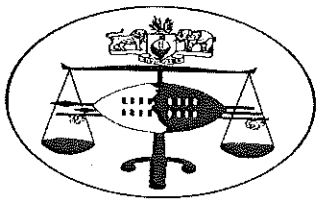


IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 1815/2021**

In the matter between:

RAYNOLDS BAARTJIES **FIRST PLAINTIFF**

SAXON (PTY) LTD **SECOND PLAINTIFF**

And

SWAZILAND INTERSTATE ASSOCIATION **DEFENDANT**

Neutral citation: *Raynolds Baarties & Another v Swaziland Interstate Association* (1815/2021) [2022] *SZHS* 136 (28/06/2022)

CORAM: **B.S. DLAMINI J**

DATE HEARD: 17 June 2022

DATE DELIVERED 29 June 2022

Summary: *Application for summary judgment. Circumstances under which the provisions of Rule 32 (2) (a)-(d) can be invoked. Whether summary judgment is competent on the facts alleged by Plaintiff.*

Held; *The application for summary judgment by Plaintiff partly succeeds. The remainder of the Plaintiff's claims are referred to oral evidence.*

JUDGMENT

INTRODUCTION

[1] The present application for summary judgment was instituted by the Plaintiffs on the 22nd November 2021. In the application for summary judgement, the Plaintiffs seek the following relief;

"**1.1 Payment of the sum of E 69,464.00 (Sixty Nine Thousand Four Hundred & Sixty Four Emalangeni) being in respect of remuneration not paid to the Plaintiff as Treasurer to the**

Defendant's Board between the month of October and November 2020.

1.2 Interest thereon at the rate of 9% per annum from the date of summons to date of final payment.

1.3 Costs of suit.

1.4 Further and/or alternative relief."

[2] The application for summary judgment is opposed by the Defendant. In the affidavit resisting summary judgment, the Defendant alleges that all the claims made by the Plaintiffs against the Defendant raise triable issues and cannot be dealt with under the Rule 32 (1) procedure.

BRIEF FACTS

[3] There are four claims instituted by the Plaintiffs against the Defendant. Claim A is said to arise from a breach of a lease agreement. The lease agreement was between the Second Plaintiff and the Defendant. The Second Plaintiff, through its director who is the First Plaintiff, alleges that the lease agreement between itself and the Defendant was for a period of Thirty Six months commencing on the 1st October 2019 and terminating on the 30th September 2022. The

Defendant was expected to pay the sum of **E 5,000.00 (Five Thousand Emalangeni)** monthly for the premises leased out to it by the Plaintiff.

[4] It is alleged by the Second Plaintiff that during or around September 2020, the Defendant vacated the premises without having paid for the months from March 2020 to September 2020. It is alleged by the Plaintiffs that the total amount owed by the Defendant in respect of the unpaid rentals is the sum of **E 35,000.00 (Thirty Five Thousand Emalangeni)**.

[5] Claim B is alleged by the Plaintiffs to arise from a resolution taken by the Defendant's Board authorizing the First Plaintiff to open a WI-FI connection account in his personal name for the benefit of the Defendant. The claim by the First Plaintiff is that the monthly charge for the WI-FI connection was the sum of **E 850.00 (Eight Hundred and Fifty Emalangeni)**. The monthly charge of E 850.00 was to be paid by the Defendant for the service to the relevant service provider.

[6] It is alleged by the First Plaintiff that the Defendant failed to pay the monthly charge of E 850.00 from the month of February 2020 to

September 2020 with the result that this monthly charge accumulated to **E 6,800.00 (Six Thousand Eight Hundred Emalangeni).** It is alleged by the First Plaintiff that since the account was in his personal name, he was forced to pay the outstanding amount from his pocket. The First Plaintiff thus seeks to be reimbursed the sum of E 6,800.00 by the Defendant.

[7] Claim C by the First Plaintiff is said to arise from electricity bills paid by the latter on behalf of the Defendant. It is alleged by the First Plaintiff that the monthly bill for electricity on the premises was the sum **of E 208.00 (Two Hundred and Eight Emalangeni)** and that from February 2020 to September 2020, the total electricity bill paid by him was the sum of **E 1,664.00 (One Thousand Six Hundred and Sixty Four Emalangeni).**

[8] The final claim by the First Plaintiff, namely Claim D, is alleged to arise from use by the Defendant of mini-buses, otherwise known as kombis belonging to the First Plaintiff for the former's shuttle services. The Plaintiff states that a total of 13 trips each costing the sum of E 2,000.00 were undertaken by him using his personal kombis on behalf of the Defendant. The total amount claimed by the Plaintiffs

under this category is the sum of **E 26,000.00 (Twenty Six Thousand Emalangeni)**.

[9] It is alleged by the Plaintiffs that on the 17th November 2020, an acknowledgement of debt agreement was concluded between the Defendant and the Plaintiffs' agent company known as S.V.M.S Investments (Pty) Ltd for payment of the sum of E 69,464.00, after the issuance of summons by the Plaintiffs. The acknowledgement of debt agreement was attached to the combined summons.

[10] The Defendant has disputed all the claims filed against it by the Plaintiffs. On the WI-FI and electricity bill claims, it is alleged by the Defendant that there are no supporting documents presented to it or filed in Court to prove these claims. The Defendant alleges that the Plaintiffs have failed to file proof of payment in respect of these claims yet this could have easily been done by the production of the relevant supporting documents if these claims were valid.

[11] The claim for the use of kombis belonging to the First Plaintiff is also disputed by the Defendant on the ground that that the former was

never at any stage authorized to use his own kombis for the benefit of the Defendant. It is alleged by the Defendant that it has its own fleet of kombis which it uses for the shuttle business.

[12] With regards to the claim of unpaid rental, it is alleged by the Defendant that the First Plaintiff, who was employed by it as Treasurer was responsible for administrative issues. The Defendant states that the First Plaintiff was supposed to close the office during the prevalence of the COVID-19 pandemic since there was no business being conducted. The Defendant argued that the First Plaintiff kept the office open simply because the rented premises belonged to his company (Second Plaintiff) and thus he kept the office open in order to personally benefit much against the prejudice of the Defendant.

[13] **ANALYSIS AND CONCLUSION**

In **Kukhanya (Pty) Ltd/Gabriel Couto JV & 2 Others v Kukhanya Construction (Pty) Ltd (1470/2018) [2020] 27 SZHC 70 (05 June 2020),** it was held by the Court that;

"[34] The real question is whether or not summary judgment 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: 3830/2019,* 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 is 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."

[14] In **Farm Chemicals Limited v Sokhulu Partners Investments (Pty) Ltd & 2 Others (1314/16) [2018] SZHC 42 (21st March, 2018), this**

Court (per Fakudze J) referring to the *Sinkhwa Semaswati judgment* (referred to herein above) held as follows;

" [16] The Learned Judge further observed that;

"The remedy provided by the rule is extra ordinary and a very stringent one in that it permits a judgment to be given without trial. It closes the door of the court to the defendant. Consequently, it should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a *bona fide* defence. While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no *bona fide* defence, on the other hand it is reluctant to deprive the defendant of his normal right to defend except in a clear case."

[16] The Court (in the *Farm Chemicals matter* cited above) further stated that;

"[17] In *C.S Group of Companies v Constructions Associates (Pty) Ltd Civil Case No. 41/2008*, the Learned Chief Justice Banda as He then was, equally observed at page 14 that;

"It has also been held that courts should be slow to close the door to the defendant if a reasonable possibility of a defence exists to avoid an injustice."

[18] **In the Supreme Court case of *Musa Sifundza v Swaziland Development and Savings Bank, Civil Case No. 67/12 at paragraph [8]* it was held that;**

"[8] It is well recognized that summary judgment is an extra-ordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay."

[17] What the list of legal authorities show in summary is that a Plaintiff who utilizes the Rule 32 mechanism of summary judgment must on the pleadings, establish a clear and unanswerable case in order that judgment may be granted in his claim without the need to go to trial. In order for this to happen, the defence raised by the Defendant must be found wanting or not satisfactory. The task of weighing the

evidence of the parties on the pleadings, must, as the legal authorities point out, be done with attention to delay and in a meticulous manner so as to avoid any injustice being occasioned by any of the parties. It is safe to say that when the measurement scale on the facts and evidence is evenly balanced or in doubt, a trial must be ordered by the Court in order to avoid an injustice.

[18] In Claim A, the Plaintiffs have sued the Defendant for unpaid rental for the period commencing from March 2020 to September 2020. In support of this claim, the Plaintiffs filed a duly signed lease agreement between the parties, that is, a signed lease agreement between the Second Plaintiff and the Defendant. The Defendant has not disputed the legality and validity of this lease agreement. The only defence raised by the Defendant on this claim is that the First Plaintiff, as director of the Second Plaintiff, should have shut down operations due to the Covid-19 situation.

[19] The Defendant has not denied being indebted to the Second Plaintiff for the months commencing from March 2020 to September 2020. The Court was not shown any instrument in which the First Plaintiff

on behalf of the Second Plaintiff was instructed to close down business operations due to the Covid-19 pandemic. Even assuming that this was the case, rent does not normally get suspended simply because the lessee is experiencing financial difficulties or suffering loss of business due to external factors. As long as the lease is in force, the lessee is expected to comply with his obligations in terms of the agreement.

[20] It is the Court's conclusion that Claim A of the Plaintiffs' claim is proper and competent in the circumstances. The Second Plaintiff is entitled to the payment of E 35,000.00 in respect of the outstanding rental from March 2020 to September 2020.

[21] The claims in respect of the WI-FI connection account and electricity bills cannot, in the circumstances, be the subject of summary judgment. The Court is in agreement with the Defendant's attorney that there are no supporting vouchers in respect of the disbursements allegedly made by the First Plaintiff on behalf of the Defendant. The First Plaintiff could have made his claims easily identifiable by filing proof of payment in respect of those undertakings allegedly made by

him on behalf of the Defendant. Given that the Defendant disputes these claims, the failure by the First Plaintiff to avail proof of payment means that these claims must be referred to trial to determine the validity or otherwise of same.

[22] The claim by the First Plaintiff in respect of the use of his personal kombis is similarly not capable of being determined through summary judgment. In the pleadings, the First Plaintiff has not stated who represented the Defendant when the agreement authorizing him to use his own kombis for the shuttle services was entered into. It is also contended by the Defendant that the First Plaintiff as Treasurer was responsible for all the office documentation. The Defendant argued that the First Plaintiff filled up the claim forms for the use of his own motor vehicles. The Defendant may be justified in casting doubt and suspicion on the claim forms completed by the First Respondent in respect of the use of the First Plaintiff's kombis as shuttle services. This claim should, in the Court's view, also be determined by way of oral evidence.

[23] One remaining issue requiring the Court's attention is the acknowledgment of debt agreement. Quite clearly, the lease agreement relied upon by the Plaintiffs is between the Defendant and a company registered as S.V.M.S Investments (Pty) Ltd. In argument, the Plaintiff's attorney submitted that the company S,V.M.S Investments (Pty) Ltd was an agent of the First and Second Plaintiffs. The acknowledgment of debt agreement however does not say so. The agreement stipulates that the Defendant "***do hereby acknowledge that I am truly and lawfully indebted to and on behalf of S.V.M.S Investments (Pty) Ltd.***"

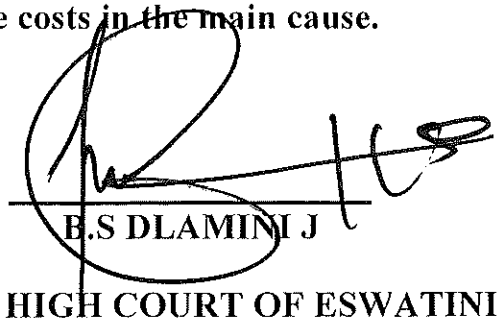
[24] The Court is in agreement with the submissions of the Defendant's attorney to the effect that the acknowledgment of debt agreement cannot assist the Plaintiffs as it was made for and on behalf of another party and not them.

[25] In the circumstances, the Court grants orders as follows;

(a) Summary judgment is entered for the First and/or Second Plaintiff in the sum of E 35,000.00 (Thirty Five Thousand Emalangeni) in respect of Claim A.

(b)The rest of the claims (Claims B, C and D) are referred to trial.

(c) Costs are to be costs in the main cause.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Plaintiffs: *Mr. B.Gama (C.J Littler & Co.)*

For Defendant: *Ms. N. Ndlangamandla (Mabila Attorneys in Ass. with N. Ndlangamandla & S.Jele)*