

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD AT MBABANE

CASE NO: 1067/21

In the matter between:

LIONHEART PROPERTIES

PLAINTIFF

And

VILLAMOURA HOLDINGS (PTY) LTD

FIRST DEFENDANT

PEDRO MIGUEL VAZ RODRIGUES

SECOND DEFENDANT

Neutral Citation: *Lionheart Properties and Villamoura Holdings (Pty) Ltd and Another [1067/21]- [2023] SZHC 133 (30 May 2023)*

Coram: LANGWENYA J

Heard: 15 August 2022

Delivered: 30 May 2023

Summary: *Civil Procedure-Application for summary judgment-plaintiff claiming specific amounts of money under claims one, two and three-claim one based on commission agreement-claim two based on agreement to sell furniture on behalf of defendants-claim three based on a lease agreement-Except for claim one, terms of agreements of claim two and three are not specified on plaintiff's particulars of claim-Defendant has raised triable issues with regard to claim one-Both parties conceded there are triable issues regarding claim two and claim three-Summary judgment refused-Matter referred to trial.*

JUDGMENT

INTRODUCTION

[1] On 7 June 2021, the plaintiff issued summons against the defendants under case number 1067/21 and claimed:-

1. Payment of the sum of E700 000,00 (Seven hundred thousand Emalangeni) being money due and owing to the plaintiff in terms of an exclusive sole mandate agreement ('commission agreement') between the parties on 9 July 2020.
2. Payment of the sum of E28 000.00 (twenty-eight thousand Emalangeni) being money due and owing to the plaintiff in terms of a furniture sale agreement between the parties on an undisclosed date. The parties agreed that the plaintiff would be paid ten percent of the sale amount of the furniture. The plaintiff secured a buyer who bought the furniture for E280 000.00 (two hundred and eighty thousand Emalangeni only).

3. Payment of the sum of E96 000.00 (ninety-six thousand Emalangeneni) being money due and owing to the plaintiff in terms of a lease agreement secured at the instance of the plaintiff between Huawei Technologies Eswatini (Pty) Ltd ('Huawei') and the first defendant in October 2020. The rental amount was set at E80 000,00 per month and was for a duration of twelve months beginning from February 2021 when Huawei moved into the premises.

[2] Upon being served with the summons the defendants duly entered appearance to defend.

APPLICATION FOR SUMMARY JUDGMENT

[3] In response to the notice of intention to defend, the plaintiff filed an application for summary judgment. The plaintiff alleged that the appearance to defend was filed by the defendants solely for purposes of delaying the action as the defendants did not have a *bona fide* defence to plaintiff's claims.

[4] On 9 September 2021 the defendants filed an affidavit resisting summary judgment where the following was not denied:-

- i) That the parties entered into a written agreement in which the defendants would pay the plaintiff E700 000,00 to facilitate the sale of the property belonging to first defendant.
- ii) That the parties entered into an agreement in which the plaintiff would be paid ten percent commission fee for selling furniture for E280 000.00. That the plaintiff performed its part of the bargain and was not paid the amount of E28 000, 00.

- iii) That the plaintiff facilitated a lease agreement between the first defendant and Huawei and was therefore entitled to payment of ten percent of E80 000,00 monthly rentals for a period of twelve months. The amount due to plaintiff is E96 000.00.

[5] It is in these circumstances that the plaintiff argued that the defendants' affidavit resisting summary judgment has been filed simply to delay the inevitable.

DEFENDANTS' OPPOSITION TO SUMMARY JUDGMENT

[6] In opposing the application for summary judgment, the defendants argue that they cannot pay the plaintiff its commission in claim one because they have still not been paid the purchase price of the property because certain suspensive conditions in the deed of sale have still not been met. According to the defendants, plaintiff's commission flowing from claim one is only due once the suspensive conditions are met; the purchase price of E17 500 000.00 is paid and the property is transferred and registered in the name of the purchaser (Huawei). This has not happened yet. The version of the defendant in this regard is not denied by the plaintiff. Plaintiff did not file an affidavit in reply to defendants' affidavit resisting summary judgment.

THE LAW ON SUMMARY JUDGMENT

[7] The quest for summary judgment is based on a trite argument that there are triable issues of fact and the motion is initiated by plaintiff that contends that all necessary factual issues are settled and therefore need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action. The purpose of summary judgment procedure is to

afford an innocent plaintiff who has an unanswerable case against an elusive defendant, a much speedier remedy than that of waiting for the conclusion of the action.

- [8] The principles applicable to summary judgment are trite. The resolution of summary judgment does not entail the resolution of the entire action. In this application, the defendants are required to set out facts which, if proved at trial would constitute a defence. The outcome of this is that the Court is required to refuse summary judgment even though it might consider that the defence will probably fail at trial¹.
- [9] In adjudicating this summary judgment application, I am not required to decide on factual disputes of the matter. By this, is meant that the Court should decide the matter from the premise that the defendants' allegations are correct² especially as defendants' averments are not disputed by the plaintiff. In arguing that payment of plaintiff's commission in claim one is dependent on payment of the purchase price and subsequent transfer of the property to the buyer, the defendants have shown that *prima facie*, the allegations contained in their affidavit resisting summary judgment are plausible and merit further investigation as to their truth during the trial. For this reason, summary judgment in relation to claim one is refused.
- [10] 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 lead the application for summary judgment being refused³. There is

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

² *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 4447

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

evidence regarding claim two and claim three that plaintiff's papers are technically incorrect as a result of inelegant drafting.

Claim 2

- [11] Plaintiff's particulars of claim do not state if the agreement regarding claim two was oral or written neither does it specify the time and place where the agreement was sealed. All that is stated is that the plaintiff was represented by Beketele Maziya. Plaintiff's particulars of claim regarding claim two are also unintelligible in so far as it states that when the agreement was sealed, 'the second defendant represented the plaintiff at eZulwini⁴.' Plaintiff's averments in this instance are technically incorrect and for this reason, among others, summary judgment is refused.
- [12] Plaintiff avers that it entered into an agreement with the first defendant to sell furniture valued at E280 000.00 on behalf of the first defendant. The agreement is that the plaintiff would be paid ten percent commission fee of E280 000.00 after the purchase price is paid to the first defendant. It is plaintiff's contention that Huawei bought the furniture for E280 000.00 and paid the first defendant the said amount. First defendant now refuses to remit the amount of E28 000.00 being the ten percent commission to plaintiff-so the argument goes.
- [13] It is not clear from plaintiff's particulars of claim what furniture was sold; when the sale was held; who was present when the sale was conducted, who represented the buyer during the sale. These are matters that require the leading of evidence during the trial.

⁴ See paragraph 12 of plaintiff's particulars of claim at page 8 of the Book of Pleadings.

[14] During oral submissions, Mr Jele for the plaintiff conceded that claim two requires the leading of oral evidence and as such the matter should go to trial. This concession was accepted by Mr Mdluli for the defendants. Summary judgment cannot be granted where the matter raises disputes of facts and the parties are agreed the matter should go to trial. For these reasons, summary judgment is refused in relation to claim two.

Claim 3

[15] In October 2020 plaintiff is said to have proposed to the first defendant that Huawei rents the property while the parties wait for the sale to go through. Plaintiff's offer was accepted by the defendants and Huawei. A lease agreement was subsequently prepared. The rentals were set at E80 000,00 per month and the lease agreement would run for a period of twelve months. As a result of facilitating the lease agreement, it was agreed that the plaintiff would be paid ten percent commission of the rental amount per month. The ten percent commission due to the plaintiff is the amount of E96 000.00⁵. The averment that plaintiff claims E96 000.00 for facilitating the lease agreement is at odds with plaintiff's prayer regarding claim 3. In its prayer, plaintiff claims a sum of E80,000.00 (eighty thousand Emalangeni)⁶. This raises a dispute of facts which cannot be resolved on the papers. It also points to incorrect averments in plaintiff's papers.

[16] The lease agreement attached to plaintiff's papers purports to be between Huawei and Villamoura yet it is not signed by the parties. There is need for this matter to be further investigated during trial to establish its authenticity

⁵ See paragraph 15 of plaintiff's particulars of claim at page 9 of the Book of Pleadings.

⁶ See paragraph 3 of plaintiff's prayer at page 11 of the Book of Pleadings.

and whether there is a nexus between the unsigned lease agreement and the defendants and Huawei.

[17] During oral submissions, both parties agreed that the unsigned lease agreement is hearsay evidence and requires the leading of oral evidence during trial. I agree. It follows therefore that summary judgment cannot be granted in a matter that requires further investigation during trial.

[18] I am of the view that triable issues have been disclosed in this matter and for this reason, the defendant is granted leave to defend the action⁷.

[19] Summary judgment must be refused if there is doubt arising as to whether the Court should or should not grant it. The basis of this rule is that an erroneous finding to enter summary judgment attracts more debilitating consequences for defendants than a plaintiff. This is because any error committed in summary judgment may be addressed during the substantive trial. Consequently, leave ought ordinarily to be granted unless the Court is of the view that the defendants have a hopeless case⁸. Defendants' case in this application is, in my view anything but hopeless. Defendants have set out its defence with sufficient particularity and completeness in order to comply with the provisions of the Rules of this Court on summary judgment.

ORDER

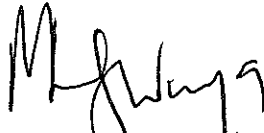
[20] In the result, I make the following order:-

1. The application for summary judgment is refused for claim 1, claim 2 and claim 3;
2. The defendant is granted leave to defend the action;

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

⁸ *First National Bank of South Africa v Myburgh and Another* 2002 (4) SA 176 (C) at 184F-J; *Smith v Kruger Incorporated v Benvenuti Tiles Ltd* [1999] All SA 242 (C) at 249B-D.

3. The costs of the application are reserved for decision by the trial Court.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Plaintiff:

Mr S. M. Jele

For the Defendants:

Mr B. G. Mdluli