

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CASE NO. 75/2018

In the matter between:

SWAZI ROOF MASTERS (PTY) LTD

PLAINTIFF

And

TRIAD CONSTRUCTION (PTY) LTD

DEFENDANT

**Neutral Citation: Swazi Proof Masters (Pty) Ltd vs Triad Construction (Pty) Ltd
(75/18) [2021] SZHC 216 (18 November 2021)**

Coram: M. LANGWENYA

Heard: 31 July 2018

Delivered: 18 November 2021

***Summary:** Application for summary judgment-plaintiff's claim arises from work performed on behalf of defendant-defendant initially admitted owing plaintiff but later changed tune and raised a defence that the work done by*

plaintiff was unsatisfactory as it damaged the roofing-this resulted in leaks on roof and damage to conduits and wires.

Application for summary judgment-power to grant it discretionary-not to be influenced by judicial officer's personal and subjective view of the merits or demerits of defence raised-rules of summary judgment outlined-application dismissed.

JUDGMENT

- [1] The plaintiff by simple summons dated 16 January 2018 sued the defendant for payment of the sum of E135 543.87 (one hundred thirty five thousand five hundred and forty three Emalangeni eighty seven cents) together with ancillary relief.

The application was opposed by the defendant.

- [2] It is common cause that on 26 January 2018 the defendant, represented by its director Ndumiso Hlatshwayo acknowledged its indebtedness to plaintiff and requested plaintiff to furnish it with the invoice of the claim so that defendant could reconcile the invoice with own records of account. This, defendant did through an email dispatched by Ndumiso Hlatshwayo to the plaintiff's attorneys on 26 January 2018. The email is marked annexure 'C'¹ and is couched in the following terms:

'Good day

On behalf of the Directors of Triad I have been instructed to table *sic* the below. First and foremost Triad is not in dispute that we are indebted to Swazi Roof

¹ See page 11 of the Book of Pleadings. See also annexure 'B'-a letter from defendant's attorneys at page 33 of the Book of pleadings.

Masters. And they have been lenient in their dealing with us and we have been faithful in our dealings with them.

As in all businesses sometimes things go the other way and derail your projections. Yet we are committed to settling same.

1. Kindly furnish us with the invoice of claim *sic* as to be precise the figure is same as our records. Reason being there was a gazebo in the drawing which was not done because it was not built as yet. We want clarity on position that it was not included in the invoice or the contrary.
2. As we stand, it's just the beginning of the year and we are still getting our footing from the challenges we faced in 2017 which include this matter at hand.
3. We have two projects to start which material is not bought by Triad. From these we expect to raise money for our creditors. Hence our proposal is to make payments when these projects begin hopefully before the end of February.
4. We also promise to continue bringing business to Swazi Roof Masters *sic* and such these two projects will be given to them to roof.

Kind Regards,

Ndumiso M. H

Ndumiso M. Hlatshwayo [Director]'

- [3] Plaintiff's declaration states that in 2017, in Matsapha plaintiff and defendant entered into an agreement wherein plaintiff was subcontracted by defendant to carry out roofing and other related works on behalf of defendant.
- [4] It was agreed that after carrying out the work as agreed, the defendant would issue an invoice to defendant for work done and defendant would pay the invoice within thirty days of receipt of same.

- [5] Plaintiff fulfilled its contractual obligations toward defendant and issued an invoice of E310 203. 87 (three hundred and ten thousand two hundred and three Emalangeneni and eighty seven cents).
- [6] The defendant made part payment of the invoice in the amount of E174 660.00 (one hundred and seventy four thousand six hundred and sixty Emalangeneni). A sum of E135 543.87 is therefore still outstanding and is now due, owing and payable.
- [7] Despite the defendant acknowledging being indebted to plaintiff as stated above, it subsequently denied its indebtedness to the plaintiff and requested plaintiff to re-issue the invoice showing the amount owing so it could reconcile it with its own records. Plaintiff obliged and attached annexure 'A' being the invoice reflecting an amount of E135 543.87 as owing.
- [8] In the affidavit resisting summary judgment, defendant denies liability of the claim and avers that it is not indebted to plaintiff for the amount or any amount at all. Defendant denies further that it filed the affidavit resisting summary judgment solely to delay the action and states it has a *bona fide* defence to the claim.
- [9] Defendant submits in providing roofing services as between the parties, plaintiff did an unsatisfactory job as the roof had leaks and the conduits and wires were damaged when plaintiff fitted the roof. Defendant avers that it registered its disquiet to the plaintiff about the leaks and damaged conduits and wires but was ignored by plaintiff.

The Law on summary judgment

[10] The power to grant or refuse an application for summary judgment is a discretionary power not to be influenced by my mood swings or what my personal and subjective view of the merits or demerits of the defence raised is. It is a judicial discretion to be exercised objectively in accordance with principles properly formulated by the court.

[11] In *First National Bank Limited v Andries Louw*² the court set out seven golden rules about summary judgment and I quote same briefly below:

'a) The resolution of summary judgment does not entail the resolution of the entire action i.e the defendant is required to set out facts which if proved at trial would constitute a defence. The upshot of this is that the court is required to refuse summary judgment even though it might consider that the defence will probably fail at trial³.

b) The adjudication of summary judgment does not include a decision on factual disputes. This means that the court should decide the matter from the assumption or premise that the defendant's allegations are correct⁴. For that reason, summary judgment must be refused if the defendant discloses facts which, accepting the truth thereof, or if proved at trial, will constitute a defence.

c) Because summary judgment is an extraordinary remedy, it should be granted only where there is no doubt that the plaintiff has an unanswerable case⁵.

d) In determining summary judgment, the court is restricted to the manner in which the plaintiff has presented its case. In this regard, the court must insist on a strict compliance by the plaintiff and technically incorrect papers should see the application being refused⁶.

e) The court is not bound by the manner in which the defendant presents his case. This is to mean that if the defendant files an opposing affidavit that

² L146/2014 [2015] NAHCMD

³ *Estate Potgieter v Elliot* 1948 (1) SA 1084(C) at 1087.

⁴ *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 4447.

⁵ See: Nathan, Barnard and Brink Uniform Rules of Court, 3rd edition at 190.

⁶ *Visser v De La Ray* 1980 (3) SA 147.

discloses a triable issue, the defendant should, on that account, be granted leave to defend the action⁷.

f) It is permissible for the defendant to attack the validity of the application for summary judgment on any proper ground. This may include raising an argument about the excepiability or irregularity of the particulars of claim or even the admissibility of the evidence tendered in the affidavit in support of summary judgment without having to record same in the affidavit⁸.

g) Summary judgment must be refused in the face of any doubt arising as to whether or not to grant it. The basis for this rule is that an erroneous finding to enter summary judgment heralds more debilitating consequences for a defendant than a plaintiff. This is because error committed in summary judgment may be dealt with during the substantive trial. In this regard therefore, leave ought ordinarily to be granted unless the court is of the opinion that the defendant has a hopeless case⁹.

[12] It is my respectful view that the principles are salutary and should be followed and adhered to by all concerned as doing so will likely result in the proper application of the law in this regard.

[13] The manner in which the defence is raised in the present matter, as well as its timing in the affidavit resisting summary judgment leaves something to be desired and may well be criticized. Some detail may have been of some assistance. It is on the other hand not lacking to the extent that I should entirely ignore it or dismiss it out of hand.

[14] I am inclined after all is said and done to conclude that some defence is raised, which may well be sustainable. Whether or not it will ultimately is an issue I need not dwell on to determine at this stage.

[15] As a consequence, the following orders will issue:

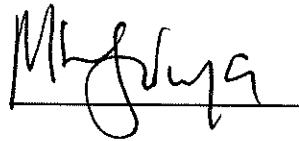
1. The application for summary judgment is dismissed.

⁷ *Lombard v Van der Westhuizen* 1953 (4) SA 84(C) at 88A-88F.

⁸ *Spice Works and Butcheries (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198(W).

⁹ *Tseven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 249B-D; *First National Bank of South Africa Limited v Myburgh and Another* 2002 (4) SA 176 at 184F-J.

2. Defendant is granted leave to defend
3. The costs of the application will stand over.

A handwritten signature in black ink, appearing to read 'M. Langwenya', written over a horizontal line.

M. LANGWENYA

JUDGE OF THE HIGH COURT

For the Plaintiff: Mr S. Dlamini

For the Defendant: Mr H. Magagula