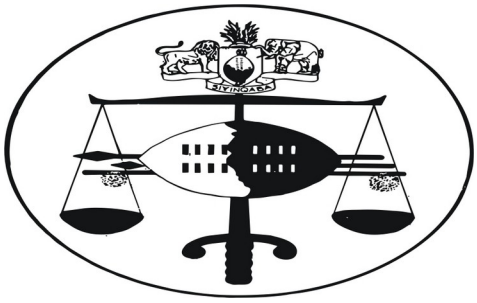

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL NO. 12/2011**

In the matter between:

AZMAN INVESTMENTS (PTY) LTD **APPELLANT**

v

THE GOVERNMENT OF SWAZ ILAND **1ST RESPONDENT**
ATTORNEY GENERAL **2ND RESPONDENT**

CORAM	:	M.M. RAMODIBEDI C.J
		A.M. EBRAHIM J.A.
	:	S.A. MOORE J.A.
FOR APPELLANT	:	M. NKOMONDZE
FOR RESPONDENTS:		V. KUNENE
HEARD	:	16 MAY 2011
DELIVERED	:	31 MAY 2011

Summary

Civil Procedure – Summary judgment – Principles involved – Where it is reasonably possible that the defendant has a good defence – Summary judgment ought to be refused – Appeal dismissed.

JUDGMENT

Ebrahim J.A.

The appellants sought Summary Judgment against the Respondents. The Respondents resisted the relief sought and succeeded. The parties were ordered to pay their own costs.

FACTS

The appellant entered into a contract with the Government of Swaziland in terms of which the appellant agreed to provide catering services at the Mbabane Government Hospital to the value of E3,090,217.30 (Three million ninety thousand two hundred and seventeen Emalangeni and thirty cents). It was the appellant's assertion that it provided the catering services for that value but was only paid E1,801,668.10 (One million eight hundred and one thousand six hundred and sixty eight Emalangeni and ten cents

leaving an unpaid balance of E1,288,549.20 (One million two hundred and eighty eight thousand five hundred and forty nine Emalangeni and twenty cents).

This aspect of its claim was referred to as CLAIM A in the papers.

The initial contract period for the provision of catering services at the MBABANE GOVERNMENT HOSPITAL was for the period 1 October 2007 to 31 September 2008.

The contract, however, was extended to 31 October 2008, the terms of the extension being that catering services would continue to be provided for this period of extension at an additional cost of E257,518.11 (Two hundred and fifty seven thousand five hundred and eighteen Emalangeni and eleven cents). It was the appellant's assertion that it was only paid E109,531.54 (One hundred and nine thousand five hundred and thirty one Emalangeni and fifty four cents) leaving a balance unpaid of E147,986.57 (One hundred and

forty seven thousand nine hundred and eighty six Emalangeni and fifty seven cents).

The total shortfall claimed in respect of the catering services provided at the MBABANE GOVERNMENT HOSPITAL is a total of E1,436,535.77 (One million four hundred thirty six thousand five hundred and thirty five Emalangeni and seventy seven cents).

It was also the case of the appellant that it entered into an agreement with the Government of Swaziland to provide catering services at the SWAZILAND COLLEGE OF TECHNOLOGY for the value of E2,784,457.60 (Two million seven hundred and eighty four thousand four hundred and fifty seven Emalangeni and sixty cents) during the period from 1 October 2007 to 31 July 2008. The appellant alleged that it was only paid E1,959,059.70 (One million nine hundred and fifty nine thousand and fifty nine Emalangeni and seventy cents leaving an unpaid balance of E825,397.90

(Eight hundred and twenty five thousand three hundred an ninety seven Emalangeni and ninety cents).

This agreement was also extended with effect from 1 August 2008 to 31 October 2008. The total costs for the additional catering services to be provided for this extended period was to be E835,337.28 (Eight hundred and thirty five thousand three hundred and thirty seven Emalangeni and twenty eight cents) but an amount of E546,205.20 (Five hundred and forty six thousand two hundred and five Emalangeni and twenty cents) was paid leaving an unpaid balance of E289,132.08 (Two hundred and eighty nine thousand one hundred and thirty two Emalangeni and eight cents).

The appellant claimed a total unpaid balance in respect of it providing catering services to the SWAZILAND COLLEGE OF TECHNOLOGY IN THE SUM OF E1,114,529.98 (One million one hundred and fourteen thousand five hundred and twenty nine Emalangeni and ninety eight cents. This aspect of the claim was referred to as Claim B.

In terms of the above Claims (A & B) the appellant deposed that it was liable to reimburse the Government of Swaziland 5% (five percent) of the monthly costs of electricity and water consumed at the MBABANE GOVERNMENT HOSPITAL and at the SWAZILAND COLLEGE OF TECHNOLOGY, but instead the 1st respondent deducted 10% (Ten percent). The amount deducted was E128,484.02 (One hundred and twenty eight thousand four hundred and eighty four Emalangeni and two cents). What should have been deducted was half that amount, that is, E64,242.01(Sixty four thousand two hundred and forty two Emalangeni and one cent. This formed the basis of its third claim (CLAIM C). The appellant sought relief for the payment of the balance being E64,242.01 (Sixty four thousand two hundred and forty two Emalangeni and one cent).

Wherefore, the appellant sought summary judgment against the Government of Swaziland in the total sum of E2,615,307.76 (Two million six hundred and fifteen thousand

three hundred and seven Emalangeni and seventy six cents) being the shortfall resulting from claims A, B and C.

The Respondents filed a notice to defend the action and raised the following defences. As regards CLAIM A they deposed that:

> "the payment was made on the basis of consumption evidenced through invoices and defendants (respondents) did pay the plaintiff (Appellant) and is not liable ... in the amount claimed or in any amount at all.

On Claim B they deposed:

> "that the plaintiff (appellant) did not perform his (sic) obligations as per the contract to the fullest in that at one point in time he (sic) performed his (sic) part of the contract for only four (4) days (28 October to 31st October, and was only paid for those days performed".

On Claim C the respondent averred:

> "that they charged Plaintiff (Appellant) electricity as per the contract of agreement".

In addition the respondents raised a further defence in terms of Claim 27.2 of the contract which provides as follows:

> "If , after thirty (30) days from the commencement of such informal negotiations, the Employer and the Service Provider have failed to negotiate such amicable settlement, any dispute, controversy, or claim arising out of or in connection with this contract or the breach, termination, or validity thereof, either party may require that the dispute be referred for resolution by final and binding arbitration in accordance with the UNCITRAL Arbitration Rules presently in force."

Although in his affidavit resisting the summary judgment the Principal Secretary in the Ministry of Education representing the Government of Swaziland raised this defence as a point taken ***in limine*** alleging that the appellant had "not

engaged the Defendants (respondents) in an effort to resolve the dispute amicably as per the contract" it seems to me that what the point taken in this regard was in essence and effectively an additional basis of defence against the summary judgment sought by the appellant.

THE LAW

It has been stated on numerous occasions that summary judgment is an extraordinary remedy and that courts should be slow to close the door to a defendant if a reasonable possibility exists that a defendant has a good or bona fide defence.

In the case of **Zanele Zwane and Lewis Stores (Pty) Ltd t/a Best Electric** Civil Appeal No. 22/07 Ramodibedi JA (as he then was) stated:

> "[8] It is well-recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is so 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. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence. See for example **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A); David Chester v Central Bank of Swaziland CA 50/03.**

Each case must obviously be judged in the light of its own merits, bearing in mind always that the court has a judicial discretion whether or not to grant summary judgment. Such a discretion must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion".

See also **Fikile Thalitha Mthembu v Standard Bank Swaziland Limited** Civil Appeal No. 3/09.

In the case of **Shelton Mandla Tsabedze and Standard Bank of Swaziland** Civil Appeal No. 4/2006 Banda JA (as he then was) stated:

> "It is trite that the summary procedure which Rule 32 introduces into the law provides "an extraordinary and stringent remedy" which provides for final judgment. Courts, have however, been warned to be slow to close the door to the defendant if a reasonable possibility exists that an injustice may be done if judgment is granted: **MATER DOLOROSA HIGH SCHOOL v R.M.J STATIONERY (PTY) LIMITED** Civil Appeal No. 3 of 2005 and **DAVID CHESTER V CENTRAL BANK OF SWAZILAND** Civil Appeal No. 50 of 2003."

Beck J.A. expressed similar sentiments in the case of **Mater Dolorosa High School and R.M.J. Stationery (Pty) Ltd.** Civil Appeal No. 3/2005 where he stated:

> "It has been held time and again in the courts of this country that in view of the extraordinary and stringent nature of summary judgment proceedings, the court will be slow to close the door to

a defendant if a reasonable possibility exists that an injustice may be done if judgment is granted.

This quotation is taken from the judgment of Tebbut J.A. in this Court in the case of **Musa Magongo v First National Bank (Swaziland),** Appeal Case No. 38/1999."

In the case of **David Chester and Central Bank of Swaziland** Civil Appeal No. 50/03 Zietsman J.A. stated:

"The above cases also refer to the fact that the procedure of summary judgment constitutes an extraordinary and stringent remedy as it permits a final judgment to be given against a defendant without a trial. The court should therefore not grant summary judgment if there is a reasonable possibility that the plaintiff's application is defective or that the defendant has a good defence."

The words of Ramodibedi ACJ (as he then was) in **Fikile Thalitha Mthembu v Standard Bank Swaziland Limited** referred to supra are also very apposite, where he stated:

"The appellant was not called upon to "prove" her defence at that stage. In this regard I find the following remarks of Watermeyer AJ (as the then was) in **Chambers v Joniker 1952 (4) SA (C)** at 637 compelling, namely:

> "Now, it was said, in the case of **Estate Potgieter v. Elliott,** 1948 (1) S.A. 1084 (C), that it is not incumbent upon a defendant, in formulating his opposition to an application for summary judgment, to do so with the precision required in a plea, and a bona fide defence does not necessarily mean anything more than the substantiation of facts which, if proved would give rise to a valid legal defence.
>
> It is true that the Rule appears to place an onus of some description on the defendant in that it requires him to satisfy the Court that he has a bona fide defence to the action, but that onus, as was pointed out in the case of **De Afrikaanse Pers (Bpk.) v Neser,** 1948 (2) S.A. 295 (C), is not a heavy one."

See also the case of **Variety Investments (Pty) Ltd and Motsa** (CA) SLR 1982 – 1986 [1] at page 77 and the cases cited therein.

It seems to me that by no stretch of the imagination can it be said that what the respondents have raised as defences can be said to be lacking in ***bona fides*** or that their defences have no possibility of success.

The learned judge ***a quo*** however, directed the parties "to comply with Clause 27 of the contract (the arbitration clause) and ordered each party to pay its costs.

The effect of what the learned judge did was to refuse summary judgment, that is, the unequivocal effect of his judgment. In my view the proper order for him to have made was to have ordered that this was not a proper case for summary judgment to be granted and to have referred the matter to trial.

It seems to me that although the respondents did raise the non compliance of the provisions of section 27 (2) (the arbitration clause) as a point ***in limine***, in its attempts to resist the granting of summary judgment in favour of the appellant, in effect what they did was in essence to provide a further ground for resisting the granting of summary judgment. The defences raised by the respondents was, therefore, two fold.

1. The non performance of the terms of the contract by the appellant.

2. The failure to attempt to resolve the impasse between the parties in terms of clause 27 (2) of the Contract.

What the learned judge ***a quo*** should have done is to have refused the granting of summary judgment and referred the matter to trial. In effect though, for all intents and purposes,

what the learned judge ***a quo*** did was to refuse summary judgment.

I am satisfied that summary judgment was properly not granted and the proper order should have been in the following terms:

> "The application for summary judgment is refused with costs and the defendants are given leave to defend the matter."

The appellant has not succeeded in this appeal save that this court is of the view that the order of the court ***a quo*** should have been properly framed as intimated above.

The end result is the same, that is, that the dispute between the parties cannot be resolved on the papers and consequently this is not a case which warrants the granting of a summary judgment.

The court ***a quo*** ordered that each party is to pay its costs. This aspect of the order has not been challenged by the respondents.

In the result the order I make is that the appeal is dismissed with costs and the application for summary judgment is refused and the respondents are given leave to defend the matter.

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

Dated this the 31st day of May 2011.