



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1751/2019

In the matter between:

DAVID ROBERTS

Plaintiff

and

MICHELO SHAKANTU

Defendant

Neutral Citation:

*David Roberts v Michelo Shakantu (1751/2019) [2022]
SZHC 362 (08 December 2023)*

CORAM	:	MASEKO J
FOR PLAINTIFF	:	ADV. P. FLYNN
FOR DEFENDANT	:	ATTORNEY H. MDLADLA
DATE HEARD	:	14/02/2020
DATE DELIVERED	:	08/12/2023

Preamble: Civil Law and Procedure – Summary Judgment – *Bona fide* defence or triable issue(s) – Plaintiff claiming payment of E2 500 000-00 allegedly loaned by him to the Defendant, and Defendant denying that the loan was a personal loan to him but alleges that it was a loan to the company Inyatsi Construction Group Holdings, and that the Plaintiff was repaid the loan in full by the

company together with his severance pay. In my view this is a triable issue and summary judgment is dismissed.

JUDGMENT

MASEKO J

- [1] On the 25th October 2019, the Plaintiff sued out a Combined Summons against the Defendant for payment of the sum of E2 500 000-00 (Emalangeneni Two Million Five Hundred Thousand) being monies lent and advanced to the Defendant by the Plaintiff, together with interest at the rate of 2% per month calculated from 21st January 2017 to date of final payment, and costs of suit.
- [2] The Defendant filed a Notice of Intention to Defend the action proceedings on the 29th October 2019, and thereafter on the 13th November 2019 the Plaintiff launched Summary Judgment proceeding wherein he states that he believes that the Defendant has no bona fide defence and has filed the notice to defend solely to delay the final outcome of the action proceedings.
- [3] In opposition to the Summary Judgment the Defendant filed an affidavit resisting Summary Judgment wherein he states that the loan was awarded to Inyatsi Construction Group Holdings (Pty) Ltd and not to the Defendant, and that he was merely acting on behalf of the said company.
- [4] The Defendant states further that when the parties entered into the agreement, there was no agreement on interest and that the issue of interest was never discussed.

- [5] The Defendant states further that on the 24th October 2017, an amount of E11 397 347-35 (Emalangeneni Eleven Million Three Hundred and Ninety Seven Thousand, Three Hundred and Forty Seven, Thirty Five Cents) was paid into the Plaintiff's account by Inyatsi Construction Group Holdings (Pty) Limited, and that same was inclusive of the loan of E2 500 00-00 which has been borrowed from the Plaintiff. The Defendant attached **Annexure "F1"** as proof of payment, and **Annexure "F2"** a letter confirming that the company was no longer indebted to the Plaintiff and which the Plaintiff signed.
- [6] In his Replying Affidavit the Plaintiff attached Annexure "DR2" a bank statement from First National Bank showing two bank account numbers, being 622 327 898 52 as his cheque account number and 620 9788 9277 as the Defendant's account number wherein the E2 500 000-00 was deposited. He states that the money was loaned to the Defendant in his personal capacity and not to Inyatsi Group Holdings Limited.

ANALYSIS OF THE CASE

- [7] In the Replying Affidavit filed on the 6th February 2020, the Plaintiff has not addressed the payment of the E11 397 347-35 into his account by Inyatsi Construction Group Holdings which the Defendant claims was inclusive of the E2 500 000-00 loan advanced to the company which he represented. This is in my view very strange that the Plaintiff has chosen not to deal head on with these allegations by the Defendant to the extend that the Plaintiff even signed a letter confirming that the company was not indebted to him.

- [8] The law governing summary judgment is very stringent that courts must be very slow to grant summary judgment because it is a drastic remedy which has a potential to result to the denial of the *audi alteram partem* principle and thereby resulting to injustice because it shuts the door of justice in the face of the defendant, who may have a *bona fide* defence to the Plaintiff's claim.
- [9] It is for that reason that the Court must only grant summary judgment to a plaintiff who has an unanswerable case. It is not for the Court hearing a summary judgment matter to assess the veracity or credibility of the defendant's defence to the plaintiff's claim, but rather that is the duty of the trial court when dealing with the defenses raised by the defendant in the summary judgment proceedings. All that the Court must do in a summary judgment is to assess if the defence raised by the defendant is *bona fide* and/or raises a triable issue or issues which can only be best dealt with in a trial situation where oral evidence would be led by the parties and thereby giving the Court a full picture of the plaintiff's and defendant's cases respectively.
- [10] The position *in casu* is that the Defendant's defence raises triable issues which can only be fairly and fully ventilated through a full-blown trial. In my view, the Defendant has alleged sufficient facts and particulars to show that there is a triable issue. The huge payment made to the Plaintiff on the 24th October 2017 introduced the element of a triable issue, coupled with the Defendant's assertion that he was acting on behalf of the Inyatsi Construction Group Holdings. Whatever the position may be, it is the duty of the trial court to determine that in a full-blown action trial. This is certainly not the case where the Plaintiff has an unanswerable case.

[11] In the case of **Basalive Bhembe v Basil Mthethwa (1675/2015) [2016] SZHC 125 (19 July 2016)** Mamba J (as he then was) stated as follows at paragraph 12:-

[12] In **Swaziland Trye Services (Pty) Ltd t/a Max T. Solutions v Sharp Freight (Swaziland) (Pty) Ltd (381/2012) [2014] SZHC 74 (01 April 2014)** this Court stated as follows:-

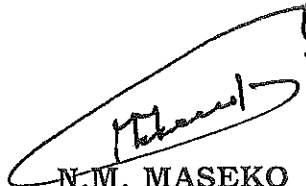
“---in the **Swaziland Livestock Technical Services v Swaziland Government and Another**, judgment delivered on 19 April 2012, Ota J said:-

“---in the case of **Swaziland Development Finance Corporation v Vermaak Stephanus Civil Case No. 4021/2017:-**

“It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial--- it is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has an unanswerable case---”

[12] *In casu*, it is my considered view that the defenses raised by the Defendant in the affidavit resisting summary judgment raises triable issues which can only be dealt with in action trial proceedings. I cannot in these circumstances grant summary judgment because the defenses raised clearly negate the unanswerable case which the Plaintiff claims to have *in casu*.

[13] For the foregoing reasons, the application for Summary Judgment is hereby refused. The costs of this application shall be costs in the trial.



N.M. MASEKO
JUDGE