

IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO: 68/2019

In the matter between:

KONS-PRO INVESTMENT (PTY) LTD

PLAINTIFF

And

KUKHANYA CIVIL ENGINEERING

CONTRACTORS (PTY) LTD

DEFENDANT

Neutral Citation: *Kons – Pro Investment (Pty) Ltd vs Kukhanya Civil Engineering Contractors (PTY)Ltd (68/19) SZHC [2019]227 (30th November 2021)*

Coram: LANGWENYA J

Heard: 4 October 2019; 2 December 2019; 30 November 2021

Delivered: 30 November 2021

Summary: *Civil Procedure-application for summary judgment-plaintiff claiming money due for hiring of 1.5 ton concrete dumper-machinery was delivered on defendant's premises and was used by defendant-Defendant's defence is that the dumper malfunctioned soon after it was delivered on its premises-that amount*

claimed is therefore disputed-plaintiff did not attach time sheet which would serve to validate plaintiff's claim-there exists a triable and arguable issue in the defence raised-application for summary judgment dismissed.

JUDGMENT

- [1] This is an opposed application for summary judgment.
- [2] The plaintiff is a limited liability company duly incorporated in terms of the company laws of eSwatini. Its principal place of business is situate at plot No. 301, Coventry Crescent, Mbabane.
- [3] The defendant is a limited liability company duly incorporated in terms of the company laws of eSwatini. Its principal place of business is at plot 496 Inyoni Park, Moneni, Manzini.
- [4] The plaintiff instituted action against defendant for payment of the sum of E76 496.00 together with interest and costs. When the defendant entered an appearance to defend, the plaintiff brought an application for summary judgment. The plaintiff alleged that defendant's appearance to defend was filed only for dilatory purposes because the defendant does not have a *bona fide* defence to plaintiff's claim.
- [5] The plaintiff and defendant entered into a verbal agreement for the leasing and hiring of a 1.5 ton concrete dumper on 28 August 2017. The number of days the machine would be leased to defendant is not set out in plaintiff's particulars of claim. The dates are however reflected in a statement addressed to the defendant. The dates are in the months of November 2017-December 2017; and January 2018 to May 2018. The plaintiff was

represented by Mveli Zondo who was acting in his capacity as director, while the defendant was represented by Phetsile Fakudze in her capacity as procurement manager when the verbal agreement was reached between the parties.

- [6] The express terms of the agreement were that: i) the plaintiff would deliver the concrete dumper to the defendant for use at Ngwane Park; ii) the daily rate chargeable shall be an amount of E912.00 inclusive of Vat at 14%; iii) the defendant would send signed time-sheets from site of operation to the plaintiff on a monthly basis which plaintiff would use to prepare invoices; iv) the defendant would pay the plaintiff for hiring the concrete dumper within ten days from date of invoice being issued for each respective month of leasing; and v) the plaintiff will deliver and collect the concrete dumper at a charge of E2 000.00 for each trip. It was agreed that the terms were non-negotiable¹.
- [7] Plaintiff's averrals in the particulars of claim reflect that the verbal agreement was subsequently reduced into writing through an email as reflected hereunder. The email is authored by Mveli Zondo and is addressed to Nosifiso. It is dated 24 August 2017 and bears the subject of 'Quotation-KuKhanya.' For completeness, I restate the contents of the email²:

'Morning Nosifiso,

This is with respect to my telephonic conversation with Siboniso requesting to hire a 1.5 ton concrete dumper for use in Ngwane Park.

Please find attached quotation. Due to past experiences with your company regarding payments, I will request that you pay 10 days after invoicing and that must be reflected on your order.

¹ See paragraphs 5.1-5.5 of plaintiff's particulars of claim.

² See annexure 'Koni1' at page 36 of the Book of Pleadings.

I will bring the machine and collect it myself and I will charge you E2000.00 for both delivery and collection, this amount should be paid in full in the first invoice. My reason for delivering and collecting the machine myself is that you failed to bring my machine back from Matsanjeni and *sic* had to go fetch it myself at my expense in March 2017.

The above terms are not negotiable.

Regards'

- [8] The plaintiff sent defendant a quotation which reflects that the rate for hiring the concrete dumper per day was E800.00³. There is no explanation in plaintiff's papers how the daily rate amount reflected in the quotation is different from the amount reflected in plaintiff's particulars of claim.
- [9] Following receipt of quotation from plaintiff, defendant, through email of August 28, 2017 issued a purchase order hiring the concrete dumper for an amount of E54 720.00 inclusive of Vat⁴.
- [10] It is plaintiff's lamentation that on or about 25 November 2017 defendant hired its concrete dumper which was delivered at defendant's site on 25 November 2017. There is no quotation or any other evidence of the additional contract of 25 November 2017 annexed to plaintiff's papers. The machinery was used by defendants on 25 November 2017 and on various days thereafter. In lieu of the service rendered, defendant was to pay the invoices raised thereon. It did not. For this reason, plaintiff contends that defendant is indebted to it to the amount of E76 496.00. The amount is now due, owing and payable but despite demand, defendant fails and or neglects and or refuses to pay.

³ See annexure 'Item 6' at page 38 of the Book of Pleadings.

⁴ See annexure 'Kon2' at page 41 of the Book of Pleadings.

- [11] 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.
- [12] Defendant submits that it indeed entered into an agreement with plaintiff to hire the concrete dumper. Defendant admits it hired concrete dumper from plaintiff on a once off basis but does not state in its affidavit resisting summary judgment for how long it used the machinery. Plaintiff avers that defendant asked to use the machine for two months⁵. Defendant avers that soon after the agreement was sealed, it caused to be transmitted to the plaintiff a purchase order stating that the machine was required by 29 August 2017. The purchase order reflects that the daily charge was E800.00 for a period of sixty days all totaling E48 000.00 excluding Vat. Inclusive of Vat the total charge came down to E54 720.00. The purchase order appears to buttress defendant's version about the once off engagement for two months.
- [13] Defendant states that while the terms of the agreement reflect that defendant would pay E2 000 for the transportation and delivery of the concrete dumper, the parties subsequently verbally agreed that the cost of delivery and return would be free of charge. This averment is vigorously denied by the plaintiff.
- [14] Defendant avers further that after the purchase order was made and sent to plaintiff, the concrete dumper was delivered but could not be used as

⁵ See paragraph 7.2 of affidavit in support of summary judgment at page 18 of the Book of Pleadings.

initially intended as it malfunctioned due to mechanical problems. To shore up its argument, defendant argues that as a result of the malfunctioning machinery no time sheets were filed to support the evidence of plaintiff. This argument is disingenuous in so far as it appears from the papers that it was incumbent on defendant to send time sheets to plaintiff from the site where the machinery was being used⁶. It was on the basis of time sheets received by plaintiff from defendant that the former would prepare invoices. Logically, without the time sheets from defendant, the plaintiff would be unable to issue invoices.

[15] The quintessence of the remedy of summary judgment is to grant immediate relief and swift enforcement of his claim against a defendant who has no real defence to that claim⁷. The remedy is final and closes the door to the defendant without trial.

[16] In order to defeat an application for summary judgment the defendant is required to show that his appearance to defend is not aimed at delaying the matter but that he has a genuine defence to the claim. In order to do so, the defendant must allege facts that disclose a defence and that are sufficient to establish that defence. The defendant must establish that 'there is a mere possibility of his success⁸'; that 'he has a plausible case'; that 'there is a triable issue⁹'; or 'that there is a reasonable possibility that an injustice may be done if summary judgment is granted¹⁰.'

⁶ See paragraph 5.3 of plaintiff's particulars of claim at page 32 of the Book of Pleadings.

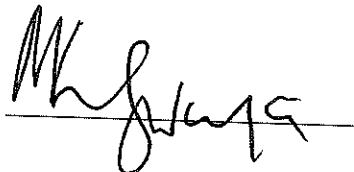
⁷ See: *Zanele Zwane v Lewis Store (Pty) Ltd, t/a Best Electric*, Civil appeal case No. 22/2001; *Swaziland Development and Financial Corporation v Vermark Stephanus* High Court Civil Case No. 4021/2007

⁸ *Mater Dolorosa High School v R.J.M Stationery (Pty) Ltd* Appeal Case No. 3/2000

⁹ *Sinkhwa SemaSwati Ltd t/a Mister Bread Bakery and Confectionary V.P.S.B. Enterprises (Pty) Ltd* Case No. 3839/2009

¹⁰ *Mfaniseni Lyford Mkhalihi v Somageba Investments (Pty) Ltd* Case No. 1044/2011

- [17] The issue is thus whether the defendant has discharged the *onus* on it. Has the defendant deposed to a defence which, if proved at trial would constitute a good defence to the plaintiff's claim? I have examined the defence raised by the defendant to plaintiff's claim. I am of the respectful view that the defence may well leave something to be desired and may also be criticized but it is not lacking to the extent that I should entirely ignore it or dismiss it out of hand.
- [18] It is my considered view that some defence which may well be sustainable has been raised. Whether or not the defence will ultimately hold sway is an issue I need not dwell on to determine at this stage.
- [19] In the result, the following order is issued:
- 1) The application for summary judgment is refused.
 - 2) The costs of the application will stand over.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Plaintiff:

Mr S. A. Lokothwayo

Boxshall-Smith Attorneys.

For Defendant:

Mr F. Tengbeh

S. V. Mdladla Attorneys