IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 22/2016

In the matter between:

MPHETSENI CO-OPERATIVE SOCIETY LIMITED **Appellant**

and

L. R. MAMBA & ASSOCIATES **Respondent**

Neutral citation	:	MPHETSENI CO-OPERATIVE SOCIETY LIMITED (22/16) [2016] SZSC 02 [30 JUNE 2016]
Coram	:	CLOETE AJA, NXUMALO AJA and MAGAGULA AJA
For the Appellant	:	MR A. M. LUKHELE
For the Respondent	:	ADVOCATE M. MABILA
Heard	:	03 MAY 2016
Delivered	:	30 JUNE 2016

SUMMARY : ***Civil Procedure – Summary judgment – Satisfy provisions of Rule 32 – Bona fide defence and material facts to prove triable issues – Conduct of Appellant within purview of peremption.***

JUDGMENT

CLOETE -AJA

BRIEF BACKGROUND FACTS

[1] 1. The Respondent alleged in its Particulars of Claim that the Appellant engaged it to undertake certain legal work on behalf of the Appellant.

2. During or about January 2012 its mandate to act on behalf of the Appellant was terminated and the Respondent rendered a statement of account to the Appellant in respect of its Attorney and client fees and disbursements including Government Sales Tax totalling the sum of E284,382.00.

3. Presumably as a result of non-payment by the Appellant, the Respondent issued a Combined Summons under Civil Case No. 649/2012 wherein it claimed payment of the said sum of E284,382.00, interest and costs.

4. As a result of the Appellant entering an Appearance to Defend, the Respondent brought an Application for Summary Judgment before the Court *a quo* on 02 June 2015 (there is no explanation before this Court what happened in the intervening period since 2012) and filed the required Affidavit in support of the Application alleging that the Appellant did not have a good and *bona fide* defence to the claim.

5. The Appellant filed an Opposing Affidavit attested to by M. F. Mabuza, identifying himself as the Vice Chairman of the Appellant who made the following allegations;

5.1 that the Executive Committee of the Appellants never met to deliberate the issue of giving the Respondent instructions and as such that the Respondent had no mandate from the Appellant;

5.2 that the Respondent did not carry out any of the alleged services;

5.3 disputed that the Appellant owed the capital sum to the Plaintiff as alleged or at all;

5.4 denied that the said sum was reasonable and was never agreed to between the Appellant and the Respondent;

5.5 challenged the accuracy of the capital sum and pointed out that same had never been taxed by the Taxing Master of the High Court.

6. The Respondent filed a Replying Affidavit in which it alleged that;

6.1 the Appellant had never denied its liability for professional fees and that the Appellant had, through its Attorneys, been negotiating and making arrangements to effect payments in instalments;

6.2 that the Appellant had paid the sum of E3,000.00 in December 2012 and during 2014 it had paid a sum of E30,000.00 and annexed a letter from the Appellants Attorneys dated 15 May 2015 which reads;

"1. We refer to the above matter.

2. *We enclose our cheque of E6,000.00 being an amount paid to us by our clients.*

3. ***Further payment will follow in due course"***

7. The matter was heard in the Court *a quo* on 10 September 2015 and Judgment was delivered on 19 February 2016 in terms of which the Court *a quo* granted Summary Judgment in favour of the Respondent with costs.

8. It is that Judgment which the Appellant is appealing against and the Notice of Appeal raises the following specific grounds of Appeal;

8.1 the Court *a quo* erred in fact and in law in finding that there were no triable issues in the Summary Judgment Application;

8.2 the Court *a quo* erred in law and in granting Judgment on the sum of E284,382.00 which such sum had not been agreed to and/or proved and/or taxed;

8.3 the Court *a quo* erred in fact and in law in finding the Appellant did not have a *bona fide* defence (and in granting Summary);

8.4 the Court *a quo* erred in fact and in law in granting Summary Judgment against the Appellant.

ARGUMENT BY THE APPELLANT

[2] 1. Counsel for the Appellant was advised to argue only on such matters as raised in the grounds of Appeal.

2. It was argued that the Court *a quo* ignored the fact that there were triable issues and referred the Court to the matter, *inter alia* of **Ezishineni KaNdlovu v Ndlovunga Dlamini and another – Civil Appeal Case No. 58/2012** and referred to the passage at page 13 and paragraph 22 thereof which states that;

"though it is judicial accord that the Defendant is not required at this stage to set out his defence with the precision or exactitude required of a plea, however, for the Defendant's Affidavit to pass muster, the allegations made therein must be bona fide,

***unequivocal and contain sufficient material facts to enable the Court to reach the concluded opinion that a triable issue is raised or that there ought for some other reason to be a trial of the claim or part of it*" (my underlining)**

3. That the amount concerned had not been taxed by the Taxing Master of the High Court of Swaziland nor had the sum concerned been agreed.

4. As far as the finding of the Court *a quo* that the conduct of the Appellant fell within the purview of peremption, the Appellant stated that by making the payments referred to by the Respondent in its Replying Affidavit, (including the payment made under cover of a letter from the Appellants Attorneys, did not amount to the abandonment of the right of Appeal of the Appellant and referred the Court *a quo* to, *inter alia* the cases of **Philani Clinic Services v Swaziland Revenue Authority and another, Civil Appeal Case No. 36/2012** and **Bhekiwe Vumile Hlophe v The Standard Bank Limited, Appeal Case No. 13/2005.**

ARGUMENT BY THE RESPONDENT

[3] 1. That the Appellant in its Heads of Argument raised matters which were not set out in the grounds of Appeal and as such should be ignored in the absence of leave to amend its Notice of Appeal.

2. In order to determine whether or not the Appellant has a defence which carries prospects of success one needs to see if the facts it has alleged in its support are sufficient and are compatible.

3. That the allegations contained in the Opposing Affidavit were ambiguous, conflicting and confusing and that the Appellant was required to set out clearly and concisely set out its defence to avoid Summary Judgment and also referred to the **Ezishineni** matter referred to above.

4. That it was disingenuous for the Appellant on the one hand to dispute that the amount claimed was not reasonable and on the other hand alleging that there was never performance of any services.

5. That not every disputed fact actually amounts to a factual dispute envisaged at law and a dispute of fact which requires to be referred to trial is one which is real and cannot be dealt with on the papers. See: **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155.**

6. That accordingly no triable issues were presented to the Court *a quo*.

7. That it was not denied by Counsel for the Appellant that the payments referred to in the Replying Affidavit were made and furthermore that on 29 March 2016 and after the Appellant had filed an Appeal, the Appellant had made a further payment of E10,000.00 to the Respondent.

8. Referred the Court to various Judgments dealing with Courts declining to entertain litigation in which there was any live existing controversy.

9. That it was clear from the actions of the Appellant, in making the payments concerned and that the doctrine of peremption clearly applied.

10. In **Dabner v South African Railways and Harbours 1920 AD 583 at 594** it was noted that ***"if the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the Judgment then he is held to have acquiesced to it…the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal…"***

11. Lord de Villiers in **Hlatshwayo v Mare Teas 1912 AD 249** stated that ***"…the bare payment by an unsuccessful party of the amount of a Judgment, in respect of which execution has been ordered, is sufficient proof of an intention to renounce the right of appealing against it."***

FINDINGS OF THIS COURT

[4] 1. As regards the disputed account rendered in 2012:

1.1 the Appellant had between 2012 and 2015 to dispute this account and there is no evidence before this Court that it ever did so;

1.2 The Appellant, during that period, was at liberty to report the Respondent to the Law Society of Swaziland which it apparently did not do;

1.3 Similarly the Appellant had the same period of time within which to request the Respondent to present its itemised account to the Taxing Master of the High Court of Swaziland in terms of Rule 63 (3) which provides that *"it shall be competent for any Taxing Master to tax all bills of costs for services actually rendered by an Attorney in his capacity as such, whether in connection with litigation or not.* The point is that the Taxing Master has the authority if requested to do so but is not obliged to tax every bill of costs on every Attorney in every transaction between Attorney and client;

1.4 The Appellant had every opportunity of setting out fully its alleged defence to the claim of the

Respondent by setting out all relevant factual issues including its purported allegations relating to the authority of the Respondent to act, that the Respondent in point of fact did not do any work of any nature and the other issues which it referred to. It failed to do so and as such failed to pass the muster of the requirement of Rule 32 and the dictum in the **Ndlovu** case above in that it clearly did not set out "*bona fide allegations, unequivocal and to contain sufficient material facts to enable the Court to reach the concluded opinion that a triable issue is raised or that there ought to be some other reason to be a trial of the claim or part of it*".

2. As regard the issue of peremption;

2.1 The actions of the Appellant before and peremption after the hearing of the matter in the Court *a quo* and the Noting of Appeal before this Court, must determine the fate of the Appellant;

2.2 It has not been and cannot be denied that the Appellant made a number of payments to the Respondent of its own volition and more pointedly, through its Attorneys;

2.3 There is no evidence before this Court that any of the payments made, were made without prejudice, under protest or on an ex gratia basis;

2.4 On the contrary, the damning evidence before this Court is the letter addressed by the Appellants Attorneys to the Respondent dated 15 May 2015 which made a bare payment and went on to state that “further payment will follow in due course”;

2.5 We agree entirely with the decisions of **Dabner** and **Hlatshwayo** matters referred to above and as such that the conduct of the Appellant in this matter is such that the only reasonable influence that we can draw is inference that the Appellant with the full knowledge of their rights of Appeal, have abandoned such rights;

2.6 we accordingly entirely agree with the Judgment in the Court *a quo* that;

2.6.1 the actions of the Appellant fall within the purview of peremption and has deemed to have accepted the claim of the Respondent and abandoned its right of Appeal;

2.6.2 that given all of the above the Respondent has no prospect of any success at a trial, the debt having being paid partially.

3. Under those circumstances this Court dismisses the Appeal of the Appellant with costs, such costs to include the certified costs of Counsel in terms of Rule 68.

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

K. NXUMALO
ACTING JUSTICE OF APPEAL

I agree

J. S. MAGAGULA
ACTING JUSTICE OF APPEAL