IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case 15/2018

In the matter between:

SOLOMON SONTO	**1st Appellant**
SOLPHARM SWAZILAND	**2nd Appellant**
And	
HLELEKILE ZWANE	**Respondent**

Neutral citation: Solomon Sonto and Another vs Hlekekile Zwane *(15/2018) [SZSC] 61 [2018] (30 November, 2018).*

Coram: **M.J. DLAMINI JA**
S.B. MAPHALALA JA
J.M. CURRIE AJA

Heard: **13 August, 2018**

Delivered: **30 November 2018**

Summary: *Civil Procedure – High Court granted an Application for Summary Judgment only on the main cause of action: further ruled that the issue of interest to be decided by the trial court in an action – this court finds*

that there was triable issue before the court ***a quo*** *– that therefore the order for Summary Judgment by the court* ***a quo*** *be set aside – the matter referred back to the court* ***a quo*** *in a trial action on the main cause of action and the interest – further costs to be costs in the cause.*

JUDGMENT

S.B. MAPHALALA JA

The Appeal

[1] This is an appeal from the judgment of the court *a quo* whereby that court granted Summary Judgment to the following:

> **1. Summary Judgment application partly succeeds.**
>
> **2. The 1st defendant is ordered to pay plaintiff;**
>
> **2.1 The sum of E90,000.00 less E2,500.00.**
>
> **2.2 Interest thereon at the rate of 9% per annum a temporae morae.**
>
> **2.3 ¾ of cost of suit.**
>
> **3. The matter is referred to oral evidence on interest in terms of paragraph 23 of this judgment.**

[2] The facts of the case, as found in the pleadings are that the Respondent issued Summons against the Appellants claiming a sum of E100,000.00 (One Hundred Thousand Emalangeni). The Appellants opposed the action basing their defence on an averment that the Respondent lent the money to the 2nd Appellant. The Respondent challenges that on the basis that the exchanged email between the parties does not suggest that the money was borrowed by the 2nd Appellant. In any event, it should have been made clear on the wording of

the exchanged email between the parties. The Respondent therefore insists that the action fits squarely within the parameters of Summary Judgment and that the court *a quo* correctly granted Summary Judgment.

[3] The decision of the court *a quo* was appealed to this court on the following grounds:

> **1. The court *a quo* erred in fact and in law in holding that alleged loan agreement was between the 1st Appellant and Respondent.**
>
> **2. The court *a quo* erred in granting summary judgment against the 1st Appellant when the 1st Appellant has raised triable issues which constituted a *bona fide* defence to the claim.**
>
> **3. The court *a quo* erred in granting costs against the 1st Appellant.**
>
> **4. The court *a quo* erred in referring to oral evidence the issue of interest on the loan where it is clear that there was no agreement on interest payable on the loan.**

[4] The attorneys of the parties canvassed their arguments on the 13th August, 2018 by way of Heads of Arguments.

[5] The thrust of the Appellants' arguments is that the facts they have stated in the affidavit resisting Summary Judgment constitute a *bona fide* defence, and as such Summary Judgment should not have been granted by the court *a quo*.

[6] In the main it is contended for the Appellants that there is a dispute of fact as to who was the debtor, in other words was it the 1st or 2nd Appellant. The Respondent contends that the loan was granted to the 1st Appellant, and on the other hand the 1st Appellant argues that the loan was granted to the 2nd Appellant as evidenced by the cheque that was made in favour of the 2nd

Appellant. That therefore it is clear that there is a dispute of fact and as such that it was erroneous for the court *a quo* to grant Summary Judgment without having resolved the dispute of facts.

[7] The Appellant's attorney cited a plethora of cases on the subject including the cases of **Plascon Evans / Paints Limited vs Van Riebeeck Paints (Proprietary) Limited (53/84 [1984] ZA 51: [1984] (2) All SA page 366,** the legal authority of **Herbstein and Van Winsen 4th Edition at page 934** and the Supreme Court cases being **Godfrey Khetho Sibandze vs Saligna Development Co. (Pty) Ltd case no. 50/2016,** that of **National Motor Company (Pty) Ltd vs Moses Dlamini case no. 1361/1993** and that of **Mater Dolorosa High School vs RMJ Stationery (Pty) Ltd, Civil Appeal No. 3/2005.**

[8] The essence of the argument of the Respondent is that on the face of the email correspondence there is no explanation given by the 1st Appellant why he used the word "1" referring to himself personally when corresponding with the Respondent in the emails.

[9] A further argument raised by the Respondent at paragraph 11 of his Heads of Argument is that during the exchange of the emails between the 1st Appellant and the Respondent, it was never mentioned that the amount advanced shall be paid to the 2nd Appellant, or that the money advanced was for the benefit of the 2nd Appellant. Instead it is clear that the contracting party was the 1st Appellant hence he went to the extent of proposing settlement. In this regard this court was referred to High Court case of **SEDCO vs Collette Bhembe t/a Computer Proficiency Training case no. 38/14.**

[10] The Respondent contends that the appeal is an abuse of the court process simply lodged to frustrate the Respondent from benefitting and enjoying the fruits of the order that was granted by the court *a quo*. The Appellant has failed

to fully disclose triable issues as well as a *bona fide* defence. He has only shifted the goal posts without giving a legal explanation of the correspondence exchanged between the parties.

The analysis and conclusions

[11] Before dealing with the issues for decision by this court it is of paramount importance to understand the remedy of Summary Judgment in our law.

[12] The learned authors in their textbook "**The Civil Practice of the Supreme Court of South Africa" Herbstein and Van Winsen, 4th Edition, page 434,** stated the following:

> **"Summary judgment procedure is designed to enable a Plaintiff whose claim falls within certain defined cases of claims to obtain judgment without the necessity of going to trial in spite of the fact that the Defendant has intimated, by delivering a Notice to Defend, that he intends raising a defence. By means of this procedure a defence lacking in substance can be disposed of without putting the Plaintiff to the expense of a trial.....**
>
> **The procedure provided by the Rules has always been regarded as one with limited objective - to enable the Plaintiff with a clear case to obtain swift enforcement of his claim against a Defendant who has no real defence to that claim."**

[13] It is further trite law that where there is a dispute of fact, the court has a discretion to either dismiss the application or refer the issue in dispute to trial. In this regard the case of **Plascon Evan vs Van Riebeeck Paints (Supra)** is authority.

[14] The Appellants contend that the Respondent issued Summons against the Appellant claiming payment of the sum of E100.000.00 (One Hundred Thousand Emalangeni), which it claimed was a loan advanced to the 1st Appellant. That the loan advanced was a sum of E90 000.00 (Ninety Thousand Emalangeni) which was paid through a cheque drawn in favour of the 2nd Appellant as shown in annexure "HLZ1" at page 10 of the Record of Appeal.

[15] The Respondent claims that the loan was granted to the 1st Appellant notwithstanding that the cheque was drawn in favour of the 2nd Appellant.

[16] Further, the Respondent produced emails exchanged between himself and the 1st Appellant, which the Respondent used as evidence to prove that the loan was advanced to the 1st Appellant.

[17] On the other hand the Appellants contend that the loan was requested by and granted to the 2nd Appellant which was represented by the 1st Appellant and as such the 1st Appellant was not liable to repay the loan in his personal capacity.

[18] The court *a quo* in its judgment at paragraph [18] stated that the defence raised by the 1st Appellant that evidence of the parties an agreement on the loan is found on the face of the cheque was drawn in favour of the 2nd appellant cannot stand in light of the number of emails authorised by 1st Appellant which indicate that the loan was at the instance of the 1st Appellant.

[19] In my assessment of these competing arguments of the parties it may well be that the email correspondence point to the 1st Appellant but the mention of the 2nd Appellant's name in a cheque drawn raises a question as to why the 2nd Appellant is cited in the cheque drawn. This to me raises a triable issue to find out what the role of the 2nd Appellant was in the whole scheme of things. It would appear to me that this question can only be addressed on trial. It is

trite law that Summary Judgment is an extra-ordinary remedy which is resorted to only where a party has a clear case.

[20] It may well be that 1st Appellant in the email correspondence was acting as a director of the 2nd Appellant. Then a question that looms large on these facts is who is liable for such a debt. Therefore, a fully fledged trial action should be undertaken to clear this uncertainty.

[21] In this regard an English law authority in Company Law the learned authors **Gower and Davies "Principles of Modern Company Law", 7th Edition on page 324** is instructive of the following:

> **At common law, therefore, the duties of directors are owed to the shareholders alone, so long as the company is a going concern. However, they are owed to the shareholders collectively, not individually. That is one of the benefits of formulating the duties as owed to the company and then equating the company, normally, with the shareholders, rather than saying that the duties are owed to the shareholders as a whole, not individual shareholders.**

[22] It was also held by the court *a quo* that the issue of the interest on the amount ought to be decided by the trial court.

[23] Having considered all the papers filed by the parties in this matter and the arguments advanced and for the above reasons, the appeal is upheld and the Application for Summary Judgment is dismissed. The matter is referred back to the court a quo for trial to commence on the main cause of action and the interest thereon. The costs of the appeal to be costs in the cause.

S.B. MAPHALALA JA

I AGREE

M.J. DLAMINI JA

I ALSO AGREE

J.M. CURRIE AJA

For the Appellants: Mr. M Magagula
(of Sithole & Magagula Attorneys)

For the Respondent: Mr K. Manzini
(of C.J. Littler & Co.)