

IN THE COURT OF APPEAL OF SWAZILAND

Civil Appeal Case No.48/01

In the matter between:

ADVOCATE ERNEST THWALA Appellant

VS TITUS MLANGENI t/a MLANGENI & COMPANY Respondent

CORAM : LEON J.P.

TEBBUTT J.A.

BECK J.A.

For Appellant : Mr Magagula

For Respondent : Ms T. Hlabangani

JUDGMENT

BECK J.A.

This is an application for leave to appeal. The applicant is an advocate who sued the respondent, an attorney, for payment of counsel's fees of E7500 for arguing an appeal. The respondent entered an appearance to defend, whereupon the applicant applied for summary judgment.

The respondent opposed the application for summary judgment. In his opposing affidavit the respondent denies that he is indebted to the applicant and avers that after the notice of appeal was filed the applicant dealt directly with the client and accepted from the client various payments in full and final settlement of his fees for prosecuting the appeal. Two representatives of the client, who is a Chief, made supporting affidavits in which they

2

confirm that the applicant was paid by and on behalf of the Chief an amount of E2000 as well as various additional sums amounting to several hundreds of emalangenis, and was also given a goat, all of which the applicant accepted as payment for the services he rendered in prosecuting the appeal.

The application for summary judgment was moved before the learned Chief Justice on 16th November 2001 and it resulted in the following order being made on that same day:

"It is ordered:

1. That the summary judgment application is refused as the issues raised by the respondent are triable.
2. The respondent/defendant is granted leave to defend the action
3. Costs of suit are reserved."

This being an interlocutory order the applicant lodged an application for leave to appeal. He sought to buttress that application by filing a "founding affidavit" in which he made numerous averments of fact that form no part of the record in the application for summary judgment. The respondent quite properly filed no affidavit in reply to this new material in the founding affidavit and merely gave notice of his intention to oppose the application for leave to appeal. That application, which was addressed to the High Court for leave to appeal to the Court of Appeal, appears to have been moved unsuccessfully before the learned Chief Justice, there being before us a copy of a court order made by him, dated 8th April 2002, which reads:

"Having heard both counsel for the applicant and the respondent it is hereby ordered.

1. That the application be and is hereby dismissed.
2. That the applicant pay the cost of the application to the respondent"

Leave to appeal is now being sought from this Court.

3

Although no written reasons have been furnished by the court a quo for either of the orders made, it is abundantly clear in my view that the learned Chief Justice was quite correct in holding that "the issues raised by the respondent are triable." Summary judgment is a special remedy that may only be granted when there is no room for doubt that the defence that the defendant seeks to raise is either false or irrelevant. Whatever the probabilities in the present matter may be, there is no proper basis to be found in the affidavits that were lodged in the application for summary judgement for holding that the defence that the appellant accepted payment of his fee in full directly from the client is a spurious averment.

The applicant has not shown that he has any reasonable prospect of success and the application for leave to appeal is therefore dismissed with costs.

C.E.L.BECK J.A.

I agree

R.N. LEON J.P.

I agree

P.H. TEBBUTT J.A.

Delivered in this 10th day of June 2002.