IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal case No: 49/12

In the matter between:

FATHOOS INVESTMENTS (PTY) LTD	**1st APPELLANT**
ALI HAMISU	**2nd APPELLANT**
NOKUTHULA HAZEERAH	**3rd APPELLANT**

AND

MISI ADAM ALI	**RESPONDENT**

Neutral citation: *Fathoos Investments (PTY) Ltd and 2 Others v. Misi Adam Ali (43/12) [2012] SZSC70 (30th November 2012)*

CORAM: A.M. EBRAHIM JA, M.C.B. MAPHALALA JA, E.A. OTA JA.

Heard : 16 November 2012

Delivered : 30 November 2012

Summary

Civil Appeal – application for summary judgment – defence of duress raised – requirements for summary judgment and for defence of duress – bona fide defence of duress disclosed - summary judgment not competent because the defence raises triable issues.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] This is an appeal against the judgment of the Court a *quo* for granting summary judgment. The following grounds of appeal were noted: firstly, that the learned judge *a quo* erred in law and in fact in not holding that summary judgment was not competent on the peculiar facts of the particular case. Secondly, the learned judge *a quo* erred in law and in fact in applying the test for determining the existence or otherwise of disputes of fact for purposes of summary judgment as if she was already dealing with the merits of the main action. Thirdly, that the learned judge *a quo* erred in law and committed a gross irregularity in not appreciating the material difference in wording between Swaziland's Rule 32 and its South African counterpart. Fourthly, the learned judge *a quo* erred in law and in fact in resorting to probabilities when determining whether or not summary judgment was competent.

[2] The respondent, second and third appellants were co-directors of the first appellant until sometime in 2009; they resolved that the respondent should cease being a co-director and shareholder of the first appellant. The respondent accordingly ceased to be a co-director and shareholder of the first appellant; however, his name was not removed from the Registry of Companies. The second and third appellants continued to operate the first appellant for their own benefit.

[3] It was agreed between the parties that the respondent would be paid an amount of E80 000.00 (eighty thousand emalangeni) in lieu of his 80% shares held with the first appellant. Sometime in 2009, the respondent lent and advanced a loan of E90 000.00 (ninety thousand emalangeni) to the first appellant represented by the second and third appellants; in addition, the second and third appellants signed a Deed of Suretyship binding themselves as sureties and co-principal debtors jointly and severally in solidium with the first appellant.

[4] Pursuant to the loan agreement between the first appellant and the respondent, a Deed of Settlement was concluded between the parties on the 10th January 2011 in terms of which the appellants would liquidate the loan by paying E10 000.00 (ten thousand emalangeni) on or before the 30th January 2011 and thereafter to pay monthly instalments of E10 000.00 (ten thousand emalangeni) until the balance due and owing has been paid in full together with interest; they further agreed that in the event the debtor defaulted in payment of the loan, including failure to pay timeously, the balance outstanding would become due and payable. The Deed of Settlement further provided that payments would be made to Zalee's Investments (PTY) Ltd or alternatively to Nokuthula N. Nkambule.

[5] In respect of the first claim, the respondent argued that the first appellant had breached the Deed of Settlement, and, that in accordance with the provisions of the agreement, the whole amount of E90 000.00 (ninety thousand emalangeni)

was now due, owing and payable; he further argued that the second and third appellants by virtue of the Deed of Suretyship were equally liable to pay the amount claimed.

[6] In respect of the second claim, the respondent alleged the existence of another agreement between the parties concluded on the 28th December 2010 in terms of which the second appellant undertook to pay E80 000.00 (eighty thousand emalangeni) in respect of the 20% shares owned by the respondent in the first appellant; the contract was concluded prior to his resignation as both shareholder and director of the company. In terms of the said agreement, payment of E10 000.00 (ten thousand emalangeni) monthly was to be made for a period of eight months commencing from December 2010.

[7] The respondent argued that the appellants had breached this agreement by failing to pay the agreed amount of his shares or any part thereof; and, that he was entitled to cancel the agreement. He further argued that the appellants were jointly and severally liable to pay the amount; he sought orders for cancellation of the agreement, payment of the amount claimed as well as interest at the rate of 9% per annum a *tempore morae*.

[8] The appellants defended both claims; and, the respondent inturn lodged an application for Summary Judgment on the basis that the appellants did not have a *bona fide* defence to the claims; he further argued that the Notice of Intention

to Defend was filed solely for purposes of delaying the final outcome of the action.

[9] The appellants inturn filed an Affidavit Resisting Summary Judgment. In *limine* the appellants argued that Summary judgment was incompetent herein on the basis that the respondent did not state in the Particulars of Claim whether the agreement was oral or written, where and when it was concluded as contemplated by Rule 18 (6) of the High Court Rules. They further argued that in terms of Rule 18 (12) if a party fails to allege these requirements in his Particulars of Claim, that pleading is irregular and liable to be set aside in terms of Rule 30.

[10] On the merits, they denied receiving the loan from the respondent; however, they conceded signing the Deed of Suretyship as well as the Deed of Settlement drawn by Attorney Mthokozisi Dlamini. They argued that the documents were brought to them by the respondent in the company of police officer Magongo from the Manzini Police Station; they further alleged that the respondent and the police officer threatened them with arrest if they didn't sign the documents, and, that they were not given time to read the documents.

(11) They further alleged that the respondent had previously lodged a charge of fraud against the second appellant with the police; he conceded that he was interrogated by the police but was subsequently released. However, the police

told him that he could be arrested soon depending on their investigations. The appellants reiterated that the documents were signed because of the fear of arrest by the police as well as losing their business.

[12] With regard to the second claim, the appellants denied that the respondent had a 20% shareholding in the first appellant; they argued that the Agreement was signed in order to legalise his stay in the country. They argued that he had to be a director and shareholder of the first appellant for him to reside in the country. They conceded paying the respondent E10 000.00 (ten thousand emalangeni) as part-payment of the E80 000.00 (eighty thousand emalangeni) through Tweneboa-Kodua Kwasi who was sent to deliver the money.

[13] The appellants further alleged that the respondent was an employee of the first appellant, and, that he was indebted to them in the sum of E101 660-78 (one hundred and one thousand six hundred and sixty emalangeni seventy eight cents). Similarly, they argued in the alternative, that even if they were indebted to the respondent in the sum of E80 000.00 (eighty thousand emalangeni), the respondent owed them more than that amount.

[14] The Affidavit Resisting Summary Judgment was signed by the second appellant on behalf of all the appellants. In addition the third appellant who happened to be the wife of the second appellant deposed to a Confirmatory Affidavit in support of the Affidavit deposed by the second appellant.

Tweneboa-Kodua Kwasi deposed to a Supporting Affidavit in which he confirmed that he was a witness to the signing of both the Deed of Settlement as well as the Deed of Suretyship. He submitted that these documents were signed at the respondent's shop in the presence of a police officer in uniform. He further confirmed that he was the person who was sent by the second appellant to give E10 000.00 (ten thousand emalangeni) to the respondent as an initial payment towards the settlement of E80 000.00 (eighty thousand emalangeni) in lieu of respondent's shares in the first appellant.

[15] Similarly, Attorney Mthokozisi Dlamini deposed to a Supporting Affidavit in which he admitted drafting the Deed of Suretyship as well as the Deed of Settlement, which documents were dated 10th January 2011. He further admitted that he was present when the respondent signed the Deed of Settlement at his offices; and, that he also signed as a witness. However, he denied that he was present when the Deed of Settlement was signed by the appellants and the other witnesses as well as when the document was taken to the Manzini Police Station to be commissioned by Sergeant Vincent Bhembe.

[16] The respondent filed a replying affidavit in response to the Affidavit Resisting Summary Judgment. In *limine* he argued that the present matter, as it related to summary judgment, falls within the ambit of Rule 32 of the High Court Rules. He argued that the action complied with the said Rule 32 since it was founded on liquid documents with a liquidated amount in money. He argued that the

Agreement between the parties to pay the respondent E80 000.00 (eighty thousand emalangeni) in lieu of his shares, the Deed of Suretyship as well as the Deed of Settlement constituted liquid documents for purposes of Rule 32 of the High Court Rules; and, that it was apparent that the matter arose from the breach of contract.

[17] He denied the allegations of threats of arrest made by the appellants and argued that if this was true, they could have reported the matter to the police or even sued him in a civil action for the cancellation of the contracts. Similarly, he denied knowledge of the alleged police officer Magongo who was alleged to have intimidated them to sign the agreements together with the respondent.

[18] He denied residing in the country illegally as alleged by the appellants and annexed a police clearance to that effect. He denied owing any monies to the appellants and argued that he started giving money to the first appellant in 2007 even before residing in the country. He began staying permanently in the country when he became a director and shareholder of the first appellant; he annexed a resolution of the Board of Directors of the first appellant taken on the 29th April 2007 in which he became a shareholder and a director.

[19] Similarly, he denied receiving part-payment from the appellants of E10 000.00 (ten thousand emalangeni) sent through Tweneboa-Kodua Kwasi in liquidation of the E80 000.00 (eighty thousand emalangeni) in respect of shares in the first

appellant. The appellants didn't ask for leave to file a further affidavit in response to the replying affidavit.

[20] The Court *a quo* found correctly that there was no merit in the preliminary objections raised by the appellants to the effect that the Particulars of Claim did not comply with Rule 18 since they failed to allege where and when the contracts were concluded, and whether or not they were in writing. It is apparent in paragraph 9 of the Particulars of Claim that the parties drew up and executed a Deed of Suretyship in 2009 in Manzini, and that a copy thereof was annexed. Similarly, the Deed of Settlement was signed in Manzini by the parties on the 10th January 2011, and that a copy thereof was annexed to the Particulars of Claim. This is reflected in paragraph 10 of the Particulars of Claim. With regard to the second claim, the Agreement for the payment of E80 000.00 (eighty thousand emalangeni) in lieu of shares was signed in Manzini on the 28th December 2010; and, this is reflected in paragraph 11 of the Particulars of Claim. A copy thereof is annexed to the Particulars of Claim.

[21] The Affidavit Resisting Summary Judgment raises certain triable issues. Firstly, the appellants concede concluding and signing the Deed of Suretyship as well as the Deed of Settlement in respect of the Loan of E90 000.00 (ninety thousand emalangeni); however, they argued that these Agreements were induced by duress. They further argued that the respondent and a police officer

in uniform named Magongo threatened them with arrest if they did not sign the documents. The respondent denies knowledge of the named police officer.

[22] The appellants further argued that the fact that the respondent caused Sergeant Vincent Bhembe to sign the Deed of Settlement in his capacity as the Commissioner of Oaths was a clear indication of the access which the respondent had to the police service.

[23] Similarly, the appellants argued that the respondent had, at the time, lodged a criminal charge of fraud against the second appellant; he was taken to the Manzini Regional Police Headquarters for questioning. He was subsequently released but informed that he could be arrested anytime soon depending on police investigations. Accordingly, the appellants argued that if they were arrested, they could lose their business; hence, they signed the documents.

[24] Another triable issue raised by the appellants is that the respondent as one of the Directors of the first appellant was refusing to sign application forms for renewal of the trading licence unless they signed the documents. They argued that at the time their business was not operational since trading without a valid licence is a criminal offence, and that they could be arrested for violating the law; hence they were compelled by circumstances to sign the documents.

[25] The appellants deny applying for and receiving the Loan from the respondent; they claim that the respondent was merely an employee of the first appellant and did not have the money to loan them.

[26] The appellants admit concluding and signing the Agreement in respect of the E80 000.00 (eighty thousand emalangeni) in lieu of shares owned by the respondent in the first appellant; they denied that the respondent held shares with the first appellant or that they owed him E80 000.00 (eighty thousand emalangeni). Their defence to the claim was that they concluded the Agreement in order to legalise the respondent's stay in the country since he had to appear as both a Director and Shareholder for the first appellant in order to reside in the country lawfully. Again this is a triable issue which also renders summary judgment not competent in the circumstances.

[27] They further argued that the respondent owed them E101 660.78 (one hundred one thousand six hundred and sixty emalangeni seventy eight cents); however, they did not lodge a counter-claim to substantiate their allegation. At paragraph 2.9 of the Affidavit Resisting Summary Judgment, they state the following:

> **"2.9 Even if plaintiff is in fact entitled to the E80 000.00 (eighty thousand emalangeni) which is not the case, the sum total of moneys that plaintiff owes to the Defendants should be set-off against what he is purportedly owed and if my calculations are good, plaintiff is not owed anything at the end of the day."**

[28] The respondent relies on three written documents as the basis for his claim; and, the appellants do not dispute concluding and signing all three documents being the Deed of Suretyship, the Deed of Settlement as well as the Agreement to reimburse the respondent of E80 000.00 (eighty thousand emalangeni) in lieu of his shares in the first appellant.

[29] It is a trite principle of our law that when a contract has been reduced to writing, no extrinsic evidence may be given of its terms except the document itself nor may the contents of such document be contradicted or varied by oral evidence as to what passed between the parties during negotiations leading to the conclusion of the contract; and, the written contract becomes the exclusive memorial of the transaction. This principle of our law is referred to as the Parol Evidence rule, and, its purpose is to prevent a party to a written contract from seeking to contradict or vary the writing by reference to extrinsic evidence at the risk of redefining the terms of the contract. Notable exceptions exist where the contract is vitiated by mistake, fraudulent misrepresentation, illegality or duress. See the cases of *Johnston v. Leal* 1980 (3) SA 927 (A) at 943; *Soar v. Mabuza* 1982-1986 SLR 1 at 2G-3A.

[30] The basis of the appeal is that the Court *a quo* misdirected itself and erred in not coming to the conclusion that summary judgment was not competent on the facts of this matter in accordance with Rule 32 of the High Court Rules on the

basis that the contracts were vitiated by duress. The rule provides the following:

> **"32. (1) Where in an action to which this rule applies and a Combined Summons has been served on a defendant or a Declaration has been delivered to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to the court for summary judgment against that defendant.**
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> **(2) This rule applies to such claims in the summons as is only –**
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> **(a) on a liquid document;**
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> **(b) for a liquidated amount in money;**
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> **(c) for delivery of specified movable property; or**
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> **(d) ejectment;**
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> **together with any other claims for interest and costs.**
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> **(3) (a) An application under sub-rule (1) shall be made on notice to the defendant accompanied by an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, and such affidavit may in addition set out any evidence material to the claim.**
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> **(b) Unless the Court otherwise directs, an affidavit for the purposes of this sub-rule may contain statements of information or belief with the sources and grounds thereof."**

[31] A liquid document is one in which the debtor acknowledges in writing over his signature, or that of his authorised agent, his indebtedness in a fixed and certain

sum of money. A claim is considered to be for a liquidated amount in money if it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation. See *Herbstein & Van Winsen*, The Civil Practice of the Supreme Court of South Africa, 4th edition, *Van Winsen* et al, Juta publishers, 1997 at pages 435-436.

[32] The purpose of the summary judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. See *Herbstein & Van Winsen* (supra) at page 434-435.

[33] Rules 32 (4) and (5) provide the following:

> **"32. (4) (a) Unless on the hearing of an application under sub-rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates 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, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.**
>
> **(b) The court may order, and subject to such conditions, if any as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any claim in reconvention made or raised by the defendant in the action.**

(5) (a) A defendant may show cause against an application under sub-rule (1) by an affidavit or otherwise to the satisfaction of the court and, with the leave of the court the defendant may deliver an affidavit in reply.

(b) Sub-rule (3) (b) applies for the purpose of this sub-rule as it applies for the purposes of that sub-rule.

(c) The court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

[34] *Dunn AJ* in the case of the *Bank of Credit and Commerce International (Swaziland) Ltd v. Swaziland Consolidated Investment Corporation Ltd and Another* 1982 -1986 SLR 406 (HC) at 407 stated as follows:

> **"... It is not enough for a defendant simply to allege that he has a bona fide defence to the plaintiff's action. He must allege the facts upon which he relies to establish his defence. When this has been done, it is for the court to decide whether such facts, if proved would in law constitute a defence to the plaintiff's claim, and also whether they satisfy the court that the defendant in alleging such facts is acting *bona fide*."**

[35] Similarly, *Corbett JA* in the case of *Maharaj v. Barclays National Bank* 1976 (1) SA 418 (A) at 426 A-E stated the following:

"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that be Court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to whether the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully"... connotes in my view that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least, disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence."

35.1 The *Maharaj* case (supra) was approved and applied by the Court of Appeal of Swaziland, as it then was, in the case of *Variety Investments (PTY) Ltd v. Motsa* 1982-1986 SLR 77 (CA) at 80 A-E; the Court held that the judgment in the *Maharaj* case correctly reflects the law in this country.

[36] Over a long period of time, our courts have consistently regarded the summary judgment procedure as stringent and extraordinary since it allegedly closes the doors of the Court to the defendant and permits a judgment to be given without

a trial. However, the Supreme Court of Appeal of South Africa has shifted from that original position for the better and limited its focus in ensuring that a defendant with a triable issue is not shut out; in addition, whether or not the defendant has a bona fide defence to the action. This development is welcome since it has the capacity to nourish, enhance and improve our jurisprudence for the better.

[37] This trend is apparent in the case of *Maharaj* (supra) as well as that of *Joob Joob Investments (PTY) Ltd v. Stocks Mavundla Zek Joint Venture* 2009 (5) SA (1) SCA at para 32-33. In the latter case *Navsa JA* stated the following:

> **"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his/her day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out....**
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> **Having regard to its purpose and its proper application, summary judgment proceedings only hold terror and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule as set out with customary clarity and elegance by *Corbett JA* in the *Mahara*j case at 425 G- 426 E."**

[38] The appellants have disclosed the nature and grounds of their defence and the facts upon which it is founded, namely, that the contracts were induced by

duress. The Supreme Court of South Africa quoted with approval and applied the principles laid down in the case of *Arend & Another v. Astra Furnishers (PTY) Ltd* 1974 (1) SA 298 (C) at 305 – 306 where *Corbett J*, as he then was, dealt with the elements necessary to set aside a contract on the ground of duress:

> **"It is clear that a contract may be vitiated by duress (metus), the *raison de'etre* of the rule apparently being that intimidation or improper pressure renders the consent of the party subtracted to duress not true consent.... Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing him a fear by means of threats. Where a person seeks to set aside a contract, or to resist the enforcement of a contract, on the grounds of duress based on fear, the following elements must be established:**
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> **(i) The fear must be a reasonable one;**
> **(ii) It must be caused by the threat of some considerable evil to the person concerned or his family;**
> **(iii) It must be the threat of an imminent or inevitable evil;**
> **(iv) The threat or intimidation must be unlawful or *contra bonos mores*;**
> **(v) The moral pressure used must have caused damage."**

[39] The defence raised by the appellants that the contracts were induced by duress does constitute a *bona fide* defence since it raises triable issues for which summary judgment is not competent. In this regard, the judge *a quo* misdirected herself.

[40] Accordingly, the judgment of the Court *a quo* is set aside and substituted with the following:

1. The appeal is allowed with costs on the ordinary scale.
2. The matter is remitted to the Court *a quo* for trial before a different judge.
3. The parties are directed to file the necessary pleadings timeously with the Registrar of the High Court pending the allocation of a date of hearing.

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M.C.B. MAPHALALA
JUSTICE OF APPEAL

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I agree: A.M. EBRAHIM
JUSTICE OF APPEAL

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I agree: E.A. OTA
JUSTICE OF APPEAL

FOR APPELLANTS Advocate M.L.M Maziya
Instructed by Attorney B. Simelane

FOR RESPONDENT Attorney M.S. Dlamini

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012