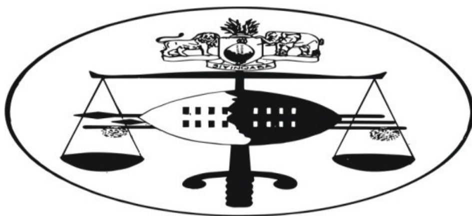

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CIVIL APPEAL CASE NO: 59 /2015(B)

In the matter between:

CENTRAL BANK OF SWAZILAND APPELLANT

AND

YAMTHANDA INVESTMENTS
RESPONDENT

Neutral Citation:	*Central Bank of Swaziland vs. Yamthanda Investments (Pty) Ltd. (59/2015(B)* [2016] SZSC 11 (30 June 2016)
Coram:	**MCB MAPHALALA, CJ** **DR. BJ ODOKI, JA** **K. NXUMALO, AJA**
Heard:	13th May 2016

Delivered: 30th May 2016

Summary: *Civil Procedure – Proceedings by combined summons under Rule 17 (1) Summary Judgment - Rules of the High Court – Notice to defend filed – Defendant not given leave to defend – Court a quo held trial – whether defendant had bonafide defence on merits – Triable issues disclosed in pleadings and hearing – Court a quo entered summary judgment against defendant – Principles governing summary judgment – court a quo erred in granting summary judgment when the defendant had a bonafide defence on the merit and proceedings raised triable issues – Appeal allowed – Appellant given leave to defend.*

JUDGMENT

DR. B.J. ODOKI, JA

[1] This is an appeal against the judgment of the court *a quo* delivered on the 9th October 2015, in which the court granted summary judgment against the Appellant for payment of the sum of E85, 158-00.

[2] On the 28th October 2014, the Respondent instituted proceedings against the Appellant for payment of the said amount in respect of diaries ordered for Appellant's staff.

[3] The Respondent claimed that it procured the diaries for and on behalf of the Appellant as per specifications agreed upon.

[4] The Respondent further alleged that it sought an extension of the time within which to deliver the diaries following an accident involving its Managing Director, and that an extension had been granted by the Appellant's former employee Mr. Sibusiso Mngadi.

[5] On the 11th March 2014 the Respondent attempted to deliver the diaries together with the invoice and Appellant refused to accept delivery of the diaries.

[6] On the 11th April, 2014 the Appellant wrote to the Respondent to advise that it had cancelled the tender for the lack of delivery of the diaries.

[7] The Respondent contended that the unilateral cancellation of the agreement was unlawful after the Respondent had discharged all its obligations and as a consequence, it suffered damages in the sum of the tender amount.

[8] When the Appellant entered an appearance to defend, the Respondent brought an application for summary judgment, contending that the Appellant had no bona fide defence, and that the opposition had been entered sorely for the purpose of delaying the matter. The Application was supported by an affidavit deposed by Anele Shabangu, the Managing Director of the Respondent.

[9] The Appellant filed an opposing affidavit deposed by Bheki O. Motsa who described himself as the Secretary of the Tender Committee of the Appellant.

[10] The Appellant alleged that it was justified to refuse to accept delivery of the diaries for two principal reasons, namely that the Respondent had failed to deliver the diaries by 1st December 2013, and that the Respondent delivered diary covers only and not diaries as per the tender award.

[11] The Appellant further stated that there was no dispute that the Respondent failed to deliver by 1st December 2013 as it could be seen from the various extensions of time that were sought on 10th December 2013, as well as after the delivery date had passed on 23rd January 2014.

[12] In its replying affidavit, the Respondent sought to deny that it was out of time and contended that one Sibusiso Mngadi (a former employee of the Appellant) granted the extension and that Mr. Mngadi had the necessary authority to do so. The Respondent claimed that Mr. Mngadi changed the tender to require the Respondent to deliver only filofaxes for 2015.

[13] It was the argument of the Appellant that Mr. Mngadi had no such authority in law to validly bind the Appellant. The decision to award the tender was taken by a lawfully consisted Tender Committee of the Appellant, which had authority to waive or vary the conditions of the tender. It was also submitted that Mr. Mngadi was designated as the official to handle enquiries and that this did not detract from the terms of the award.

[14] The learned judge in the court a quo heard the evidence from the Appellant and Respondent and granted the summary judgment.

[15] In its Notice of Appeal, the Appellant stated the following grounds:

> ***"1. The learned Judge erred to grant Summary Judgment in circumstances wherein it was not competent to do so as set out below:***
>
> ***1.1 That there were triable issues in this matter and Summary Judgment ought not to have been granted.***
>
> ***1.2 The court a quo proceeded under Rule 32 (5) (d) to conduct a trial, whereas it should only have called upon the Defendant and not the Plaintiff.***
>
> ***1.3 A plea on the merits to warrant a full blown trial had not been filed, so the Appellant could not have its case fairly and properly determined.***
>
> ***1.4 There were no special circumstances stated in the judgment warranting that any officer of the Defendant be examined under oath.***
>
> ***2. The learned Judge erred by not refusing Summary Judgment as it was apparent that the Plaintiff had not presented an unanswerable case and the matter indeed ought to be referred to trial."***

[16] The Appellant prayed that the Judgment of the court *a quo* be set aside with costs.

[17] In its Heads of Argument the Appellant elaborated on the above grounds of appeal. The main points raised were as follows:

1. That The Learned Judge in the court *a quo* erred in holding that the amount in question was a liquidated amount in money, whereas the Respondent has claimed damages which had not been pleaded in accordance with Rule 18 (10).

2. To constitute a liquidated amount in money, the amount must be one agreed upon or capable of speedy and prompt ascertainment.

3. The *court a quo* purporting to act in accordance with Rule 32 (5) (d), erroneously conducted a mini-trial without a plea having been filed on the merits.

4. The court *a quo* erred by allowing the Respondent to lead evidence of its claim, as Rule 32 (5) (d) only applies where it appears to the court that there are special circumstances for it to order the Defendant's Director, Manager, Secretary or other similar officer, either to produce any document or to attend before court and be examined.

5. The Respondent claimed to have delivered 300 diaries referred to as filofaxes which is not what was in tender award or what the Respondent invoiced for.

6. The court *a quo* erred in law to accept that the person whom enquiries were to be directed had authority to change the tender award.

[18] In its Heads of Argument the Respondent raised the following submissions:

1. That the Counsel for the Appellant did not object to referring the matter for trial on the specific issue.

2. That the court *a quo* was correct in granting Summary Judgment in the absence of a *bona fide* defence from the Appellant, and courts should not be lenient to defendants who raise bogus defences in order to evade obligations.

3. That Mr. Mngadi had express authority to deal with the tender as he had been designated as the contact person.

4. That the sum of E85, 158-00 was the total value of the tender award and therefore the Respondent is entitled to payment of this amount as it performed in terms of the tender upon the extension granted by the Appellant through its contact person after all the specifications of the diaries were extensively discussed with the contact person and approved. The Appellant should be estopped from denying that Mr. Mngadi had authority

to vary the terms of the tender as the Respondent reasonably believed that he was dealing with someone duly authorised by the Tender Committee. No evidence was led to suggest that Mr. Mngadi had no authority to deal with the Respondent.

[19] The Respondent lodged a combined summons under Rule 17 (1) of the High Court Rules which provides:-

> ***"(1) Every person making a claim against any other person may, through the office of the Registrar, sue out a summons as near as may be in accordance with Form 10 or Form 11 of the First Schedule addressed to the Sheriff directing him to inform the defendant inter alia that if he dispute the claim, and wishes to defend he shall –***
>
> ***(a) within the time stated therein, give notice of his intention to defend;***
>
> ***(b) thereafter, if the summons is a combined summons within twenty one days after giving such notice, deliver with or without a claim in reconvention, a plea, exception, or application to strike out"***

[20] This Rule has been considered in numerous decisions of this court. In **AZMAN INVESTMENTS (PTY) LTD. vs. GOVERNMENT OF SWAZILAND & ANOTHER** (12/11) [2011] SZSC 21 (31 May 2011) The Supreme Court held that summary judgment is not to be granted where it is reasonably possible that the defendant has a good defence.

The court held that summary judgment is an extra-ordinary remedy and that the courts should be slow and close the door to a defendant if a reasonable possibility exists that a defendant has a good or bona fide defence. The court referred to several decisions of this court which include **ZANELE ZWANE AND LEWIS STORES (PTY) LTD. t/a BEST ELECTRIC,** Civil Appeal Case No. 22/07 where Ramodibedi JA (as he then was) stated:-

> "[8] ***It is well-recognised that summary judgment is an extra ordinary 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 sorely for the purpose of delay. The true import of this remedy lies in 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 vs. BARCLAYS BANK NATIONAL BANK LTD. 1976 (1) SA 418 (A) DAVID CHESTER vs. CENTRAL BANK OF SWAZILAND CA 50/03"**

The court went on to say that –

> ***"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."

[21] In the case of **SHELTON MANDLA TSABEDZE vs. AND STANDARD BANK OF SWAZILAND CIVIL APPEALL CASE NO. 4/2006,** Banda, JA (as he then was) stated,

> ***"It is trite that the summary procedure which Rule 32 introduces into law provides an extra ordinary and stringent remedy which provides for final judgment. Courts have however been warned to be slow to close the door to the defendant of a reasonable possibility exists that an injustice may be done of judgment is granted***. **MATER DOLOROSA HIGH SCHOOL vs. R.M. STATIONERY (PTY) LIMITED CIVIL APPEAL CASE NO. 3 OF 2005 AND DAVID CHESTER vs. CENTRAL BANK OF SWAZILAND, CIVIL APPEAL CASE NO. 50 OF 2003."**

[22] In **FIKILE THALITHA MTHEMBU vs. STANDARD BANK SWAZILAND LIMITED** Civil Appeal Case No. 3/09, Ramodibedi ACJ referred to the cases of **CHAMBERS vs. JONIKER 1952 (4) SA (C)** and **ENATE POTGIETER vs. ELLIOT 1948 (1) SA 108 (C) AND DE AFICAANSE PERS (BPK) vs. NESER 1948 (2) SA 295 (C)**, and held that while 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, the onus is not a very heavy one.

[23] In the present case according to the learned judge in the court _a quo_ –

> ***"[1] When the summary judgment application was argued before me, I ordered that the matter be referred to trial on the aspect of ascertaining what exactly was delivered."***

[24] The court then heard the evidence of PW1 Anelemabhale Palisa Shabangu, the Director of the Respondent, and DN1 Zanele Mkhonta DW1, an employee of the Appellant.

[25] After the witnesses had testified, the learned judge in the court _a quo_ identified the main issue in the case as follows:

> ***"[13] Was defendant's subsequent conduct of refusal to accept the purported delivery by the plaintiff and the subsequent cancellation of the tender, lawful and justifiable as per defendant's paragraph 5 above, in the circumstances of this case? In legal terminology, did the plaintiff repudiate the contract in order to warrant cancellation thereof by the plaintiff?"***

[26] The learned judge in the court _a quo_ then made findings of fact that the Respondent has been granted extension of time in order to effect

delivery, and that the letter of cancellation of the tender which came after the attempted delivery, did not point out that the filofaxes were not the diaries ordered.

[27] During hearing of this appeal, it was pointed out that the full proceedings of the hearing before the court *a quo* were not on record: However, for the reasons which will be apparent from this judgment, the absence of the record would not affect the outcome of this appeal.

[28] It is clear from the proceedings in the court a quo that there were facts or evidence in dispute which raised triable issues. The Appellant had a bona fide defence on the merits. The Appellant claimed that it was justified in cancelling the tender because the Respondent did not deliver on time and when it delivered it did not deliver the diaries in accordance with the tender award. This was *prima facie* a bona fide defence, whether it would be successful or not. It was not a bogus defence intended to evade its obligations as claimed by the respondent.

[29] Rule 17 (1) does not envisage a trial in order to grant summary judgment. It envisages an expeditious procedure to grant a remedy in

clear cases where the defendant does not have a possible defence on the merits.

[30] In the present case the defendant had not been given an opportunity to present its defence on the merits, and therefore the court *a quo* erred in holding what was called a **"mini-trial".**

[31] It is clear that the Respondent was claiming damages for breach of contract by cancellation of the tender. Although the Respondent claimed the tender price of E85,158-00, it is what it estimated as the damages for cancellation of contract but what was the measure of damages for the cancellation after failure to deliver per tender, according to the Appellant? The measure of damages had to be ascertained after proper hearing of the matter; not during an application for summary judgment.

[32] For these reasons, I hold that the court *a quo* erred in granting summary judgment in this matter, and the application for summary judgment should have been refused with costs, and the defendant given leave to defend.

[33] Accordingly, I make the following orders:

(a) The Appeal is upheld.

(b) The Appellant/Defendant is granted leave to defend the matter.

(c) Costs are granted to the Appellant.

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DR. B.J. ODOKI

JUSTICE OF APPEAL

I agree

____

MCB MAPHALALA

CHIEF JUSTICE

I agree

____

K. NXUMALO

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: **M. P. SIMELANE**

FOR THE RESPONDENT: **MR. M. SITHOLE**