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IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.:1815/2016

In the matter between

KUKHANYA (PTY) LTD/GABRIEL COUTO JV **1ST PLAINTIFF**

KUKHANYA (PTY) LTD T/A KUKHANYA CIVIL **2nd PLAINTIFF**

ENGINEERING CONTRACTORS CONSTRUCTS GABRIEL A.S. COUTO SA
3Rd PLAINTIFF

AND

POTS CONSTRUCTION AND TECHNICAL SERVICES **DEFENDANT**

Neutral Citation: *Kukhanya (pty) ltd/ Gabriel Couto JV & 2 Others* Vs *Kukhanya Construction (pty) ltd (1470/2018) [2020] 27 SZHC 70 (05 June 2020)*

Coram: Hlophe J.

For the Plaintiffs: Mr

For the Defendant: Mr

Date Judgement Delivered: 05th June 2020

Summary

Civil Proceedings – Summary Judgement application – Action founded on an acknowledgement of Debt signed by the Defendant acknowledging her indebtedness – Effect of Performance bond or guarantee on the Defendant's liability to the Plaintiff – When summary judgement is an appropriate claim to make – Whether or not the requirements of summary judgement met in the circumstances.

JUDGMENT

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[1] The Plaintiff, the main contractor in the Road Project often referred to as the Sicunusa – Nhlangano Project, concluded a subcontract with the Defendant company, as a subcontractor.

[2] As I understand it from the papers filed of record between the parties herein, the issue is not about whether or not any work that was supposed to be performed was so performed than monies by the Plaintiff which the latter had paid to the Defendant as part of some advance payment.

[3] The circumstances under which the said monies had been advanced to the Defendant are not in issue at all in these proceedings given acknowledgement of debt in terms of which the Defendant acknowledged that it was indebted to the Plaintiff in the sum of E287, 309.46 (Two Hundred and Eighty Seven Thousand , Three Hundred and nine Emalangeni, Forty six cents) arising from monies that had been paid to it in advance by the Plaintiff. The instrument containing the acknowledgement in question is in a form of a letter dated 28th May 2015 which stated ex facie itself, then paragraph 3, that by signing it the Defendant (Pots Construction and Technical Services) would be acknowledging its indebtedness to the Plaintiff. It is not in dispute the Defendant acting through its representative did sign the acknowledgement.

[4] In terms of the documentation before court, that the Defendant was indebted to the plaintiff for the sum of money disclosed in the foregoing paragraph, was confirmed by means of a letter written by the Plaintiff dated the 12th June 2015. The heading of the letter and its body which followed the name

of the officer to whom it was addressed to in the Defendant , stated the following:-

> "RE: Settlement Of Monies Owed To Kukhanya.
>
> We acknowledged receipt of your letter dated the 5th June 2015 with regards to Settlement of an amount of E287 309.46 owned to yourselves. We confirm the amount as per the joint agreement and therefore request to owner (sic: should apparently be honour) the debt as soon as funds are available.
>
> We are currently experiencing cash flow problems as most of our jobs are government jobs hence payments are more often delayed.
>
> We thank you in advance for your understanding."

[5] It is certain that the Defendant never managed to pay the debt acknowledged as owing and or due on its part, because on or about the 10th July 2018, the Plaintiff sued out of this court a summons claiming the sum of money acknowledged as owing by the Defendant.

[6] Other than citing the first Plaintiff as the joint venture between Kukhanya (PTY) LTD and Gabriel Couto, there was for some reason also cited the two entities that formed the joint venture as individual Plaintiffs. In that regard Kukhanya (PTY) LTD T/A Kukhanya Civil Engineering Contractors was cited as the Second Plaintiff whilst Contrucoes Gabriel A.S. Couto SA was cited as the Third Plaintiff. It is unclear from the papers why this had to be done, except that it was perhaps for emphasis on who the claimants were provided the joint venture was disputed on an entity.

[7] It would appear from the facts that the Notice of intention to Defend filed by the Defendant on the 20th July 2018 was followed by a request for further particulars filed by the Defendant, at least with the Registrar of the High Court, on the 1st August 2018 (judging by the Registrar's stamp); when it was itself signed on the 30th July 2018 by the Defendant's Attorneys who prepared it.

[8] It is clear from my perusal of the papers filed of record that the said request for further particulars was filed after the Plaintiff had filed and served a Summary Judgement Application. This I say because whereas the Notice of

Intention to Defend was filed on the 20th July 2018, the Application for Summary Judgement was filed on the 30th July 2018 whilst the Request for further particulars was filed on the 1st August 2018, per the Registrar's stamp.

[9] I have taken the liberty to analyze the filing of these documents in an attempt to ascertain the propriety of the further particulars of claim sought from the Plaintiff, at least from that angle even though there could be another way of ascertaining the propriety of same, which would get from the angle of what purpose the filing of such a document is meant to achieve including whether those particulars as sought meet such a purpose. An answer to these issues or questions should determine whether or not the request for the said particularly deserve consideration by the court before determining the summary judgement application.

[10] I would have to determine this question because in its Affidavit Resisting Summary Judgement, the Defendant raised the issue of the further particulars as one of the two points it raised in limine. (The other point, which is that relating to its having concluded no contract with either the

second or third Respondents shall be dealt with soon after the one on the Further particulars).

[11] In the context of this matter, it seems to me that an issue with the further particulars sought can be taken on two fronts. That is were they sought timeously or procedurally in terms of the Rules and whether or not they were sought for a proper purpose.

[12] On the question whether or not the further particulars were sought timeously or procedurally, it seems to me that in so far as they were sought after a summary judgement application had been filed, it was no longer opened to the Defendant to ask for such particulars, in particular where the liquidity of the claim is not in dispute.

[13] Even if I was not correct in this view, it still seems to me to be inappropriate that such particulars would be sought in such a way that its alies would run paripassu with that of the summary judgement. It could be that if there was an entitlement to request such particulars, the Defendant would have had to

seek an order staying the application for summary judgement. I believe in such a case the Defendant would have to show the prospects for such a request to succeed or answer the question whether he was entitled to such particulars.

[14] I am bolstered in my belief by the fact in this matter, the particulars sought seem to be in the form of a fishing expedition. It is a fact that the Plaintiff seeks same to know who attended a certain meeting including who voted for the decision to take it to court. It however places no information before court why such authority could not have been given against it in a case where it had acknowledged in writing that it was owing the amount claimed and subsequently that it was going to pay as soon as its cash flow would have improved which did not seem to be feasible in the circumstances.

[15] I am therefore convinced that the request for the further particulars sought would be in appropriate or would be incapable of derailing the applicant's claim on account if their having been sought after a summary judgement application had been sought without it being stayed first.

[16] On the second front, the practice is settled in this jurisdiction that further particulars can be competently sought strictly for purposes of enabling the Defendant plead or strictly for purposes of enabling the Defendant prepare for trial. There is no question that in this the Defendant prepare for trial. There is no question that in this matter they could not have been sought strictly for purposes of trial given that this prospect does not even arise as pleadings have not even been closed. I take it they can be completely be sought for trial where the matter is ripe for trial.

[17] What this means therefore is that the further particulars could at this stage strictly and only be sought so as to enable the Defendant plead to the Plaintiff's claim. For this to happen, the particulars should be sought to clarify issues so as to allow the Defendant to plead. I do not think that further particulars with regards to which directors attended a meeting that resolved to take the Defendant to court, including which ones voted in favour of instructing the proceedings or even the name of the place where the meeting was held are strictly necessary to enable the Defendant plead to the claim against her, particularly where such a claim is based on a liquid document.

[18] The same answer would prevail in my view on whether or not the minutes for the meeting of the 3rd Plaintiff were supplied a list of which directors attended the meeting including which directors voted in favour of instituting the proceedings and the name of the place where such a meeting was held if there is no disputing the liquidity of the document on which the pleadings are based.

[19] I am therefore convinced that the point on the further particulars having not been given before the summary judgement could be given is not a material one. It would have no bearing on continuing to decide the question whether or not the summary judgement can be determined at this point which means that I shall go ahead and determine the said summary judgement application notwithstanding the further particulars sought.

[20] I have noted from the Heads of Argument of both parties that there has been raised the question whether or not the Plaintiff's action against the Defendant had been authorized. From my perusal of the papers this was not raised as one based on facts. It was instead raised as one based on

conjecture, as it was couched as follows in paragraph 4 of the Plaintiff's papers:-

> *"4. The Defendant requested to be furnished with further particulars, and such request has been ignored by the Plaintiff's. A copy of the request is annexed hereto marked "P.C.1" and contents thereof should be read as if specifically incorporated herein.*
>
> *4.1. I am advised that the failure to furnish the further particulars as requested proves that the action against the Defendant was not authorized by the Board of Directors of the Plaintiff's and as such the matter cannot be heard if not duly authorized through resolutions of the Boards of Directors of the Plaintiffs.*
>
> *4.2. The Plaintiff's are further requested herein to furnish the court with the further particulars requested in annex the "PC1".*

[21] I have already ruled on the propriety or otherwise of the further particulars sought. It should follow that as the point on the alleged lack of authority by the Plaintiff hinged on the failure to provide the said particulars by him, same cannot be sustained if the court came to the conclusion that the seeking of the said particulars was done outside the rules and also for a purpose not envisaged by the law at this stage of the proceedings. This means that the Plaintiff was entitled not to provide such particulars as were sought. This further means that the challenge to the Plaintiff's authority to institute the proceedings in terms of the said particulars cannot stand if the court has concluded that the particulars sought are improper.

[22] Even if I were to be forward not to correct in the view I have expressed above, it was found that there was a challenge to the Plaintiff's authority as such, it seems to me that the contention by the Defendant challenging such authority is weak in so far as it is raised without any factual basis, has not been substantiated and is actually conjectural. In other words the Defendant is not saying based on whatever information at his avail the Plaintiff had no authority to institute the said proceedings. All he says is that simply because further particulars as sought by it were not provided, then the Plaintiff must be having no authority to institute such proceedings. I cannot agree with

such a conclusion. This is so because in terms of the evidence on record per the Plaintiff's deposition to the affidavit in support summary the judgement such evidence is the only one which has the effect that he was duly authorized to institute the proceedings on behalf of the Plaintiff and there is none countering that.

[23] In my view the Defendant cannot, without a factual basis, challenge the direct evidence of the Plaintiff's deponent to the said affidavit. He should, at least contend, by giving a factual basis, why he says the latter had no authority to institute the proceedings. I for this reason contend that the Defendant's challenge to the Plaintiff's authority is a weak one. Faced with the challenge to the authority to institute proceedings that was ambiguous, bare and probably tactical the Appellate Division or Supreme Court in the Republic of South Africa, had the following to say in **Tattersall And Another V Nedcor Bank LTD 1995 (3) SA 222 (A)**:-

> "*A copy of a resolution authorizing the bringing of an application need not always be annexed, nor does Section 242 (4) of the Companies Act 61 of 1973 provide the exclusive method of providing a company's*

resolution: there may be sufficient aliunde evidence of authority, and in casu there was. The court pointed out that the Appellant's denial of S's allegations was ambiguous, bare and probably tactical. Accordingly, the instant case was one in which the approach adopted in Mall (Cape) (PTY) LTD V Merino Ko – Operasie BBPK 1957 (2) SA 347 (C) namely that when the challenge to authority was a weak one, minimum evidence will suffice, applied. Weight had to be given to the use by S, of the word "duly" (authorized): it was an indication that the authority conferred on him was properly conferred. Furthermore, "S" had dealt with the grant of the loan and subsequently requested payment, and if this was so, S would surely have been the person who would have acted on behalf of the bank. The court accordingly held that the bank had discharged the onus of showing that the application was properly authorized."

[24] Consequently even if the point in limine on the lack of authority by the Plaintiff to institute the proceedings had been raised as a stand alone point, it

would for the foregoing reasons not succeed. Therefore any challenge to the authority to institute these proceedings is dismissed.

[25] The question that the parties in the second and third Plaintiffs had been cited as plaintiff's when no agreement had been concluded between them and the defendant entitling them to institute any proceedings against the said defendant, was raised by the latter who contended that the proceedings as instituted by the two against the defendant ought to be dismissed.

[26] Whilst I may agree that it was perhaps for the Plaintiff's, after having cited the joint venture by the Second and Third Plaintiffs, it is apparent that there is no prejudice that has been occasioned the Plaintiff. I may as well hazard the fact that whether or not it was improper to cite the two as Plaintiffs, it depends on the legal standing of a joint venture in law. In other words, is it akin to a company or to a partnership. This I say because if it is the latter, then nothing in law prohibits the citing of the Partners alongside the Partnership. If that was the case the citation of the Second and Third Plaintiffs was not irregular. This because the liability of a partnership is, unlike that of a company, not limited.

[27] Whereas the Defendant awaits to say the joint venture by the two Plaintiffs as expressed in terms of the first Plaintiff was a 'company' and that the directors of each company had to each privately resolve to take action against the Defendant, I have a contrary view. It all starts with clearly identifying the joint venture as an entity in law; in other words, what is it?

[28] Describing a joint venture, Black's Law Dictionary puts the position in the following manner:-

> *"Joint Venture(18C) A business undertaking by two or more persons engaged in a single defined project. The necessary elements are (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) Each member's equal voice in controlling the project."*

[29] It is further stated there that " The joint venture is not as much of an entity as is a partnership." This means that a joint venture is an entity more akin to a

Partnership. Although a partnership has no legal personality, it can in law be cited as a business entity in proceedings alongside the partners forming it. This position was expressed in the following words in **Gibson's South African Mercantile And Company Law, Seventh Edition, Juta and Company 1997, at page 253:-**

> *"Nature of a Partnership*
>
> *Unlike a company (which an artificial person} a partnership is not a person apart from its members (R V Shamowitz & Schatz (Supra) at 693). It is simply a group of persons acting jointly. Despite this general rule it was stated in Potchefstroom Dairies V Standard Fresh Milk Supply Co. (Supra) at 513:-*
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> > *"I do not think, however, that it makes much difference whether we regard it as a contractual compound of several personal…The distinction between the two seems more academic than substantial. I am…prepared to go to extent of holding that a partnership though not a corporate individual, is so far analogous to a persona that it*

may be called a quasi – persona. This, indeed, seems to me to be an accurate statement of the law, deducible from the recent cases. For many purposes it has, or is treated as having, a persona of its own; and particularly in relation to commercial transactions is this a convenient and succinct way of regarding its position.' It is, however, clear that in the common law a partnership is not a persona but is a 'contractual compound of several personal'."

[29] I am for the foregoing reasons of the firm view that whatever the correct position of the Defendant's contention that it had concluded no contracts with the Second and third Plaintiff such will not matter in a matter like the present where the contract was concluded with a joint venture formed by both the second and third Plaintiffs. Furtherstill the citation of the two occasions the Defendant no prejudice. I am afraid if I were to uphold the Defendant's point in this regard, I would most likely be elevating form over substance, a practice that all legal jurisdictions are moving away from nowadays. See, in this regard the case of **Savannah Maseko V BR Doors**

and Windows /2009. Accordingly the Defendants point in limine concerned is dismissed as well.

[30] As I understand it, the Defendant's defence in the merits of the Summary Judgement application is that it had obtained an insurance cover meant to cover the very debt that was now sought to be recovered from it. The Insurance policy it claimed to have handed over to the First Plaintiff to recover its debt from. The Insurance Policy concerned is annexed to the affidavit resisting summary judgement as "PC3".

[31] I have scrutinized the annexure concerned and it nowhere shows the Plaintiff as the entity to claim on it. If anything it is not in dispute that the insured in terms thereof is the Defendant; who would under normal circumstances be entitled to raise a claim with its insurer to pay the amount covered by the Policy.

[32] Besides, I note that on the face of annexure 'PC3' to the Summary Judgement application, the entity covered in terms of the Insurance Policy

concerned, is the Principal debtor whilst the Insurer is the surety and co – principal debtor who renounced the exception of beneficum ordimus seu excussionist et divisionis. If the insurer provided the cover as a surety and co – principal debtor, it then means that such did not absolve the Defendant from being liable as a Principal debtor. She could in fact be sued alone just as she could be sued together with the surety and co – principal debtor.

[33] If the Defendant sought indemnification for its liability assuring it was it was entitled to that in law, required to issue a third party procedure to have the insurance concerned joined as a party. If that was not done, the Defendant has itself to thank, if such could have been done successfully.

[34] The real question is whether or not summary judgement is in law warranted from the facts of the matter. The position is long settled that such a remedy avails a Plaintiff who has among other things a liquid claim against the defendant. Put differently it will not be granted where the defendant can show according to rule 32(4) (a), 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." This requirement of the rules, it was observed

in **Sinkhwa Semaswati t/a Mister Bread Bakery And Confectionary V PSB Enterprises (PTY) LTD, High Court Civil Case No.3830.09**, required the Defendant to show that there is a triable issue or question or that for some other reason there ought to be a trial. It was observed that this requirement of the current rule spelt a move from the previous one (that the one before the 1990 Amendment of the Rules per Legal Notice No.38 of that year) which required the Defendant to " disclose fully the nature and grounds of the defence and the material facts relied upon thereof."

[35] I am therefore required to answer the question whether in the present matter the Defendant can be said to have shown that there is an issue or question in dispute which ought to be tried or that for some other reason there ought to be a trial.

[36] That the Defendant is liable to the Plaintiff for the amount claimed cannot be disputed. It was in fact acknowledged by the Defendant in writing as an amount that was not only outstanding but one that was also due. The acknowledgement of debt and the letter requesting an indulgence for the payment of the acknowledged debt are respectively annexed to the Summary

Judgement application as annexures “K1” and “K2”. There is no triable issue I can see a requiring a trial particularly because all the other issues have been considered and rejected in the manner set out above.

[37] I have therefore come to the conclusion that there is no reason why the Plaintiff’s application for summary judgement cannot succeed. Accordingly I make the following order:-

37.1. The Plaintiff’s application for summary judgement succeeds with the result that the Defendant be and is hereby ordered to pay Plaintiff the sum of E287 309.46 (Two Hundred and Eighty Seven Thousand Three Hundred and Nine Emalangeni and forty six cents).

37.2. The Defendat be and is hereby ordered to pay Plaintiff the costs of the proceedings.