IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Civil Appeal Case No. 38/2014

In the matter between

SMALL ENTERPRISES DEVELOPMENT COMPANY **Appellant**

And

CLOETTE NTOMBI BHEMBE t/a COMPUTER PROFICIENCY TRAINING CENTRE AND BUSINESS COLLEGE **Respondent**

Neutral citation: *Small Enterprises Development Company v Cloette Ntombi Bhembe t/a Computer Proficiency Training Centre and Business College (38/2014)* [2014] SZSC 41 (3 December 2014)

Coram: RAMODIBEDI CJ, MCB MAPHALALA JA and DR ODOKI JA

Heard: 20 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary: **Civil procedure – Summary judgment – Principles discussed – Defendant failing to raise a *bona fide* defence or to show the existence of triable issues – Appeal dismissed with costs.**

JUDGMENT

RAMODIBEDI CJ

[1] I discern the need to commence this judgment with a chronology of the relevant events pertaining to the matter.

[2] On 15 March 2010, the present respondent, as plaintiff, issued a simple summons against the appellant, as defendant, for payment of a total sum of E 22, 617.00 (Twenty Two Thousand Six Hundred and Seventeen Emalangeni) for professional training services rendered, allegedly at the dependant's own special instance and request. The plaintiff also sued for interest at the rate of 9% per annum and other ancillary relief. Henceforth, I

shall refer to the parties by their nomenclatures in the court below.

[3] On 23 March 2010, the defendant filed a notice of intention to defend the matter.

[4] On 12 May 2010, the plaintiff filed a declaration. I shall return to the material terms of the declaration in due course.

[5] On 14 June 2010, the plaintiff filed an application for summary judgment on the basis that the defendant had no *bona fide* defence and that appearance to defend was made solely for the purpose of delay. The supporting affidavit of Colette Ntombi Bhembe was attached in that regard. More importantly, this deponent verified the facts as set out in the declaration. These include the material allegations referred to in paragraph [9] below. I shall return to this aspect of the case later in this judgment.

[6] Strangely, instead of filing an affidavit resisting summary judgment, and on 12 July 2010, the defendant filed a plea.

[7] On 21 September 2012, which as can be seen was full two (2) years after it had filed a notice of intention to defend, the defendant finally filed an "affidavit resisting summary judgment."

[8] In his belated affidavit resisting summary judgment the defendant's Managing Director, Dorrington Matiwane, failed to address issuably each and every paragraph in the plaintiff's declaration. Instead, he relied on two factors only as constituting what he perceived to be a *bona fide* defence or, as he alleged, triable issues, namely:-

(1) that there was "no proof of allegation" to show that there was any purchase order made by the plaintiff to the defendant;

(2) that one Oscar Maphalala who was alleged in the plaintiff's declaration to have acted on the defendant's behalf was not duly authorised to do so and that he was "an ordinary employee." It is important to record, however, that at the hearing of the appeal in this Court Mr M.P. Simelane for the appellant properly conceded that Oscar Maphalala had, at the very least, ostensible authority to represent the defendant. So the point about lack of authority falls away. Similarly, the defendant's complaint that there was no purchase order is completely without merit in the circumstances of this case. This is so primarily because it is common cause that the parties subsequently engaged in negotiations, not on whether or not a purchase order was made, but specifically on quantum only.

[9] It is convenient at this stage then to return to the point about the plaintiff's material allegations in the declaration as indicated in paragraph [4] above. In his affidavit resisting summary judgment, Dorrington Matiwane dismally failed to contest issuably the following allegations which, as stated in paragraph [11] below, now constitute evidence:-

(1) that in or about November 2009, and at plaintiff's premises, the plaintiff acting personally and the defendant duly represented by Oscar Maphalala, who was admittedly its employee as a training consultant, and who held himself out as being fully authorised to bind the defendant, entered into an oral agreement;

(2) that in terms of the agreement the defendant engaged the plaintiff to provide training for Constituency administrators on Entrepreneural and Office Procedures;

(3) that the agreed charge rate for the training in question was E150.00 per person per hour, being the standard and customary rate charged by the plaintiff;

(4) that on or about 27 November 2009, the plaintiff duly carried out a fund training workshop for group A, for Constituency administrators as agreed. The training was held at Maguga Lodge and was attended by 23 participants. The duration was $3^{1}/_{2}$ hours;

(5) that, similarly, on or about 4 December 2009, the plaintiff duly carried out a second training workshop for group B of the Constituency administrators at Orion Hotel. Nineteen (19) participants attended for a duration of $3^{1}/_{2}$ hours; and

(6) that on or about 17 December 2009, the plaintiff duly presented her invoice, annexure "CB3", to the defendant, reflecting an amount of E 22,617.00 as being due and payable but which amount the defendant "despite lawful demand either neglects, refuses and/or fails to pay."

[10] In paragraph 2 of her affidavit in support of an application for summary judgment the plaintiff, Colette Ntombi Bhembe, made the following crucial averments:-

"*I have read the plaintiff's particulars of claim and state that:*

2.1 I can and do verify the facts in the cause of action claimed therein.

2.2 In my belief there is no bona fide defence to the claim and the defendant has entered appearance to defend solely for the purpose of delaying the action."

[11] What this then means is that the plaintiff's allegations fully set out in paragraphs [9] above now constitute evidence against the defendant by virtue of Colette Ntombi Bhembe's affidavit. If

any authority is needed for this proposition in this jurisdiction, it is **Prime Minister of Swaziland and Others v Christopher Vilakati, Civil Appeal Case No. 30/12; Simon Vilane N.O. and Others v Lipney Investments (Pty) Ltd Civil Appeal No. 78/2013**. Since the defendant failed to contest these allegations issuably or at all in his affidavit resisting summary judgment, the court is entitled to proceed on the basis of their correctness for the purpose of summary judgment.

[12] Now, the principles governing summary judgment are well – settled in this jurisdiction. The court proceeds from the premise that summary judgment is an extraordinary and stringent procedure which is primarily designed to provide a speedy remedy to a plaintiff in a case where the defendant has no *bona fide* defence and where appearance to defend has been made solely for the purpose of delay. See, for example, such cases as **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric**, **Civil Appeal No. 22/07; Bernard Nxumalo v The Attorney General, Civil Appeal Case No. 50/2013**. It is, however,

necessary to bear in mind that in this jurisdiction, and in terms of Rule 32 (4) (a) of the High Court Rules, the court is entitled to dismiss an application for summary judgment simply on the ground that there are triable issues in the matter. See **Jeke (Pty) Limited v Samuel Solomon Nkabinde, Civil Case No. 54/2013 per Ramodibedi CJ (Moore and MCB Maphalala JJA** concurring). I should be prepared to add that it is the duty of the court to determine whether a "triable" issue is genuine and not raised simply to defeat plaintiff's right to a speedy resolution of the case.

[13] Similarly, I discern the need to approach the present matter on the basis of the fundamental principles laid down in **Du Setto (Sunny Side 11 (Pty) and Others v Financial Services Company of Botswana Ltd [1994] BLR 274 (CA)** at 287 to the effect that the court should "not be astute to extend liberality to defendants in summary judgment matters who raise bogus defences in order to evade their obligations and to keep plaintiffs with valid claim out of their money." This Court

adopted the principle in Jeke's case supra. The Court cautioned, however, that each case must depend on its own peculiar circumstances.

[14] Apart from an acceptance of the correctness of the plaintiff's version as fully set out in paragraph [9] above, I am of the view that the defendant faced a further insurmountable hurdle. It is common cause that after it was presented with an invoice in the matter, on 17 December 2009, it entered into negotiations with the plaintiff in the course of which it evidently acknowledged its indebtedness to the latter, at least in the sum of E3353.00. In this regard the defendant addressed a letter on its official letterheads to the plaintiff's attorneys dated 17 June 2010. It proves convenient to reproduce the evidently incriminating letter in question:-

"MS & CO ATTORNEYS, NOTARIES & CONVEYANCERS
P O Box 3610
Mbabane H100
Swaziland

17th June 2010

Dear Miss/Sir,

RE: SEDCO/CLOETE NTOMBI BHEMBE

I refer to you letter dated 16th June 2010 and apologize for a late response.

I wish to advise of our position pertaining the settlement we feel is appropriate under the circumstances. Our understanding is that there is a normal charge that can be applicable when determining a charge for training services as offered by college lecturer which we believe Miss Bhembe is. A University Lecturer offering part time training is paid E 398.00 per hour regardless of the number of students. We therefore wish to propose a settlement of the following;

DATE	***HOURS/KM***	***RATE***	***AMOUNT (E)***
27 November 2009	*3.5 hrs*	*E398*	*1 393*
Travelling: Mbabane to Maguga Lodge	*120 km*	*E2.10*	*252*
04 December 2009	*3.5 hrs*	*E398*	*1 393*
Travelling: Mbabane to Orion Hotel	*150*	*E2.10*	*315*
TOTAL			***3 353***

I hope this proposal will be acceptable to Miss Bhembe.

Yours Faithfully

D.M. Matiwane
Managing Director."

Similarly, on 23 June 2010, the defendant's attorneys addressed a letter to plaintiff's attorneys confirming the proposed settlement.

[15] As can be seen from its letter of 17 June 2010, the defendant was not disputing liability as such. Crucially, it did not dispute that the plaintiff did in fact provide professional training services as agreed. Instead, and as stated above, the defendant merely queried the quantum on what it alleged a university lecturer offering part-time training was paid per hour, namely, E 398.00 regardless of the number of students. In this regard, it will be recalled from paragraph [9] above that the charge rate agreed between the parties was E 150.00 per person per hour. There is no evidence on oath to the contrary.

[16] It is interesting to note for that matter that it took full six (6) months after receiving plaintiff's invoice for the defendant to "propose a settlement" of the matter in which it now sought a variation of the parties' original agreement. Undoubtedly, such lackluster attitude is inconsistent with a *bona fide* defence. As is evident from correspondence, the defendant never raised queries, such as the allegation that there was no purchase order or that it's own admitted employee, Oscar Maphalala, was not authorised to act on its behalf. Not surprisingly in these circumstances, the plaintiff rejected the defendant's "proposed settlement" and insisted on payment in full as agreed. The *court a quo* upheld its claim by way of summary judgment.

[17] Purely for the sake of completeness, and in order to recap, it is necessary to briefly return to the facts. In this regard, it is pertinent to emphasise a strange feature of this case. It is that instead of filing an affidavit resisting summary judgment, and on 12 July 2010 as stated above, the defendant filed a plea contrary to the clear provisions of Rule 32. In my view, if there is any

significance to be attached to that plea it is that it provides material on which the court is able to determine whether there are triable issues in the matter.

[18] Regrettably for the defendant, the plea simply amounts to a bare denial of plaintiff's allegations without more. It does not raise any triable issues at all. Thus, for example, (1) it does not address the plaintiff's material allegation that professional training services were actually rendered to the defendant, (2) it does not raise the query referred to in paragraph [14] above to the effect that a university lecturer offering part-time training was paid E 398.00 per hour regardless of the number of students, and (3) while denying in paragraph 9 that on or about 17 December 2009 the plaintiff duly presented its invoice to the defendant for settlement, the defendant inexplicably makes the following averment in paragraph 6 of its plea:-

> *"The defendant only learnt of the training upon <u>presentation of the invoice</u> …. ." (Emphasis added.)*

[19] On a conspectus of all of the foregoing, and having regard to the principles governing summary judgment, I have come to the inexcapable conclusion that the learned judge *a* quo (Mabuza J) was correct to grant summary judgment on the ground that the defendant had no *bona fide* defence in the matter. It is clear, as it seems to me, that this is a typical case where the defendant raised a bogus defence in order to evade its obligations, and to keep the plaintiff with a valid claim out of her money. It is astonishing, to say the least, that it has succeeded in doing so for almost five years now.

[19] In the result the appeal is dismissed with costs.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree _____

MCB MAPHALALA

JUSTICE OF APPEAL

I agree _____

DR. B.J. ODOKI

JUSTICE OF APPEAL

For Appellant **:** Mr M.P. Simelane

For Respondent **:** Mr M.L. Sithole