

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO: 95/2018

In the matter between:

BHEKI ALEX KHUMALO

APPELLANT

And

BALENI INVESTMENTS (PTY) LIMITED

RESPONDENT

Neutral Citation: *Bheki Alex Khumalo v Baleni Investments (Pty) Limited*
(95/2018) [2019] SZSC 08 (18 March 2019)

CORAM:	S.P. DLAMINI	JA
	S.B. MAPHALALA	JA
	J.M. CURRIE	AJA

Heard: 04 March 2019

Delivered 18 March 2019

Summary:

Civil Procedure – Condonation application – Appeal against Summary Judgment – Cancellation of Sale of Property – Appellant Defendant raising new defences in heads of argument in Court a quo – Both parties remiss in making necessary allegations in the papers – Respondent/Plaintiff failing to establish an unanswerable case – Court a quo should have exercised its discretion in favour of refusing summary judgment.

J.M. CURRIE AJA

INTRODUCTION

- [1] This is an appeal against a judgment of the Court *a quo* granting Summary Judgment in favour of the Respondent (Plaintiff in the court *a quo*) in terms of which the eviction of the Appellant (Defendant in the court *a quo*) from premises it had purchased and occupied in terms of a sale agreement was granted.

CONDONATION

- [2] The Court, having considered the totality of the circumstances pertaining to the application for condonation by the Appellant, particularly the fact that it was not opposed by the Respondent and the interests of justice, the Court granted an *ex gratia* order condoning the late filing of the Appellant's Heads of argument with no order as to costs made. Now that order is hereby confirmed and it is to be read as one as with judgment of this Court. However, the granting of the condonation should not in way serve as precedent as shift from the well established jurisprudence of

this Court when it comes to such applications but as an exception on the basis of the contents herein.

BACKGROUND

- [3] The background to the application for Summary Judgment in the Court *a quo*, as far as it was set out in the papers, was not contained in the judgment of the learned Justice Magagula and for the sake of completeness it is set out hereunder.
- [4] On 31st July 2007, the Respondent, represented by a certain James Jeremiah Dlamini, the Appellant and a certain Zanele Simelane and Happiness Khumalo entered into a sale agreement in terms of which they purchased certain immovable properties from the Respondent described as Erf. Number 109 Hlathikhulu Township and Erf. Number 114 Hlathikhulu Township for the sum of E250 000 (two hundred and fifty thousand Emalangen).
- [5] The purchasers breached the agreement by non-payment and the seller cancelled the agreement in writing on the 25th August 2010 and demanded that the purchasers vacate the properties. The letter of cancellation was sent by registered post and copies of the registered slips were attached to the founding papers.

[6] On the 5th November 2012 the Respondent entered into a subsequent agreement with the Appellant which superseded the previous agreement. The material terms of this agreement, to be considered by the Court were the following:

- "1. The sum of E 184 205.11 remained outstanding in respect of the two properties;*
- 2. Any remaining balance would attract interest at the rate of 10% (ten percent) per annum);*
- 3. The balance of the purchase price would be paid as follows:*
 - 3.1 1.1 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable on or before the final day of November 2012;*
 - 1.2 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable on or before the final day of December 2012;*
 - 1.3 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable on or before the final day of January 2013;*
 - 1.4 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable on or before the final day of February 2013;*
 - 1.5 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable before the final day of March 2013;*

- 1.6 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable on or before the final day of April 2013;
- 1.7 A sum of E20 000.00 (twenty thousand Emalangeni) will be payable on or before the final day of May 2013;
- 1.8 The balance remaining after payment as per paragraph 1.7 above will therefore be liquidated in monthly installments of E4 000.00 (four thousand Emalangeni) beginning
4. The Purchaser would be liable for rates accruing as from the 31st July 2007 and would be responsible for all rates and dues levied on the property before transfer of the property.
5. If the Purchaser failed to make payment timeously of any amount, the entire balance owing would immediately become due and payable.
6. The Seller would, upon 7 (seven) days written notice to the Purchaser, calling upon him to remedy the breach, have the right to either seek specific performance of the entire amount owing or cancel the agreement.
7. If the Seller cancelled the agreement due to any other breach, the Purchaser would forfeit as estimated damages any sums already paid by him in respect of the sale."

[7] The Appellant breached the agreement by non-payment and the Respondent's attorneys, on the 20th March 2018, wrote to the Appellant

calling upon the Defendant to remedy the breach. The Appellant did not remedy the breach and on the 20th May 2018 the Plaintiff's attorneys sent a further letter to the Appellant calling upon him to vacate the premises. There is no indication from the papers filed of record that the letters were sent by registered post.

[8] On the 18th July 2018 the Respondent issued Summons claiming, claiming:, *inter alia*:

(a) *Ejectment of the Defendant and all those claiming occupation him from the said Erf Number 109 Hlathikhulu Township Shiselweni District, Swaziland.*

(b) *That and in the event of non-compliance within 7 (Seven) days of service of the Order, the Deputy Sheriff be empowered to Execute the Order and with the Assistance of the Royal Eswatini Police Force (Shiselweni Region).*

(c) *Costs of suit on the Attorney and Own Client Scale.*

[9] The Summons was defended and the Respondent launched an application for Summary Judgment claiming the relief set out in the Summons.

[10] The Appellant resisted the summary Judgment Application and in its Affidavit resisting summary judgment stated, *inter alia*, the following:

“6.8 I do acknowledge that the purchase price has not yet been paid in full and this constitutes a breach of the agreement. However, I humbly submit that failure to pay the purchase price as provided for in the agreement does not automatically mean that I should be evicted from the premises because the agreement through which I occupy the premises has not been properly cancelled.”

FINDINGS OF THE HIGH COURT

[11] Upon the hearing of the application for Summary Judgment the Court *a quo* granted the relief sought by the Respondent being:

(i) Ejectment of the Defendant and all those claiming occupation under him from the said Erf. 109, Hlathikhulu Township, Shiselweni District, Swaziland.

“(ii) That in the event of non-compliance within 7 (seven days) of service of the order, the Deputy Sheriff is empowered to execute the Order and with the assistance of the Royal Eswatini Police Force (Shiselweni Region).

(iii) Cost of suit at attorney and own client scale.”

[12] The Appellant being dissatisfied with the judgment of the court *a quo*, per Justice Magagula, appealed to this court as follows:

“1. The court a quo erred in fact and in law in finding that the Respondent gave Notice to Terminate the sale agreement between Appellant and Respondent yet the Respondent, failed to produce proof (in the form of a certificate issued by the Post Office) that the Notice of Termination was indeed sent to the Appellant.”

APPELLANT'S ARGUMENT

[13] The Appellant contended that:

1. The Deed of Sale was not properly cancelled because the letters allegedly sent to the Appellant dated 20th March 2018, calling upon the Appellant to rectify the breach and the letter of 20th May 2018 calling upon the Appellant to vacate the property had not been received by the Appellant, There was no proof of them having been sent by registered post and as such the ejectment of the Appellant from the property should not have been granted.
2. The facts contained in the Affidavit resisting Summary Judgment constituted a *bona fide* defence and that summary judgment should not have been granted.
3. Summary judgment is a procedure provided by the rules and is one to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has not real defence to that claim. He relief on **“The Civil Practice of the Supreme Court in South Africa – Herbstein and Von Winsen, 4th Edition, page 343”**.
4. Summary judgment should not be granted if there is an issue or question in dispute which ought to be tried or that there ought for some reason to be a trial of that claim – **Godfrey Khetho Sibandze v Saligna Development Co. (Pty) Ltd (Case No. 50/2016.**

5. All the court requires is (a) whether the defendant has fully disclosed the nature and grounds of his defence and (b) whether on the facts so disclosed the defendant appears to have, a defence which is *bona fide* and good in law – **National Motor Company (Pty) Ltd vs Moses Dlamini Case No. 1361/1993.**
6. The Court should not close the door if a reasonable possibility exists that an injustice might be done if judgment is summarily granted. If a defendant raises an issue that is relevant to the validity of the plaintiff's claim, he should have the opportunity to have such issue tried – **Mater Dolorosa High School v RMJ Stationery (Pty) Ltd, Civil Appeal No. 3/2005.**
7. The Appellant had paid substantial sums of money towards the purchase of the property and that it would be grossly unfair to the Respondent to eject the Appellant when it had already tendered to pay the balance owing to the Respondent in October 2018 (and had provided a guarantee from Standard Bank for this purpose) – **Botha and Another v Rich NO and Others (2014) ZACC 11.** A copy of the guarantee was only raised and annexed to the Appellant's Heads of Argument in the court *a quo* and had not been raised in the Affidavit Resisting Summary Judgment. The Appellant's Counsel submitted that there had been a change of attorneys representing

the Appellant and he had inherited the matter after the Affidavit had been submitted.

8. There exists a dispute regarding the balance owed to the Respondent in that the Respondent had charged interest in respect of the months April to June 2018 at the rate of 10% per month instead of 10 % *per annum*.
9. The Appellant had clearly demonstrated that there were triable issues which need to be fully ventilated at a trial including the issue of whether the written demand calling upon the Appellant to rectify the breach and thereafter cancelling the contract had been sent to the Appellant.

RESPONDENT'S ARGUMENT

[14] Respondent contended that:

- 1 The crisp issue to be determined was whether the contents of the Affidavit Resisting Summary Judgment disclosed a **bona fide** defence and referred to the principles set out in **SWAZILAND DEVELOPMENT AND FINANCIAL CORPORATION VS VERMAAK STEPHANUS Civil Case No. 4021/07** and **GLINKSY & ANOTHER VS SUPERB LANDERS DRY CLEANERS (PTY LTD 1978 (3) SA 897 AT 809 & 810.** The defence must be set out

clearly, the nature of the defence, the grounds of the defence and the material facts relied upon to establish such a defence and these requirements must be fully stated.

2. The Appellant raised the argument denying receipt of the notice placing it in *mora* and the notice of cancellation for the first time in its Heads of Argument. This was not raised in the affidavit resisting summary judgment and the only issue raised by the Appellant was that, in his view, the earlier agreement was not properly cancelled. The Appellant did not deal in detail in its affidavit with the Particulars of Claim. There was no mention of lack of service of the correspondence. The Appellant did, however, admit that the purchase price had not been paid in full and this constituted a breach of the agreement and the Respondent submitted that therefore the Appellant had no *bona fide* defence to the claim for eviction. He further submitted that the Respondent should be awarded costs on a punitive scale.

FINDINGS OF THE COURT

- [15] The Respondent alleges that it sent letters placing the Appellant in *mora* in terms of the second agreement and thereafter a letter calling upon the Appellant to vacate the premises but whilst copies of these letters are attached there is no proof that these letters were sent by registered post.

- [16] In its Particulars of Claim the Respondent only claimed the eviction of the Appellant and there was no claim for cancellation of the agreement, nor any claim for forfeiture of all amounts paid to date in terms of the agreement.
- [17] The affidavit of the Appellant is poorly drafted and it acknowledges that the full purchase price has not been paid but it claims that cancellation of the agreement has not been effected and eviction cannot therefore be claimed. The Appellant does not produce any proof of what had been paid.
- [18] There are a number of documents filed of record which have not been explained by either Appellant nor Respondent. There is a statement attached to the Respondent's Founding Affidavit in the court *a quo* which appears to show that Erf 114 was sold and the proceeds were put towards the indebtedness of the Appellant but there is no explanation of this. The same statement reflects that interest may have been charged at the incorrect rate for the months of April to June 2018 but none of the affidavits filed of record deal with this issue and this issue was only raised in Appellant's Heads of Argument in the court *a quo*.
- [19] In **JOHNSTON V LEAL 1980 (3) SA 927** at page 930 the following was expressed:

"Parties cannot themselves give direct evidence of what their intention was What is implicit Is that the document itself should contain the only memorial of the transaction between the parties and evidential dispute in regard thereto should be avoided"

[20] In **NATIONAL MOTOR COMPANY LIMITED v MOSES 1987 – 1995**

SLR at 124, Dunn J held that:

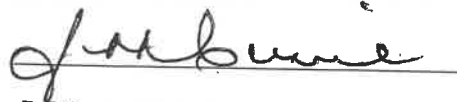
"The Defendant's affidavit must condescend upon particulars and should as far as possible deal specifically with the plaintiff's claim and state clearly what the defense is and facts relied upon to support it. It should also state whether the defence goes to the whole or should specify the part."

[21] In my view both parties have been remiss in making the necessary allegations in their papers. It cannot be said that the Respondent had established an unanswerable case and neither of the parties have met the criteria set out above and there are clearly triable issues requiring to be fully ventilated in the court *a quo*. I accordingly make the following order:

ORDER:

1. The appeal succeeds.
2. The judgment of the Court *a quo* is set aside and substituted with the following orders:
 - (a) *The application for summary judgment is dismissed.*
 - (b) *The Appellant is given leave to defend.*

3. Costs to be costs in the cause.




J.M. CURRIE
ACTING JUSTICE OF APPEAL

I agree



S.P. DLAMINI
JUSTICE OF APPEAL

I agree



S.B. MAPHALALA
JUSTICE OF APPEAL

For Appellant : N. Manzini

For Respondent : M. T. M. Ndlovu