

IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Civil Appeal Case No. 17/2019

In the matter between:

BROOKLYN INVESTMENTS (PTY)LTD

Applicant

and

BONGANI BHEMBE

Respondent

Neutral Citation: *Brooklyn Investments (Pty) Ltd v. Bongani Bhembe*
(17/2019) [2020] SZSC 02 (25/03/2020)

Coram: **DR. B.J. ODOKI JA.**

Heard: 17 MARCH 2020.

Delivered: 25 MARCH 2020.

SUMMARY: *Civil procedure – Application for summary judgment to recover rental money reclaimed by defendant/respondent – Defendant/Respondent pleads counter-claim – Triable issues raised – Application for summary judgment dismissed with costs – Application for leave to appeal against order of costs – No likelihood of success established – Application for leave dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI– JA

- [1] This is an application for leave to appeal against the judgment of the High Court delivered on 15 February 2019, dismissing with costs an application for summary judgment.
- [2] The applicant filed an application for summary judgment claiming payment of the sum of E87,500.00 (eighty seven thousand and five hundred Emalangeni) with interest and costs of the suit. The application was accompanied by an affidavit sworn by one Fransinah Yolanda Sibonisile Nkambule a Director of the applicant.
- [3] The respondent filed a notice to defend accompanied by his affidavit resisting summary judgment. In his plea, the respondent submitted a

counter-claim against the applicant for payment of the sum of E125,000.00 (one hundred and twenty five thousand Emalangeni) and averred that he had a *bona fide* defence to the applicant's claim.

- [4] The respondent was the Director of the applicant's company which owned a block of flats situated at Ngwane Park on Plot 774, Mbalwane Street in Manzini. The applicant rented one of the flats to one Charles Rudd at a rental amount of E3000.00 (three thousand Emalangeni) which was increased to E3500.00 (three thousand five hundred Emalangeni) when payable to the lessor or landlord, and not to the Director.
- [5] It was alleged that the respondent with the intention of misappropriating the rentals, intercepted the rental moneys paid by the said Rudd from December 2015 to January 2018 for his personal gain, by issuing fraudulent receipts to Rudd without remitting the money to the applicant. It was claimed that the respondent misappropriated rental to the tune of E87,500 (eighty seven thousand and five hundred Emalangeni) from December 2015 to January 2018.
- [6] In his plea, the respondent claimed that he was a Director of the applicant's company and owned 1% of the shares therein. He claimed that he was entitled to monthly Director's fees of E3500.00, and that therefore he lawfully retained the rentals. He pleaded a counter-claim against the applicant in the sum of E125,000.00 (one hundred and

twenty five thousand Emalangeni) as a *bona fide* defence to the applicant's claim.

- [7] In dismissing the application for summary judgment, the learned Judge *a quo* held that the respondent's counter-claim was a defence to the claim and further that the respondent had raised triable issues which should go for trial.
- [8] In submitting on the question whether the intended appeal had any prospects of success, the learned Counsel for the applicant indicated that he had abandoned other grounds and was now seeking leave to appeal against the order of costs against the applicant. It was Counsel's contention that the Court *a quo* erred in awarding costs instead of reserving costs in the cause, since the proceedings were still continuing. Therefore the appeal had prospects of success.
- [9] On the other hand, Counsel for the respondent submitted that the applicant has failed to prove that the intended appeal has any prospects of success. He contended that award of costs was in the discretion of the trial Court, and an appellate Court will not interfere with the exercise of that discretion unless it has not been exercised judiciously. In the present case, the Court *a quo* gave reasons why it awarded costs against the applicant because the applicant was reckless in presenting the application for summary judgment after the respondent had filed a plea which disclosed a *bona fide* defence to the claim. Counsel relied on Rule 32 (7) of the Rules of the High Court to support his submission.

[10] In an application for leave to appeal, the applicant must establish that the appeal has prospects of success. It is well recalled that in awarding costs, the Court has a discretion to be exercised judicially upon consideration of all the facts and ensuring fairness on both sides. In appeals against costs, the question is whether there was an improper exercise of induced discretion, i.e. whether the award is vitiated by irregularity or misdirection or is disquietly inappropriate. The Court will not interfere merely because it might have taken a different view. **See Ward v. Sulzer 1973 (3) SA 701 at 706-707; Intercontinental Exports (Proprietary) Ltd v. Fowles 1999 (2) SCA 1055; Inter Agencies (Pty) Ltd v Corban Electrical & Electronics (Pty) Ltd and Others (71/2019) SZSC 14 (9 May 2019).**

[11] Rule 32(7) of the High Court Rules provides as follows:

“If the Plaintiff makes an application under sub-rule (i) where the case is not within this rule or if it appears to the Court that the Plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then without prejudice to any other powers, the Court may dismiss the application with costs and may require the plaintiff to pay the costs forthwith.”

[12] In the present case, the Court *a quo* gave reasons why the application for summary judgment could not be granted. The Court recalled that

there had been allegations of fraud which could not be determined in summary judgment proceedings as evidence was required. Secondly the application was filed after the respondent had filed its plea containing a counter-claim amounting to E125,000.00. Thirdly the affidavit resisting summary judgement had raised a number of trial issues.

[13] The learned Judge in the Court *a quo* then concluded:

“[5] In view of the foregoing, can it be said that the plaintiff’s case meets the benchmark of this drastic and extra-ordinary procedure? Certainly not. Triable issues loom like a colossus, and the fact that there is a counter-claim which exceeds the claim shows how ambitious and foolhardy it was for the plaintiff to apply for summary judgment fully aware what the defendant’s case was, and to persist with the same despite the contents of the affidavit resisting summary judgment”.

[14] The learned Judge in the Court *a quo* further stated that he ordered the plaintiff to pay the costs because of the hopelessness of his application. In so doing I am of the view that he exercised his discretion judiciously in accordance with Rule 32 (7) of the High Court Rules.

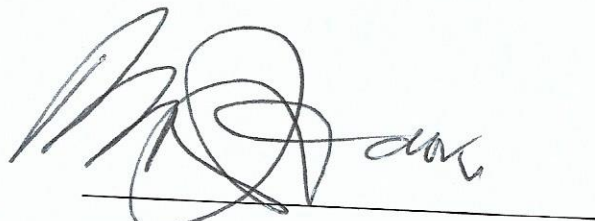
[15] In **Inter Agencies (Pty) Ltd v. Corban Electrical & Electronics (Pty) Ltd and Others** (*supra*) the Supreme Court dismissed an appeal against

costs where the application had been dismissed with costs because, the applicant/appellant had applied for summary judgment in circumstances where it was aware that the defendant had a clear defence to the claim.

[16] It is clear that the appeal has no prospects of success, and therefore this application for leave is hereby dismissed with costs.

[17] For the foregoing reasons, the Court make the following order:

- The application for leave to appeal is dismissed with costs.



DR. B.J. ODOKI

JUSTICE OF APPEAL

For the Applicant: MR. M. NDLANGAMANDLA FROM MLK
NDLANGAMANDLA ATTORNEYS

For the Respondent: MR. L. MANYATSI FROM MANYATSI AND
ASSOCIATES