IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIV. APPEAL CASE NO. 35/2021**

In the matter between:

ESWATINI INVESTMENT GROUP LIMITED Appellant

and

NOMCEBO OLIVIA SIMELANE Respondent

Neutral Citation: *Eswatini Investment Group Limited v Nomcebo Olivia Simelane (35/2021) [2022] SZSC 23 (10 June 2022)*

CORAM: **JUSTICE M.J. DLAMINI JA**
JUSTICE S.B. MAPHALALA JA
JUSTICE S.M. MASUKU AJA

DATE HEARD: **11/05/2022**
DATE DELIVERED: **10 /06/2022**

Summary: *Civil Procedure – Summary Judgment Procedure. Rule 32 (5) of the High Court Rules requires a defendant who is opposed to Summary Judgment, to file*

an affidavit resisting it. According to Rule 32 (4) The Court is obliged to scrutinize such opposing affidavit to ascertain for itself whether there is an issue or question which ought to be tried or there ought for some reason to be a trial of that claim or part thereof. The defendant must set out material facts of its defence in its affidavit, though not in an exhaustive fashion. The defence must be clear, unequivocal and valid.

Held: *Appeal dismissed with costs, Appellant failed to raise a clear, unequivocal and valid defence. Appellant failed to set out material facts of its defence and/or that there are issues or questions that remained to be resolved at trial.*

JUDGMENT

MASUKU AJA

[1] The Appellant lost its bid to successfully defend a Summary Judgment application filed against it by the Respondent in the Court *a quo*. The facts of the matter are captured in the Respondent's Declaration.

[5] On or about the 11th February 2021 the Respondent instructed her attorneys to demand payment of the invested funds together with the accrued interest. The letter of demand sets out the background of the investment agreement and the last two paragraphs of the letter reads:

> *'4. We have now been instructed to demand, as we hereby do, that you pay to client the redemption amount together with all the due interest on or before ...18 February 2021...*
>
> *5. Further be advised that should you fail to attend to payment as demanded we shall escalate the matter through the appropriate forum ...'* (Underlining added).

[6] The Appellant responded to the demand by letter dated 19th February 2021 signed by its legal secretary and stated *inter alia*: -

> *"2. We confirm that on or about the 12th August 2015 the company received an investment of the sum of E200 000-00, under Class A Share Certificate (No. A00110) and Class E Share Certificate (No. 00242) from your client. We confirm that the said investment portfolio was and or is redeemable with interest, in the month of August 2020.*
>
> *3. We confirm further that as at the month of August 2020, the redeemable amount for both classes is the sum of E314 909-32 made up of E214 909-32 under Class E and the sum of E100 000-00 under Class A. We further confirm that the company is and has been paying monthly dividends to your client under Class A whenever they fall due.*

[2] On or about the 12th August 2015 at Mbabane, the parties entered into a partly written and partly oral investment agreement wherein the Respondent invested a sum of E200 000-00 in Shares that she held in certificates. The investment had two categories of shares, under Class A she invested the sum of E100 000-00 and under Class E she invested the balance of E100 000-00.

[3] The investment was for a period of 5 years redeemable in the month of August 2020. A sum of E314, 909-32 was due to be paid to the Respondent over and above the monthly dividends that accrued to her and were due and actually paid to her during the five-year period under her Class A shares.

[4] On or about August 2020 the Respondent informed the Appellant that her shares were due for redemption and that she was desirous of withdrawing the invested funds as at the 12th August 2020. She, instructed the Appellant to deposit her funds into her designated bank account that she had been using to transact the investments. The Appellant however failed to deposit the funds and has never done so.

4. *We advise that the company is and has always been committed to paying all redemptions due to its clients including your client. We advise further that; the company is committed to paying the interest accrued beyond the aforementioned due date.*

5. *We therefore undertake to pay all redemptions due to your client within the next 21 (twenty-one) working days, and as such we kindly seek your client's indulgence until then.*

6. *We reiterate that the company remains committed to paying all redemptions due to its clients, please do not hesitate to contact the undersigned should you need further clarities and or assistance thereof." (Underlining added)*

I will return later in this judgment to comment on the two letters.

[7] The Appellant failed to honour its commitment in whatever form it perceived. As it turned out in its defence against Summary Judgment, it said that the amounts were not due owing and payable, alternatively the redemptions referred to in the agreement and/or letters was a process of conversion of linked loan units into ordinary shares to occur in the event it defaulted on the repayment of the capital on the redemption date.

[8] The Appellant filed its intention to defend the action and in response to the notice, the Respondent filed an application for Summary Judgment that was countered by Appellant's Affidavit Resisting Summary Judgment. The matter was set-down for contest before the Court *a quo* and the Court granted Summary Judgment of the Court *a quo* in its entirety. The Appellants filed this Appeal.

Appeal Grounds

[9] The grounds of appeal were first filed on the 23rd July 2021 and later amended on the 15th March 2022. There being no objection to the amendment, I proceed to capture the essence of the grounds before this Court: -

9.1 the Court *a quo* erred in law and in fact by granting Summary Judgment when the declaration was irregular and expiable and there being no compliance with Rule 18 (6) of the High Court Rules, the Court *a quo* should have held that the claim had not been established and the pleadings were not technically correct;

9.2 the Court *a quo* erred in law and in fact to have held that the letter of undertaking by the Appellant to pay the Respondent was a

liquid document to be read in isolation from the contractual agreement between the parties when granting Summary Judgment. It ought not have granted Summary Judgment contrary to the contractual agreement between the parties;

9.3 the Court *a quo* erred in law and in fact in holding that the letter of undertaking to pay the Respondent was a waiver or novation that altered the contractual terms of the agreement between the parties;

9.4 the Court *a quo* should have held that there was a dispute as to whether any part of the agreement was verbal or not and that the Respondent should have attached the agreement in its entirety.

Condonation Application

[10] Three days prior to the date of the hearing [11 May 2022] the Appellants filed an application for condonation for the filing of further heads of argument coupled by supplementary submission (the further heads of argument I presume). The reasons for the supplementary submission. It was submitted were to address new issues that the

Respondent had raised in the Heads of Argument that were also filed three days prior to the date of the hearing.

[11] The Appellant sets out the reasons for delay although not satisfactory because it based them on the lateness of the Respondent's filing. There is ample authority of this Court that such reasons are not acceptable by the Court. A party is required to observe its own *dies* when it comes to the filing of heads of argument. The Appellant did not even attempt to place its prospects of success on appeal in its application. Nonetheless the application was not opposed presumably because of the Respondent's own lateness in filing its heads (5th May 2022).

[12] If there was any prejudice to be suffered, for the late filing it would have equally applied to both parties. It is not in the interest of justice that litigants should be prejudiced by their Counsel's shoddiness, this Court irrespective, condoned the late filing of the supplementary submission. The parties were also allowed to file further authorities in due course..

[13] The law governing Summary Judgment has been stated in numerous cases in the High Court and in this Court. I find it apposite to briefly restate the relevant excerpts applicable *in casu*. I found the detailed exposition of Rule 32 of the High Court Rules aptly articulated, with respect, by Mr. Justice Mamba J in a number of cases, and in particular the case of **Bhembe v Mthethwa (1675 of 2005) [2016] SZHC 125 (19 July 2016)** citing **Benedict Vusi Kunene v Mduduzi Mdziniso and Another (1011/2015) [2016] SZHC 40 (12 February 2016).** The Court stated as follows: -

> *"[9] The circumstances or grounds upon which summary judgment may be granted or refused are well known in this jurisdiction. In the* ***Swaziland Tyre Services (Pty) Ltd. t/a Max T. Solutions v Sharp Freight (Swaziland) (Pty) Ltd. (381/2021) [2014] SZHC 74 (01 April 2014*** *the Court stated as follows;*
>
> > *"[6] In* ***Swaziland Livestock Services v Swaziland Government and Another****, judgment delivered on 19th April 2012 Ota J said: -*
> >
> > *... in the case of* ***Swaziland Development Financial Corporation v Vermaak Stephanus Civil Case No. 4021/2007****.*
> >
> > *It has been repeated over and over that Summary Judgment is an extra-ordinary stringent and drastic remedy, in that it closes the door in final fashion to the Defendant and permits judgment to be given without trial ... it is for this reason that in a number of cases in South Africa, it was held that summary*

judgment would only be granted to the Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far."

[14] The rules have therefore laid down certain requirements as checks and balances to the summary judgment procedure in an effort to prevent miscarriage of justice. This Rule 32 (5) requires a defendant who is opposed to summary judgment, to file an Affidavit Resisting a Summary Judgment and by Rule 32 (4) the Court is obliged to scrutinize such an opposing affidavit to ascertain for itself whether "there is an issue or question which ought to be tried or there ought for some other reason to be a trial of that claim or part thereof". 'The defendant must have set out material facts of his defence in his affidavit, though not in an exhaustive fashion. The defence must be clear, unequivocal and valid.' (Underlining added)

[15] In **Sinkhwa Semaswati** *(supra)* His Lordship Mamba J also had occasion to say: -

"[3] In terms ofRule 32 (5) (a) of the Rules of this Court a defendant who wishes to oppose an application for Summary Judgment... "may show cause against an application under sub-rule (1) by affidavit or otherwise to

the satisfaction of the Court and, with the leave of Court the Plaintiff may deliver an affidavit in reply." 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 thereof."

[16] The Court will not merely "be slow" to close the door to a defendant, but will in fact refuse to do so, if a reasonable possibility exist that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiff's claim, the Court cannot deny him the opportunity of having such an issue tried." **Mater Dolorosa High School v RJM Stationary (Pty) Ltd. Appeal Case No. 3/2005** a similar exposition was restated by Hon. Mr. Justice Lukhele AJA in a judgment of this Court in **ESW Investment Group and Thabsile Daphne Mkhatshwa 36/2021 [2022] SZSC 09 (12/05/2022).**

Non-Compliance with Rule 18 (6) of the High Court Rules

[17] I turn to each ground of appeal raised. The Appellant had raised an objection in argument in the Court *a quo* that the Respondent's failure to annex or attach the relevant copy of the agreement to its declaration

was expiable and in contravention of Rule 18 (6) of the High Court Rules which rule states: -

> *"A party who in his pleadings relies upon a contract shall state whether the Court is written or oral and when, where and by whom it was concluded, and if the contract in written, a true copy thereof or the part relied on in the pleading shall be annexed to the pleading."*

[18] *In casu* the Respondent did not annex the investment agreement to its declaration. The Court *a quo* held that the existence of the contract between the parties is non issue. The Court held that in any event the agreement had been filed by the Appellant in annexures ESW 2 and ESW 3. The court concluded further that the filing of the annexures was to complete the picture of the relevant issues. It said the Court deals with real issues of substance rather than strict formalism. The Appellant did not complain of any prejudice as a result of Respondent's failure to attach the agreement. It dismissed the objection for which the Appellant has raised as one of the grounds of its Appeal.

[19] The Appellant argued at the Court *a quo* and on appeal that the Summary Judgment ought not to have been granted. The declaration was irregular and expiable because the Respondent did not attach the

investment agreement. It was argued that the Respondent's claim had therefore not been established.

[20] The Respondent on the other hand submitted that the Appellant's defence lacked merit because not only is it technical but it was also an afterthought as it was not even raised in the Affidavit Resting Summary Judgment. If indeed the objection was genuine, the Appellant would have raised an exception to the Respondent's declaration for non-compliance with Rule 18 (6) of the High Court Rules, so the argument goes. Lastly, that after all, the Respondent's case was not based on the investment agreement but on an unequivocal acknowledgment of debt.

[21] I tend to be persuaded by the Respondent's submission and the findings of the Court *a quo* on the above ground. Appellant's arguments on this point were half-hearted from onset in the Court *a quo*. It lacked the heart, spirit or interest of persuasion, perhaps Counsel himself did not believe fully in the defence. I say so because of some of the excerpts from the transcript of the arguments in the

Court *a quo*. In addressing the Court *a quo* at page 41-42 of the transcript the Learned Counsel submitted that, "[42] Here it is a *question of law, it has got nothing to do with the facts. The facts are common cause as to what happened so we will not waste the Court's time with regards to that*" ... at page 42 Counsel submitted '... so the *question of the letter which then comes it might be there but it is neither here no there. So, my Lord this is a clear question of law and it is very, very crisp. There are no factual disputes in terms of the occurrence of the events they are as stated.* The only thing is the law and the interpretation of the contract.'

I cannot criticize the Court *a quo*'s conclusion that 'In any event, the existence of the contract between the parties is not in issue. It had been filed by the Appellant in annexures ESW 2 and ESW 3 in the Affidavit Resisting Summary Judgment after all.

[22] It is also correct that exception was never raised either as a stand-alone pleading or as a point objecting to the non-compliance with Rule 18 (6) in the Appellant's Affidavit Resisting Summary Judgment. It is also correct that the Respondent sought to rely on the

acknowledgment of debt and undertaking to pay that was pleaded and annexed to Respondent's declaration.

[23] I am persuaded by the submission that this point and ground for appeal is technical and lacks real issue of substance. It was correctly dismissed by the Court a quo. See **Matata Retail (Pty) Ltd.** *(supra)* where this Court in the judgment of Honourable Cloete JA at paragraph [13] citing the judgment of the Court **a quo** (per Hon. Mlangeni J): - "The other aspect, however, is that Summary Judgment is about the existence or non-existence of a defence on the merits of the matter. See for instance, my observations at paragraph 12 of the Judgment in **Mbuluzi Game Reserve (Pty) Ltd. v Iron Wood (Pty) Ltd and Another (64 & 65/17) [2018] SZHC 18.** Where a defendant has no defence to the merits, and relies solely on a technicality that relates to non-compliance with the rule of or some other aspect that has nothing to do with the merits, does it serve the interests of justice to hold in favour of such Defendant." The Learned Judge Mlangeni J in the Mbuluzi *(op. cit 13)* further says: - "If the application for Summary Judgment is dismissed and the plaintiff reinstates the action in future, the Defendant will still have no defence on the merits. In the meantime,

legal cost will have escalated for both parties, and precious time will have been lost. To dismiss the application on the basis as argued for by the Appellant would have the effect of going against the celebrated position espoused in the **Shell Oil Swaziland (Pty) Ltd Limited t/a Sir Motors Court of Appeal Case No. 23/2006**. This is exactly what Summary Judgment seeks to avoid, delay of justice in circumstances where the appellant has no *bona fide* defence on the merits".

[24] Tide up to this ground is the Appellant's appeal ground that there is real dispute of fact on whether or not the agreement was verbal or written and that the Respondent should have attached the agreement in its entirety to the declaration. In dealing with the issue of the agreement, the Court *a quo* did not see this as an issue or a question in dispute which ought to be tried. The Court *a quo* correctly concluded in my view that the claim was based on the acknowledgment of debt and undertaking to pay and that the existence of the contract was a non issue between the parties.

[25] The Appellant's Affidavit Resisting Summary Judgment does not in any way set out that as an issue at all. Even if it did, it would have been required to set out the material facts that constitute its defence and how it remains an issue to be resolved at trial. The Appellant instead pleaded a written agreement in the affidavit. It pleaded that the agreement was in written portions of which were contained in the prospectus, investor information and the investment recordial which were attached to its affidavit and was marked "ESW 2" and "ESW 3".

[26] The Appellant has relied on the parties' written agreement for its defence, in this instance Clause 1.5.5. of the agreement. Further the Appellant's supplementary submissions relied extensively on the written agreement. I find no substance of this ground and agree with the Court *a quo* that existence of the contract between the parties was no real issue. This ground of appeal must also fail.

The Investment Contract versus the Acknowledgment of Debt

[27] The ground of appeal in this regard is set out at paragraph [9.2] *supra*. In essence the first part of the Appellant's argument before us is that it

did not regard itself as being in breach of the terms of the parties' agreement which terms were found in the prospectus that had been provided to the Respondent. That it never at any point acknowledge its indebtedness to the Respondent, but the letter of the 19th February 2021 only confirmed the existence of the invested amounts and the redeemable value of the amounts. Further that Clause 1.5.5 of the prospectus contains a clause that triggers a conversion of the investment in "Linked loan units" to ordinary shares in the company, upon default by the company. The conversion trigger protects the investor in the event of default because the investor acquires equity in the company. The Appellant argued therefore that the amounts that were invested with it were not due owing and payable as alleged by the Respondent.

[28] The second part of the Appellant's argument was that the Court *a quo* was careless and it misdirected itself to have expressed the view the Respondent's claim was based on an acknowledgment of debt to pay and not so much on the initial investment agreement. The Court *a quo* at paragraph [7] of the judgment expressed the view that" ... with respect, these business or economic pontifications by the defendant

do not constitute a defence to the plaintiff's claim. But more importantly, the defendant ignores the fact that it is being sued, not so much on the initial investment agreement but on its acknowledgment of debt and undertaking to pay referred above. In these proceedings, the claim is founded on the acknowledgment of debt..."

[29] The Appellant's purported defence in the affidavit is that the nature of the investment portfolio that the parties entered into under Class A and Class E of the shares was linked to loan units guided by the prospectus that the Respondent had acknowledged to be the terms of the investment agreement. Accordingly, when a redemption accrues to any of its client (like the Respondent) and a redemption demand is not met by the company, in such instance Clause 1.5.5 guides those circumstances. The clause reads as follows: -

> "Conversion of linked loan units into ordinary shares is obligatory in the following events: -
>
> - Default by the company on repayment of the capital on the redemption date; or

- Non-payment of three consecutive returns on the linked loan units by the company.

In any of the above events, the linked loan unit holder will immediately notify the company in writing. Upon such notification all linked loan units, dividends, interests and capital shall convert into ordinary shares. The conversion rate into ordinary shares shall be calculated at the fair and reasonable price of the ordinary shares as determined by the auditors of the company on the day of the default ..."

[30] As I understand it, for the Appellant to rely on this defence as valid and unequivocal against the Respondent's redemption claim, it has to at least show in the affidavit that Clause 1.5.5. of the prospectus was triggered to convert the investment in linked loan units into ordinary shares upon the default of the company to pay on the redemption date. The Appellant however, concedes in the affidavit that there was no notification by the Respondent of the Appellant's default and therefore Clause 1.5.5. was not triggered. Instead, Appellant admits that only a letter demanding payment for the redemption was sent and, in a bid,

to ensure that the Respondent is afforded her redemption and in good faith they undertook the route to provide the redemption within 21 days. The persistent default was as a result of an ongoing restructuring process that once completed was to be to benefit of the Respondent and be of advantage to her.

[31] The purported defence cannot be said to be available to the Appellant because the Respondent did not notify the Appellant company that it had defaulted on repayment of the capital on its redemption letter or at the redemption date (11 February 2021). The Appellant instead took the route of an acknowledgment and agreement to pay the Respondent within 21 days and it still has not paid the Respondent despite the undertaking. There is therefore nothing in my view that suggests that an issue or any question has arisen from the non-triggered agreement that ought to be tried if at all we were to accept that the Appellant's argument on the terms of Clause 1.5.5. carried any weight and that it was the document that was to be relied on and not the acknowledgment of debt. This ground must also fail.

[32] On the acknowledgment of debt and undertaking to pay as described by the Court *a quo*, the Appellant denied that it was in default to pay the Respondent the sum of E314, 909-32 (Emalangeni Three Hundred and Fourteen Thousand, Nine Hundred and Nine, Thirty-Two Cents) despite the company secretary's letter dated 19th February 2021. The Court *a quo* found that the Appellant unequivocally accepted that it was in default of payment of the debt as it undertook to pay it within 21 days from the 19th February 2021.

[33] The letter of the 19th February 2021 was captured in this judgment *supra*. The question is how does the Appellant escape that it made an undertaking to pay the Respondent in that letter? The Appellant stated in its affidavit that the amounts that the Respondent invested 'are not due, owing and payable as alleged by the Respondent'. The Appellant went on to recount that there was a change in its shareholding and that there were new directors who are fixing the problems caused by old management. That there was some restructuring in progress working towards rebuilding the company including the re-financing of the company: The assets are there, but are not liquid'. 'This as a result handicapped the defendant's alibility to service its client's redemptions

that have fallen due as in the case of the plaintiff: 'It is in line of these developments that the defendant has fallen in default.' (Underlining added).

[34] I cannot see how the Appellant can escape the fact that it conceded in the affidavit that it was handicapped and unable to service the Respondent's redemption instructions that had fallen due. This had been caused by restructuring developments that were taking place that caused it to default. The Appellant's reasons cannot in my view deter the granting of Summary Judgment.

[35] There is also no doubt in my mind that the letter of the 19th February 2021 is an unequivocal acknowledgment of debt and an undertaking to pay the amount of E314 909-32 (Emalangeni Three Hundred and Fourteen Thousand, Nine Hundred and Nine, Thirty-Two Cents). The letter is a response to the Respondent's letter of 10th August 2020 headed 'Withdrawal of Investment Funds'. It sets out of her intention to withdraw her investment funds from the Appellant which she said were payable as of the 12th August 2020. She provided her bank

account for the deposit of the funds. She clearly did not contemplate a conversion of any of her shares in the share certificates. Her attorneys also wrote a letter of demand a few months later (about 5 months later) when there was no payment forthcoming. In that letter the attorneys wrote that the investment portfolio was for a period of (5 years) redeemable with interests in the month of August 2020. That despite demand to pay the redemption amounts there were excuses and postponements to perform in terms of the agreement. They demanded payment of redemption amount with all interests due.

[36] The Appellant's secretary then wrote on the 19th February 2021 in response, confirming the investments that had been made by the Respondent to the Appellant and the details of the classes of shares and the expected amount of E314, 909-32 (Emalangeni Three Hundred and Fourteen Thousand, Nine Hundred and Nine, Thirty-Two Cents) to be paid out on redemption date. The Appellant pledged its commitment to paying all redemption due together with interest that would have accrued beyond the due date to all its clients including the Respondent. It undertook to pay the Respondent within 21 working days and accordingly sought the Respondent's indulgence until such

promised date. It reiterated its commitment to pay all redemptions due to its clients and called for any clarities or assistance thereof.

[37] In interpreting of what exactly all this amounted to I find the recent decision of this Court apposite; **Swaziland Lottery Trust (Pty) Ltd v Swaziland Revenue Authority (CIVI 65/2021) [2022] SZSC 11 (13 May 2022)** that explored the stated principles which governs the construction of legal documents citing the South African Supreme Court of Appeal Case of **Natal Joint Municipal Pension Fund v Emdumeni Municipality [2012] 2 ALL SA 262 (SCA) 2012 (4) SA 593 (SCA)** as follows: -

> *"[8] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own ... The relevant authorities are collected and summarized in* ***Bastian Financial Services (Pty) Ltd. v General Hendric Schoeman Primary School****. The present state of the law can be expressed as follows. Interpretation in the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language use in light of the*

ordinary rule of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to me that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used ..."

[38] Considering that the parties give different meaning to the letter of the 19th February 2021 on whether it is an acknowledgment of debt and an undertaking to pay or not, I am persuaded to accept that it is an acknowledgment of debt. The reasons are that if one has to look at the apparent purpose and context to which the withdrawal letter, the letter of demand and the response provided by the company secretary, one should conclude that it was all about the Respondent's claim to be paid her investment money together with interest at the end of the five years investment period. This in my view is a sensible and or businesslike meaning that is attributable to the apparent purpose of the correspondence between the parties that was concluded by the Appellant's acknowledgment and undertaking to pay. I cannot

therefore fault the Court *a quo*'s conclusion that the Appellant unequivocally accepted that it was in default of payment and it undertook to pay the Respondent within 21 days of the acknowledgment. It had not paid the Respondent at the time of the hearing of the appeal.

[39] The last ground of appeal raised by the Appellant is that the Court *a quo* should have held that the letter of the 19th February 2021 was not a waiver or novation to alter the terms of the contract between the parties. This ground emanates from the conclusion of the impugned judgment. The Court *a quo* stated at paragraph [7] that ... 'with respect, these business or economic pontification by the Defendant do not constitute a defence to the Plaintiff's claim. But more importantly, the Defendant ignores the fact that it is being sued, not so much on the initial investment agreement but on its acknowledgment of debt and undertaking to pay referred above. In these proceedings, the claim is founded on the acknowledgment of debt ...'

[40] The Appellant contends that the letter of the 19th February 2021 was not an acknowledgment of debt by the company. The Court *a quo* carelessly and erroneously held that not only was it an acknowledgment of debt and undertaking to pay but it also novated the parties' investment contract. It accepted that the Appellant was sued on the acknowledgment and not the investment contract. The Appellant's argument is that it could not have been the case because a party who sues on the novated contract must clearly plead its case and that was not the case for the Respondent. On the other hand, the Respondent's Counsel submitted that the Court a quo rightfully upheld the Summary Judgment as the claim was based on the acknowledgment of debt and not the investment contract.

[41] The Author of *'BUSINESS TRANSACTION LAW', Ninth Edition* **Robert Sharrock** in his book addresses this question when he discusses novation and acknowledgment of debt he states (at page 263) 'By novation there occurs the extinction of contract or obligation and substitution for it of a new contract or obligation ... In general, novation is not lightly inferred a clear intention to novate on the part of the parties must be proved.'

[42] Hon. Steyn CJ in the case of **Roberts Construction Co. Ltd. v Dominion Earth-Works (Pty) Ltd. and Another 1968 AD** supports of the appellant's contention that an implied contract must be pleaded by the party who relies on it. He stated in that case that 'an implied contract cannot be pleaded badly and left as it were, in the air without any indication from what it is to be inferred, it is necessary to plead the circumstances giving rise to the implied contract'.

[43] Thus to a greater extent there is a point to be reckoned as argued by the Appellant that acknowledgment of debt need/ought to have been pleaded. However, it does not end there as there is authority to the proposition that novation does not necessarily mean that the parties intend to substitute the acknowledgment for the original contract but the creditor merely intends to obtain liquid proof of his claim, he may sue either on the acknowledgment of debt or the original contract.

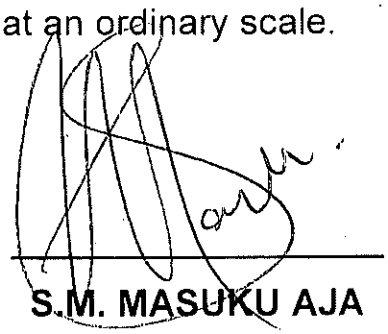
[44] See **Rodel Financial Services (Pty) Ltd. v Naidoo and Another 2013 (3) SA 151 (KZP)** cited by Robert Sharrock *supra* [page 263] *supra*, where it was held that "an acknowledgment of debt, given in

respect of a debt arising from a discounting agreement, had not novated that agreement. The Court pointed out there must be clear and cogent proof of a novation, as the creditor is more likely to have intended to strengthen or confirm the existing right with the new contract, than to destroy it through novation. The courts have often said that giving of a promissory note does not necessarily mean that the parties intend to substitute the note for the original debt, but rather that the creditor merely intends to obtain liquid proof of his claim. Similarly, the giving of an acknowledgment of debt merely means that the creditor may sue either on the acknowledgment or the original debt." (Underlining added)

[45] Although the Court *a quo* did not admit that the original contract was substituted by the acknowledgment of debt, it simply stated that the Appellant was being sued not so much on the initial contract but on the acknowledgment of debt. The dictum cited above gives credence to the Court *a quo's reasoning* that a creditor may sue either on the acknowledgment of debt or the original debt. In this case, the Respondent sued on the acknowledgment of debt. This Court has no reason to fault the judgment of the Court *a quo* in that regard. It

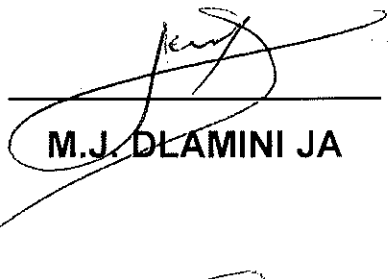
accepts as correct the proposition that the Respondent had a choice to sue either on the acknowledgment or the original contract.

[46] In the circumstances the appeal must fail and the Appeal stands to be dismissed with cost at an ordinary scale.



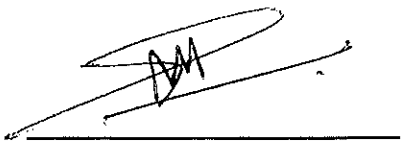
S.M. MASUKU AJA

I agree



M.J. DLAMINI JA

I also agree



S.B. MAPHALALA JA

FOR THE APPELLANT:	**MR S. V. MDLADLA OF S.V. MDLADLA AND ASSOCIATES**
FOR THE RESPONDENT:	**MS. B. CHARAMBA OF WARING ATTORNEYS**