



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Case No. 94/2020

HELD AT MBABANE

In the matter between:

RUCHI SHOPPING CENTRE (PTY) LTD

Appellant

and

HUGE SPAN INVESTMENT (PTY) LTD

Respondent

Neutral Citation: *Ruchi Shopping Centre (Pty) Ltd vs Huge Span Investments (94/2020) [2021] SZSC05 (03/06/2021).*

Coram: **M.C.B MAPHALALA CJ**
 J.P ANNANDALE JA
 S.J.K MATSEBULA JA

Heard: 3rd May, 2021

Delivered: 3rd June, 2021

SUMMARY

Civil Law - Appeal - Summary Judgement - Court a quo finds for the Plaintiff - on appeal - what constitutes a bona fide defence to summary judgement - Rule 32 (4) (a) discussed - case law examined - Court determines whether defendant has a bona fide defence or not based on the facts disclosed.

Held - on the facts disclosed the Appellant had no bona fide defence;

Held further - that the claim or counter claim does not fully disclose the nature and grounds of the defence; and Held further - Appeal is dismissed.

JUDGMENT

S.J.K. MATSEBULA JA

- [1] This is an appeal against the summary judgement issued by Nkosinathi Maseko J. against the Appellant Ruchi Shopping Centre (Pty) Ltd (Defendant in the Court *a quo*) in a case instituted by the Respondent Huge Span Investments (Pty) Ltd (Plaintiff in the Court *a quo*).

HISTORICAL BACKGROUND

- [2] On or about the 5th October, 2018 at the Industrial town of Matsapha the parties entered into a written Agreement (written contract) in terms of which Huge Span Investments (Pty)Ltd, Respondent herein, undertook to construct warehouses, shops, driveways, storm water reticulation and a parking lot on Plot 941 Matsapha Industrial Sites.
- [3] The parties were each represented by their Directors during the signing of the contract, that is, Imran Patel represented the Respondent and Ashvin Patel represented the Appellant.
- [4] The Respondent undertook to construct the works based on a labour contract, with working tools and equipment included, for the sum of ES,500,000.00 (Five Million and five hundred thousand Emalangeni). In return, the Appellant undertook to pay the contractor (Respondent) at regular intervals as certified by the Appellant's consultant, Creative Structural Engineering Solutions within 14 (fourteen) days of certification.
- [5] In the event of breach the Appellant was entitled to terminate the contract and the Respondent would be paid the amount that had been certified by the Appellant's consultant.

[6] The duration of the contract or its full performance was stated in the written contract to be thirteen (13) months from the date when the construction site was handed over to the Respondent to start the works. This date has not been disclosed on the papers or on the contract. Only the date of signing of the contract is shown as the 5th October, 2018.

[7] On the 26th November, 2018 the Respondent submitted to the Appellant certificate No.5 certified by the Appellant's consultant, for the payment of E441,312.50 (Four hundred and forty one thousand three hundred and twelve Emalangi and fifty cent). The Appellant failed or refused to pay for this certified certificate.

[8] On the 6th November, 2018 the Appellant through the consultant notified the Respondent of the Appellant's intention to terminate the contract, which was to take effect the following day, the 7th November, 2018. The reason for termination of the contract is stated as follows-

" The reason for the termination is your continual missing of deadlines for partial completion and handover of the works, (as per your agreement with Ruchi Shopping Centre (Pty)Ltd, the handover date for the warehouse Grid B to Grid N together with a 6m wide access strip to the warehouses roller shutter

doors was the 7^h November, 2018). After your failure to complete and hand over the said portion of work, you made commitment to hand over the works by the 26th November, 2018, today (Oh December 2018) that work has not been completed and handed over to the client.

The contract termination date shall be end of business day on the 11^h December, 2018. You are advised to take immediate steps to bring the construction work to a close and to reduce expenditure to a minimum"

- [9] The reasons as stated above do not cite any poor workmanship but on "**missing deadlines**". The termination was not contested by the Respondent. The certified certificate No. 5 was submitted on the 26th November, 2018 with a due date for payment of the 11th December, 2018. The letter of termination was issued on the 6th December, 2018 and effective on the 7th December, 2018 (4 days) before the deadline for payment of certificate No. 5.
- [10] On the 6th January, 2020 the Respondent issued combined summons wherein it claimed payment for the sum of E441, 312.50 as certified by the Appellant's consultant as per the written Agreement for the work done up to the 26th November, 2018.

[11] On the 16th January, 2020 the Respondent applied for a summary Judgement alleging that the Appellant had no defence to the claim and that the notice of intention to defend had been filed solely for the purpose of delaying the action proceedings.

The Appellant's Case

(12) On the 30th January, 2020 the Appellant filed its Affidavit Resisting Summary Judgement alleging amongst others things that-

- (a) the Respondent herein breached the contract by failing to complete the project within the stipulated time;**
- (b) that the Respondent owed the Appellant monies amounting to E352, 350. 00 advanced to the Respondent;**
- (c) poor workmanship such that the Appellant had to engage another contractor to remedy the shoddy work to the sum of E134, 220;**
- (d) the Respondent utilized electricity from the Appellant's source which Respondent was not entitled to;**
- (e) the Respondent caused damage to a retaining wall valued to the sum of E69, 500.00;**
- (f) the Respondent was liable to penalties amounting to E70, 000.00 and other penalties still to be determined; and**

(g) the Respondent breached the contract hence the Respondent was liable to pay the sums set out in annexure marked "R3" amounting to E801,618.80 (eight hundred and one thousand six hundred and eighteen Emalangeni and eighty cents) alternatively appearing as a counter-claim and additional monies which the Appellant was still to compute.

The Respondent's Case

[13] The Respondent disputes the Appellant's submissions and attributes the delay to the Appellant for effecting structural changes, late delivery of drawings amongst other things. He further disputes owing the Appellant any advanced loans, disputes the claims of poor workmanship and further alleges the utilities such as electricity were the obligations of the Appellant to provide and lastly disputes the counter-claim. The Respondent further maintains that the cash amounts advanced and owed to the Appellant were not advanced to the company (Respondent) but is a private and personal loan to the Director of Respondent.

And wherefore, the Respondent insists on the terms of the contract, which stipulates that payment shall be made within 14 days after the Appellant's consultant had certified the certificate as correct and due for payment for work done.

The Law

[14] Summary judgments are regulated by Rule 32 of the High Court Rules and of relevance for my judgment is sub-rule (4) which states as follows -

"(4) (a) Unless on the hearing of an application under sub-rule (1) either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgement for the Plaintiff against the Defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

(b) The Court may order, and subject to such considerations, if any, as may be just, stay execution of any judgement given against a defendant under this rule until after the trial of any claim in reconvention made or raised by the defendant in the action".

[15] This rule is captured in a myriad of cases but, for my judgment, one such case should suffice as there is no merit flogging a dead horse. The Mahara j vs Barclays Bank Ltd 1976 (1) SA 418 (A) case which was adopted as part of

Eswatini law in *Variety Investments (Pty) Ltd v Motsa* 1982-86 SLR at p.80
 CA. Corbett JA in the *Maharaj* case *supra*, at p.426, stated as follows-

" Accordingly one of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that a material fact alleged by the Plaintiff in his summons or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or determine whether or not there is a balance of probabilities in favour of one party or the other. All that the Court enquires into is:-

- (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
- (b) whether on the facts so disclosed the defendant appears to have as to either the whole or part of the claim, a defence which is bona fide and good in law" (my underlining)

[16] The underlined words or phrases are good posts that should guide the Court in its enquiry as to whether there is a *bona fide* defence or not. Having captured the Rule and the case law on summary judgments, let me examine whether or not the Court *a quo* erred in fact or in law in applying the Rule or the case law in arriving at the decision that it did.

[17] The Respondent's claim herein, is based on certificate No. 5 certified by the Appellant's consultant as per the written contract, certifying that certain works have been done as per the plans and therefore the Appellant should pay for the value of the works so done at the value of E441, 312.50 (four hundred and forty one thousand and three hundred and twelve Emalangeni and fifty cents) and the payment should be made no later than the 11th December, 2018.

[18] The Appellant does not dispute the authenticity of certificate No.5 nor does it allege fraud or collusion. But instead the Appellant alleges, as one of the grounds for failure to pay, poor workmanship. The Appellant as per contract undertook to pay the Respondent whenever his expert, the consultant, has certified the work through a certificate to have been done in terms of the contract. This is the position of law unless the Appellant can displace this position by a valid and *bona.fide* defence. The Appellant's claim in this regard is pitied against the expert advice of his consultant. The

consultant's certified

certificate carries more weight than the Appellant's evidence which is supported by a quotation instead of an invoice or such similar evidence. This ground of appeal cannot stand.

[19] The second ground of appeal is that the Respondent is indebted to the Appellant as he lent and advanced to him some monies. The Court *a quo* correctly found that the written contract did not provide for advancement or provision of any loans more so that the contract was signed after the loans or advancements were made. The Respondent says apart from the fact that these loans were paid back, they were personal and had nothing to do with the Respondent Company. The piece of diary where the loans were recorded does not reflect the name of the Respondent company and further written there are the words -"New Building". Further down the piece of the diary is written against two amounts the words "returned". The Appellant has not explained the meaning and import of these words. It is also not true that the loans were made "during the currency of the contract between the parties". From the diary, the loans bear these dates: 10/02/2018, 17/02/2018 and 07/06/2018 yet the contract was signed on the 05/10/2018.

This ground of Appeal stands dismissed.

[20] The third ground of Appeal is that the Court *a quo* erred in fact and in law in not holding that the advance payment were not relevant to the project hence

they do not constitute a valid and *bona fide* counter claim. As pointed out in my preceding paragraph [19], the loans were made before the written contract came into existence and no evidence ties it to the Respondent company even the name of the Respondent does not appear anywhere on the face of this document. The Director of the Respondent says the loans were made to him in his personal capacity and in any event were paid back. In the piece of the diary filed herein there are two entries showing monies "returned". No evidence has been given whether or not the piece of the diary is a full record of the loan transactions between the Appellant and the Director of the Respondent. This is relevant as the sums of money recorded in the piece of the diary do not add to E352,350 claimed by the Appellant as advanced loans. The record if not scanty is incomplete to make any sense. Again as a matter of law and practice personal loans cannot be loans of the business of the Respondent company unless there is a legal instrument to that effect. This ground of appeal also stands to be dismissed.

[21] The fourth ground of appeal is that the Court *a quo* erred in fact and in law for not allowing claims which fall outside the scope of contract between the parties to defect a legitimate claim. The legitimate claim according to the Appellant is found in paragraph 8 of its heads of arguments and is stated as follows -

" The plaintiff is indebted to defendant in the sum of "E801,618.80 (eight hundred and one thousand and six hundred and eighteen Emalangeneni eighty cents), which is made up of advance payments made to the plaintiff in cash during construction period, and also in respect of works carried out to remedy plaintiff's poor workmanship on the project, and materials used by the plaintiff which was provided by the defendant, which plaintiff was supposed to pay for, and the use of electricity as well".

[22] In support of its claim or defence, which also appears as a counter claim the Appellant quoted the case of National Motor Company (Pty) Ltd v. Moses Dlamini case No. 1361/1993 where the High Court stated -

"where the defence is based upon facts in the sense that material facts alleged by the Plaintiff in summons or combined summons are disputed so new facts are alleged constitute a defence, the Court does not attempt to decide those issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the Court enquires into is -

(a) Whether the Defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded,

(b) Whether on the facts so disclosed the defendant appears to have as either the whole or part of the claim a defence which is *bona fide* and good in law. (My underlining)

[23] I understand the underlined words to mean that the Court seized with the matter must, first determine whether the facts alleged constitute a defence or not. Secondly, that such defence must be *bona.fide* and good in law.

[24] (a) As I have pointed out *supra*, the amounts claimed as advance loans were not advanced to the Respondent but were personal loans to the Director of the Respondent. And therefore are not a defence to the summary judgement. The signed contract does not provide for advancement of loans.

(b) The plaintiff claims monies for remedial work because of poor workmanship by the Respondent and to that end the Appellant files a quotation. A quotation is just a quotation and does not reflect any actual expended monies or actual monies to be expended and by its nature it is not

a binding document reflecting precise monies expended. This defence is therefore bad in law and must be dismissed.

(c) The plaintiff further claims in its defence for material used by the Respondent which were bought or provided by the Appellant and which Appellant expected to be re-imbursed. On page 1 and page 5 of the signed contract between the parties it provides that, it is actually the responsibility of the Appellant to provide these as he did. This renders the defence dead and not being *bona.fide* as well.

[25] The fifth and last ground of appeal alleges that the Court *a quo* erred in holding that the Appellant's defence disclosed very scanty evidence and thus its defence rendered *ma/a.fide* and not good in law.

[26] At paragraph [38] of the judgement being appealed the Court *a quo* found that the amount said to have been advanced to the Respondent seems to have been an advance for another project, outside the terms of the contract. The amounts appearing in the piece of diary do not add to the total claimed. The advance was to another person, the Director of the Respondent, and not to the Respondent *and my addition is that there is no evidence or allegation of a surety agreement that might have at least tied the Respondent to the loans*. The judge *a quo* concludes by stating in paragraph [39] -

" . . .on the scanty material so disclosed before this Court, I am unable to appreciate the existence of a *bona fide* and good defence in law on the part of the Defendant's case."

I agree with the Learned Judge a quo. There is nothing on the papers filed tying the loan to the Respondent. A defence based on this claim is bad in law and not *bona fide* and must be dismissed.

[27] On the other hand, the Respondent's claim is based on a certified certificate, amounting to an acknowledgement of debt, signed by the Appellant's consultant. The consultant had an opportunity to deduct any monies or claims belonging to the Appellant if the consultant believed in such claims, such as for the loans, poor workmanship, electricity and other expenses. There is no explanation advanced as to the reasons why these amounts were not deducted if they were *bona fide* yet the certified certificate is not disputed. I agree with the Judge a quo's conclusion. The Respondent's case has more weight than the Appellant's case.

[28] The appeal does not pass the muster. If the defence is also based on a counter-claim, there is no evidence of such counter-claim being instituted or prosecuted. The Combined Summons were issued on the 6th January, 2020 and today there is still no evidence that the counter-claim is being prosecuted

hence an order staying the grant of the summary judgment pending the finalization of the counter-claim proceedings would not be appropriate. As things stand, there are no counter-claim proceedings in motion. Of note is that the counter-claim is made up of monies advanced to some other person but not the Respondent. The counter-claim contains monies for goods or services claimed from the Respondent when the contract says there were supposed to be provided by the Appellant itself. The counter-claim further contains unliquidated claims where the figures of the claim are based on a quotation for which may not represent the true value of the work done or to be done. Some amounts forming part of the counter-claim are amounts already paid and acknowledged by the Appellant, reference is made to the piece of the diary which lists monies advanced as well as amounts "returned".

[29] I am not satisfied in as much as the Court *a quo* was not satisfied that the Appellant's defence is *bona fide*. I am of the opinion that the Appellant has not fully disclosed the nature and grounds upon which the defence is founded. The facts so disclosed do not convince me that the Appellant has a defence to the summary judgement which is *bona fide* and good in law.

(30) Accordingly the Court makes the following orders -

(a) The appeal is dismissed with costs; and

(b) The orders bearing numbers 1, 2 and 3 of the judgement of the Court a quo delivered on the 4th December 2020 are confirmed.

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JUSTICE OF APPEAL

I agree



I.C.B. MAPHALALA

CHIEF JUSTICE

I agree



J.P. ANNADALE

JUSTICE OF APPEAL

For the Applicants: NKOSINATHI MANZINI OF C.J. LITTER &
COMAPNY

For the Respondent: N.D. JELE OF ROBISON BERTRAM ATTORNEYS