi Sixty Eight Cents) as at the end of 2011. It is submitted that all business transactions between the Plaintiff and the 1st Defendant ceased when the 1st Defendant closed its business on or about the year 2009. This fact has not been denied by the Plaintiff. The Plaintiff has failed to provide a liquidated statement of account as to what the balance due at year 2009 was; instead he has merely put forth a globular figure owed as at 2011 with no basis as how the figure was arrived at.
- [7] The 1st Defendant further contends that the Plaintiff has failed to plead and substantiate the basis upon which the 14% interest was charged by the Plaintiff on the alleged capital sum owed to the Plaintiff by the Defendants and such the summons are excipiable. There is also the issue of whether the amounts claimed equal the sum being owed by the Plaintiff. The Defendant submitted that the interest on the alleged sum owing is in violation of the In

Duplum Rule which provides that arrear interest ceases to accrue once the sum unpaid equals the amount of capital outstanding at the time. The sum allegedly claimed by the Plaintiff dates back as far as the year 2007 and a suit was brought eleven years thereafter with interest charged which is way above the legal limit.

The Applicable law

[8] Rule 32 of the High Court Rules governs Summary Judgment. Rule 32(1) states that “where in an action to which this Rule applies and a combined Summons has been served on a defendant or a declaration has been delivered to him and that defendant has delivered a Notice of Intention to Defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons or to a particular part of such a claims, apply to court for summary judgment against the Defendant. Sub rule (2) states that “This Rule applies to such claims in the Summons as is only (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified movable property; or (d) ejectment.”

[9] In the case of **Busalive Bhembe v Basil Mthethwa High Court of Swaziland Case No. 1675/2015**, His Lordship Mamba J. held as follows at pages 6,7 and 12:

“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 as 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 scrutinise such 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.”

[10] Likewise, in **Mater Dorolosa High School vs RTM Stationery (Pty) Ltd** it was stated that:

“It would be more accurate to say that a Court will not merely “be slow” to close the door to a Defendant, but will infact 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 a 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.”

[11] At paragraph 4 of page 8, the court further observed that:

“A close examination or revealing of the case law on both the old and present rule shows that the scope and/or ambit and measuring 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 for in the former rule..... 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.....”

[12] Finally, the court observed as follows at page 12:

“In the present application there is certainly an issue whether the amount claimed by the Plaintiff from the Defendant was a loan or not. The Defendant has, in my judgment, raised a triable issue pertaining or relating to the payment that was made to him by the Plaintiff. Should this matter be decided in favour of the Defendant during the trial, it would afford him a complete defence to the Plaintiff’s claim. This is what makes it a triable issue or matter. Lastly, one cannot ignore the working relationship immediately before the payment of the claimed amount was made.”

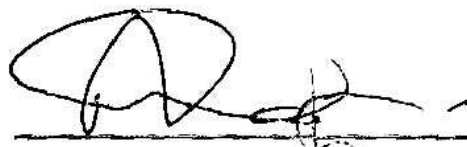
Court's observations and conclusion

[13] Having listened to the Plaintiff's counsel and the Defendant's counsel's argument, this court is inclined to agree with the Defendant that there are triable issues which bars the Plaintiff from being granted Summary Judgment. The first triable issue pertains to the uncertainty as to the amount the Defendant owes to the Plaintiff. In the summons, the Plaintiff is claiming a sum of E1,326,058.57 (One Million, Three Hundred and Twenty Six Thousand and Fifty Eight Emalangen Fifty Seven Cents). The sum consists of the sum owed (which is E384,669.68) and the rest being interest. During argument, the Plaintiff's counsel stated that Summary judgment must be granted with respect to the E384,669.68 which is undisputed. The Defendant's counsel disputed that amount reason being that in the Plaintiff's statement of account attached to the Summons, the amount owed is E284, 669.68. The Plaintiff has not explained this anomaly in its Replying Affidavit. This leads to the court concluding that the amount that is being claimed by the Plaintiff is uncertain and therefore Summary Judgment cannot be granted.

[14] The other triable issue pertains to when the goods were last delivered. According to the Defendant the First Defendant ceased its operations in the year 2009. The claim filed by the Plaintiff pertains to certain deliveries that were made beyond 2009. The Plaintiff has failed to provide a liquidated statement of account as to what the balance due was in 2009. Instead, the Plaintiff has put forth a globular figure with no basis as to how it was arrived at. These issues were raised by the Defendant in the Affidavit Resisting

Summary Judgment. The Plaintiff did not respond to them by way of a Reply.

[15] In the totality of all that has been said above, I am convinced that triable issues have been raised by the Defendant. The Application for Summary Judgment is therefore dismissed with costs at an ordinary scale.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'A' and 'KUDZE'.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Plaintiff: W. Maseko

Defendant: F. Tengbeh