IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Appeal Case **No. 36/2021**

HELD AT MBABANE
In the matter between:

Es,v INVEST1'1ENT GROUP LIMITED — Appellant

and

THABSILE DAPHNE MKHATSHWA — Respondent

Neutral citation: *ESW Investment Group Limited v. Thabsile Daphne lvlkltatsl11va - 36/2021 /2022/ SZSC 09 (12/05/2022.*

Coram:
A. M. Lukhele A.J.A.
S.M. Masuku A.J.A.
M.M. Vilakati A.J.A.

Date of I-lea ring: 4th April 2022

Delivered: 12th May 2022

Summary: ***CIVIL PROCEDURE - Summary judgement - Appellant acknowledged indebtedness to Respondent - Appella11t faili11g to raise existence of trial issues and/or bona fide defence in Court a quo- Appeal dismissed with costs.***

JUDGEIVIENT

INTRODUCTION

[l] This is an appeal against the judgment of the C_ourt a *quo* delivered on the 12th July, 2021, in which summary judgment was granted against the Appellant

[2] In the Court *a quo* the Respondent had sought and was granted summary judgment on the basis that the Appellant had no *bona.fide* defence and had, in its papers, failed to raise any triable issues. The Appellant now appeals against the Court *a quo* judgment.

BACKGROUND FACTS

[3] The facts in this matter are largely common cause. On or about August, 2017 the Appellant and the Respondent entered into a written agreement in terms of which the Respondent paid a sum of ES00,000.00 (Five Hundred Thousand Emalangeni) to the Appellant as an investment.

[4] The amount of ES00,000.00 (Five Hundred Thousand Emalangeni) was to be retained and invested by the Appellant for a period of five years with the Respondent retaining an option to withdraw the aforesaid invested amount together with interest accrued thereon on notice to the Appellant.

In tenns of the written agreement between the parties, the Respondent was to apply for a withdrawal of her investment by giving at least three months' notice of such withdrawal to the Appellant.

[5] On the papers it is not in dispute that in August 2020, after the expiry of three years the Respondent, by letter addressed to the Appellant, indicated her intention to make the withdrawal of the investment in line with the parties' contractual obligations. Respondent made it clear that she wished to be paid the invested amount together with accrued interest.

[6] Upon receipt of Respondent's notice of withdrawal the Appellant in a letter to Respondent acceded to Respondent's request of withdrawal and ma.de an undertaking to pay the invested a.mount, together with a.II accrued interest by no later than the 30^{1h} November 2020.

[7] The Appellant however, failed to make the payment as per its unde1iaking. On or a.bout the 18^{1h} February, 2021 the Respondent through her lawyers, wrote and sent a letter to the Appellant, demanding payment of the invested amount together with any accrued interest.

[8] On or about the 1 9^{111} February, 2021 and pursuant to the aforesaid letter of demand the Appellant confirmed that it owed the Respondent the invested amount of ES00,000.00 (Five Hundred Thousand Ema.langeni). The Appellant also confirmed that the value of Respondent's investment at the date of withdrawal was the sum of E770,263.50 (Seven Hundred and Seventy Thousand Two Hundred and Sixty-Three Ema.langeni Fifty

Cents). This amount was made up of the initial investment together with interest accrued thereon.

[9] The Appellant again undertook to pay the amounts due to the Respondent by a set date, but failed to do so.

PROCEEDINGS BEFORE THE HIGH COURT

[1OJ Respondent's Attorneys then issued out a simple summons against the Appellant. After that the Appellant filed notice of intention to defend. Thereafter the Respondent's filed a Declaration and applied for Summary Judgement pursuant to Rule 32 of the High Court Rules. The Respondent claimed that summary judgment be granted for £770,256.60 (Seven Hundred and Seventy Thousand Two Hundred and Fifty-Six Emalangeni Sixty Cents), interest and costs.

[11] In the papers filed before the High Court, the Respondent's allegations in the Declaration were that during 2017, in tenns of a11 oral agreement with the Appellant had paid and invested the sum ofE500,000.00 (Five Hundred Thousand Emalangeni) to the Appellant. The agreement between the parties was that the investment was to be for period of five (5) years, with the Respondent having the right and option to renew and/or withdraw the investment together with all interest accrued thereon on the completion of a three-year period. The withdrawal was to be made by the Respondent upon giving the Appellant at least three months' notice of such intention to withdraw her investment.

[12] The Respondent further alleged in her Declaration that, in full compliance with the material tenns of the agreement she discharged our obligations and deposited a sum of ES00,000.00 (Five Hundred Thousand Emalangeni) with the Appellant as the investment amount and was duly accepted by the Appellant. She states that after a three-year period she took the decision to withdraw her investment and she accordingly notified the Appellant of her decision and called up the investment. The obligation of the Appellant was to pay the Respondent the invested amount and such interest as accrued at the date of withdrawal. The Respondent undertook to make the necessary amount of ES00,000.00 (Five Hundred Thousand Emalangeni) that was invested by the 30°[1] November, 2020 together with the accrued interest. The Appellant however failed to pay by date it stated.

[13] The Respondent further alleged that, the Appellant's failure to pay prompted the Respondent, through her Attorney to send a letter of demand to the Appellant demanding payment of the invested amount together with the accrued interest. The letter was received by the Respondent. The Appellant responded in writing through its authorised officer by stating that: -

> *"2. We co11firm that your client has several investments with our company, specially we confirm that your client has made a request for an ear/.J' withdrawal of her ES00,000.00 (Five Hundred Thousand Emalangeni) investment under the growth fund, under account No. 00699. We further confirm that the withdrawal date as per your client's application was and/or is the 3ot1, November, 2020 and the redemption value is the sum of £770,263.60 (Seven Hundred and Seventy Thousand Two Hundred and Sixty-Three Emalangeni Sixty Cents).*

3. *We advised that the company is and has always been committed to pay all redemptions due to its clients including your client. We re-iterate that the granting of the request for early withdrawal of the aforementioned redemption subsists and the company remains committed to fulfilling its obligations to clients, your client included.*

4. *We therefore undertake to pay all redemptions due to your client within twenty-one (21) working days; and as such we kind(v seek your indulgence until then."*

[14] Upon service of the summons the Appellant entered appearance to defend the suit. thereafter the Respondent's launched an application for summary judgement for the amounts admitted by the Appellant. In opposition to the application the Appellant filed an affidavit resisting the summary judgement in which its Managing Director, inter *alia*, stated as follows: -

"9 ..... Pursuant to the letter of demand fi·om the Plaintiff's Attorneys the Defendant in a bid to ensure that the Defendant is afforded his redemption and in good faith made an undertaking that same would be provided within twenty-one (21) days. It must be noted that pursuant to this the Defendant continued to be in default. This is mainly a result of the ongoing restructuring process, a process which will be once completed in the Plaintiff's full benefit and advantage.

I 0. I state fitrther that up to date the Defendant has not convened a meeting to any and or all classes of shareholders at which meeting proposals are being considered including but not limited to the early or partly redemption of linked loan units into ordinary shares or cash or a combination of ordina1J1 shares and cash. In light of the foregoing, it is clear that the Defendant bona fide has stated a

good defence in the matter, which in all sorts is not in any way prejudicial to the Defendant. In the event the Court would find against the Defendant the Plaintiff would suffer great prejudice as this would lead to a liquidation of the Defendant and the Plaintiff would suffer great loss. It is therefore in protecting the Plaintiff's interests that the Defendant has defended this matter in order to protect the interests of the Plaintiff and other investors."

COURT A OUO'S FINDINGS AND ORDERS

[15] On the 12th July, 202 l the Court *a quo* delivered its judgment whereupon it granted the application for summary judgment as prayed in the Summons against the Appellant.

[16] In delivering his judgment the Learned Judge, *a quo* concluded that: -

"/1Of In its defence to the application, the Defendant states, inter alia, as follows: -

5.1.1. I do not deny that 1 am in default to the Plaintiff in the sum of £770,263.60. I state, however, that based on the agreement between the parties/,/ the Appellant is not in breach of the terms of the agreement as clearly set out in the prospectus which details the guiding terms of the agreement between tlte parties, ***1*** *state that the amounts that have been invested with the Appellant are not due, owing and payable as alleged by the Respondent.*

The Defendant states that it is undergoing restructuring and is now under new management and the effect of such restructuring "means that the Defendant's assets are there, but are not liquid as the

rebuilding of the Defendant includes refinancing of the Defendant and its processes. This as a result handicaps the Defendant's ability to service its client's redemptions that have fallen due as in the case of the Plaintiff "

In simple terms, the Defendant admits that the Respondent's redemptions are now due, owing and payable. The Appellant ft1rther avers that it has no money to meet i.ts obligations towards the Respondent and this is due to its restructuring process which requires refinancing. The Defendant admits further that it is in default of payment. The rest of the seemingly technical and verbose assertions by the Defendant are meaningless and constitute no defence at all to .the Plaintiff's claim. It does not constitute a triable issue at all.

/1I/ *The Defendant avers that in terms of the agreement between the parties, " .....in the event the Appellant is in default, the linked loan units will be converted into ordinary shares, after a client has notified the Defendant that there has been a default' and the Plaintiff has not made such notification to the Defendant This again offers no defence to the Appellant's claim in as much as the Plaintiff has opted to withdraw her investment and her election has been accepted by the AppeUant.*

/12/ *The Defendant made an undertaking to pay within a specified period, but Jailed to honour this undertaking. Impecuniosity and inability to pay cannot be a defence in such a case; or a triable issue in an application for sumnuu:v judgement."*

THE APPEAL

[17] The Appellant, being dissatisfied with the above judgment of the Cami *a quo* has lodged an appeal before this Cami, on the following grounds: -

"l. That the Court *a quo* erred in law and in fact by granting the Respondent Summary Judgment contrary to the contractual agreement between the parties;

2. That the Court *a quo* erred in law and in fact in holding that a letter of undertaking to pay the Appellant to the Respondent was a liquid document and would be read in isolation to the contractual agreement between the parties when granting summary judgment.

3. That the Court *a quo* erred in fact and in law in holding that the letter of undertaking to pay to the Respondent was a waiver of the Appellant's rights in the contractual agreement between the parties."

APPELLANT'S CASE AND ARGUMENTS BEFORE THIS COURT

[J 8] Advocate Velten, has argued in this Court that summary judgement ought not to have been granted when regard is had to the parties' contractual obligations therefore the Court *a quo* erred in taking the letter written by the Appellant to the Respondent acknowledged indebtedness as a liquid document. For these reasons he has invited the Court to uphold the appeal.

RESPONDENT'S CASE AND ARGUMENTS BEFORE THIS COURT

[19] Mr. Simelane, for the Respondent, has argued that the investment was withdrawn in full compliance with the agreement between the parties and that the Appellant acknowledged in writing that Respondent was entitled to the withdrawal payment she was seeking. Mr. Simelane further argued that the affidavit resisting summary judgement did not disclose a *bona fide* defence to the claim, or raise any triable issues hence the Court *a quo* was correct in granting the summary judgment as sought. Mr. Sirnelane urges to dismissed the appeal.

THE LAW, RULES AND PRINCIPLES RELATING TO SUMMARY JUDGEMENT

[20] Summary judgment is regulated by Rule 32 of The High Court Rules. Of relevance in this matter the *rule inter alia* provides that: -

> ***"(4) (a) Unless on the hearing of an application under sub rule (l) either the Court dismisses the application or the Defendant satisfies the Court with respect to the claim, or the part or 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 some other reason to be a trial of that claim or part, the Court may give such judgment for the Plaintiff***

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 judgment given against a Defendant under this rule until after the trial or any claim in reconvention made or raised by the Defendant in the action. "

[21) In argument Advocate Vetten was very critical of our Rule 32 on Summary Judgment arguing that it closes the door to a litigant who wish that the matter to be referred to trial for ventilation of its defence.

[22] In *Sinkhwa Semaswati tla Mister Bread Confectionary v* ***PSB*** *Enterprises (Pty) Limited Case No. 3830/09 Mamba J.,* gave what, in my view, was a lucid exposition of our law on the summary judgment procedure. ln this respect one need only to respectfully reproduce His Lordship's statement on our rule, viz: -

"/3/ In terms of Rule 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 of affidavit or otherwise to the satisfaction of the Court and, with the leave of the Court the Plaintiff may deliver an affidavit in reply. "In the present case the Defendant has filed an affidavit. In showing cause Rule 32 (4) (a) requires the Defendant to satisjj1 the Court. .. .. "That there is an issue or question in dispute which ought to be tried or that there ought/or some other reason to be a trial or that there ought/or some other reason to be a trial of that claim or part thereof "I observe here that before these rules were amended by Legal Notice

Number 38 of 1990, Rule 32 (3) (b) required tlte Defendant's affidavit or evidence to "discloseft1lly tlte nature and grounds of tlte defence and the material facts by Counsel for tlte Plaintiff in !tis heads or argument and is similarly worded. I am advised, to Rule 32 (3) (b) oftlte Uniform Rules of Court of South Africa. Titus, under the former or old rule, a Defendant was specifically required to show or "disclose fully the nature and grounds of his defence and the material facts relied upon therefor," whereas under the present rule, he is required to satisfy the Court 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 on tlte whole claim or part thereof The Defendant must show tltat there is a triable issue or question or tltatfor some other reason there ought to be a trial. This rule is modelled on English Order Number I4/3 of the Rules of the Supreme Court.

/4/ *A close examination or reading of tlte case law on both the old and present rule shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under tlte present rule, the primary obligation for tlte Defendant is to satisfy the Court that there is a triable issue or question, or that for some other reason there ought to · be a trial. This, I think, is wider than merely satisfying the Court that the Defendant has a bona fide defence to the action as provided in the former rule. See VARIETY INVEST/11ENTS (PTY) LIMITED v !11OTSA 1982-1986 SLR 77 at 80-81 and BANK OF CREDIT AND CO/11/vlERCE INTERNATIONAL (SWAZILAND) LINIITED v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER, 1982-1986 SLR 406 AT*

PAGE 406 H - 407 E which all refer to a Defendant satisfying the Court that he has a bona fide defence to the action and fully disclosing its nature and the material/acts relied upon therefor. I would also add that where there is a dispute of fact a Court would be entitled to refuse an application for summary judgment. Under the present rule, the Defendant is not confined or restricted to satisfying the Court that he has a bona fide defence to the action or to complain of procedural irregularities.

/5/ *In MILES v BULL /1969/ IQB258; /1968] 2 ALL ER 632, the Court pointed out that the words "that there ought/or some other reason to be a trial" of the claim or part thereof, are wider in their scope than those used in the former rule referred to above. It sometimes happens that the Defendant may not be able to pin point any precise "issue or question in dispute which ought to be tried" nevertheless it is apparent that for some other reason there ought to be trial.....*

Circumstances which might afford "some other reason/or trial" might be, where e.g. the Defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the Plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in fit II light of publicity.".

(See also Swaziland Tyre Services (Pty) Limited v Sharp Freight (Swaziland) (Pty) Limited (381/2012) /2014/ SZHC 74 (01 April 2014); FNB Swazila11d Ltd t/a Wesbank v Rodgers Mabhoyane du Pont (4356/2009) 4556/09)."

The above exposition, no doubt identifies the significant differences between our Rule 32 and its South African counterparts.

[23] Advocate Vetten's criticism was in Dulux Printers (Pty) Limited v. Apollo Services (Pty) Limited (72/2012) [2013] SZSC 19 (31.05.2013) at (Paragraph 20) dealt with by Maphalala MCB JA (as he then was) as follows:-

> *"A close look at Rule 32 shows that the remedy for summary judgment is not a weapon of i11justice because it does not close the doors to a Defendant who can show that there is an issue or question in dispute which ought to be tried of that reason to be a trial of that claim. Courts should not be sceptical of this remedy when considering that its purpose is to enable a Plaintiff with a clear case to obtain swift e1 forcement of his claim against a Defendant wlto has no real defence to that claim,*

[24] The principles governing summary judgement are well settled in this jurisdiction. *In Zanele Zwane v. Lewis Stores (Pty) Limited tla Best Electric (Appeal Case No. 22/07), per Ramodibedi J.A. (as he then was) stated the principles of s1111111w1y judgment as follows: -*

"8. It is well-recognised that summary judgement is an extraordina,y remedy. It is a very stringent one for that matter. This is because it closes the door to the Defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has a bona fide defence and where the appearance to defence has been made solely for the pwpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a Plaintiff's claim against a defendant to which there is clearly no valid defence...."

[25] In Jeke (Pty) Limited v. Samuel Solomon Nkabinde (54/2013) [2013] SZSC 53 (29.11.2013) Ramodebedi Chief Justice (as he then was) at Paragraph 13 further stated that: -

"[I3/ It is equally trite that the Defendant does not have to prove his defence when resisting Summary judgment application. In this jurisdiction, all that the Defendant is required to do at that stage is to raise triable issues. Rule stated: - 32 (4) of the High Court Rules 1954 is itself authority for this proposi't'wn ... ... "

[26] Similarly, in Nihon Investments (Pty) Limited v. Tilly S. I Investments (Pty) Limited (103/2017) 120181 SZSC 42 - (30.10.2018) at page 10 Paragraph 19, S. P. Dlamini J. A. quoted with approval Winsen J. in Gilinsky and Another vs. Superb Landers Dry Cleaners (Pty) Limited 1978 (3) S.A. 807@(809 to 810) which postulates the duty imposed upon

a Defendant in terms of Rule 32 (4) of the High Court Rules 111 the following tenns: -

"The Courts have over a number of years formulated what is required of a defendant in order that his affidavit may comply with the terms oft/wt rule. The defendant must satisfy the Court that he has a defence which (f proved; would constitute an answer to the claim and that he is advancing it honestly. The latter part of the rules sets out what must be stated in an affidavit to put the Court in the position to satisfy itself whether or not a bona fide defence has been disclosed.

It requires the affidavit to state: -

a) the nature; and

b) the grounds of the defence; and

c) the material facts relied upon to establish such a defence and these requirements must be stated tillly."

It follows therefore, that if the allegation in the defendant's affidavit relates to these factors are equivocal or incomplete or open to conjecture the requirements of the Rule in question have not been complied with ..... the obligation placed by the rule on Defendant to make his disclosure fully has been interpreted to mean that wile the defendant has not deal exhaustively with the fact and evidence ....upon to substantiate them he must at least disclose his defence, and the material facts upon which it is based with sufficient particularly and completeness to enable the Court to decide whether the affidavit discloses a defence."

(27] In Dulux Printers (Pty) Limited vs. Apollo Services (Pty) Limited (supra) at (Paragraph 18) M.C.B. Maphalala J.A. (as he then was) stated that: -

"/ *I 8/* *Similarly, Corbert JA in the Case of Maharaj v. Barclays National Bani(1976 (I) SA 418 A at 426 A-Estated the following: -*

"Accordingly, one of the ways in which a Defendant may successfully oppose a claim for summa1y judgment 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 the material facts alleged by the Plaintiff in his summa,y or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide the issue or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court requires into is; a) whether the Defendant has filling disclosed fully the nature and grounds of his defence particularly and the material facts upon which it is founded; and b) whether on the facts so disclosed the Defendant appears to have, as to whether the whole or part of the claim, a defence which is both bona defence and good in law. · If satisfied on these matters the Court must refuse summa,y judgment either wholly or in part as the case may be. The wordfi1/ly connotes in my view that while the Defendant need not deal exhaustively with the facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particulars · and completeness to enable the Court to decide whether the affidavit disclosed a bona fide defence.

[28] Furthennore in Bernard Nxumalo v. The Attorney General (50/13) 12014] SZSC 33 (30.05.2014), Dr. B. J. Odoki JA at Para 30 stated that:

"I 30/ In the present case, the issue is whether this was a proper case in which to grant sununmy judgment given the fact that the Appellant defence raised a triable issue Rule 32 (4) (a) of the High Court Rules provides: -

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

/31/ It is clear from the above that the Defendant need not prove his defence at this stage. All that is required us to raise a triable issue.

[29] In MTN Swaziland vs. 2BK Services and Another (93279/2011) [2011] SZHC 52 - 11.3.2011 Ota J. at Page (4) (paragraph 13) stated that: -

"/13/ It is in honour of the need for caution elucidated ante, that a Court seized with a Summm'.)I Judgement application, is enjoined to scrutinise the affidavit of the defendant resisting the application, to see if same discloses, a bona fide defence or triable issue, pursuant to Rule 32 (4). By that rule a defendant who wishes to resist su111111a1)' judgement is required to .file an affidavit opposing same. But the mere

filing of an affidavit does not automatical(y entitle the defendant to defend. The Defendant is required to satisfy the Court through his affidavit, that he has a good defence to the action on the merits, by disclosing such facts as may be deemed to enable him to defend generally."

CONSIDERATIONS OF THE GROUNDS OF APPEAL

GROUND I - COURT A QUO ERRED IN GRANTING SUMMARY JUDGMENT CONTRARY TO ¹RITTEN CONTRACTUAL AGREEMENT

[30] On this ground Advocate Velten attacked the Court *a quo* 's judgment on the basis that it found that the agreement between the parties was oral and not written. Advocate Vetten argued that the Court *a quo* erred on this finding and the judgment and orders ought to be set aside.

[31] It is a finding of this Court, Advocate Vetten's argument ignores one important fact and that the matter does not only turn on whether the agreement was oral or in writing. The matter stmis initially with a written agreement, but its decisive and more important aspects, are oral. Having considered this matter Appellant's attack of the judgment on this ground ought to fail.

GROUND 2 - COURT A QUO ERRED BY HOLDING THAT LETTER OF UNDERTAKING TO PAY WAS A LIQUID DOCUMENT

[32] The Second attack of the Court *a quos* judgment was the Court's admission and reliance on Appellant's of Acknowledgment letter dated 19th February, 2021.

[33] Advocate Vetten, for the Appellant's argued that the letter was not a liquid document as its of indebtedness was in no way unequivocal as its contents could be susceptible to two interpretations.

[34] **Herbstein** & **Van Winsen in The Civil Practice The Superior Court's in South Africa 3rd Edition** at Page 132 - defines a liquid document as follows:-

> "... .....*a document wherein the debtor acknowledges over his signature, or is in law regarded as having acknowledged, wit/tout his signature being actually affvced thereto, his indebtedness in a fvced and determinate sum of money ....."*

[35] In **Jenkins vs. De Jager 1993 (3) SA 534 n at 537** (I **J)** stated that a liquid document was stated thus: -

> *"ft is well settled, that the liquid document concerned need not re.fleet the causa debiti at all-if it is unnecessary that a causa debiti be .....in a liquid document, then there seems to be no reason why the causa debiti should have any relevance.*
>
> *After all it is strong prima facie proof afforded by the unconditional acknowledgment above the signature of the Defendants or his agent of the indebtedness due and payable to the*

Plaintiff that is the essential, and as such the causa debiti is not directly relevant.

The essence of the case which is made against the Defendant is that he signed a liquid document which evidence his u11conditional acknowledgement of indebtedness to the Plaintiff The essence of tlte case lte has to meet is other words that, whatever the underlying causa debiti may be, he acknowledged his liability to the Plaintiff

In short, the case the Defendant has to meet is simply that he has signed a document in which he acknowledges his u11conditional indebtedness to the Plaintiff, and in that regard the causa debiti is not relevant. "

[36] *in ca.S'U,* there is no doubt that Appellant's letter is a liquid document. The contents thereof reflected an unconditional acknowledgement of indebtedness to the Respondent for a fixed sum. With regard Advocate Vetten argument on the interpretation to be letter, the simple answer is to look at the context in which the letter had been written by the Appellant to the Respondent. The context in which the letter was written to the Respondent was not in issue. lt is not in dispute that the Respondent had indicated her intention to withdraw her investment and to be paid the amounts due to her, being the amoui1t invested and interest accrued. The request was duly accepted by the Appellant in the letter to the Respondent. ln the letter of the 19th February, 2021 Appellant's, through its company secretary replied thus.

"4. We therefore undertake to pay all redemptions due to your client within 21 (twen(Ji-one) working days a11d as such we kind(11 see// your client's indulgence until then."

[37] ln seeking to interpret the contents of the letter of the Appellant, it is of course trite that regard should be had to the context in which the letter was written and the surrounding circumstances relating to its purpose as well as its background.

[38] In this respect it is appropriate to take heed of the comments expressed by Diemount JA in List v. Jungers I 979 (3) SA 106 (A), where at 118D, he said:-

> *"It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine it more usual and ordinary meaning and then, having done so to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on the more usual or ordinary meaning of the word may be a delicate task .....it* is *clear that the context in which the words used* is *of prime importance."*

[39] Similarly, in *Swaziland Government v. Lucky Mhlanga and others (432/201) /2018/ SZHC 176 (01/08/2018)* the Court had this to say on the interpretation of documents, viz:-

> *"In Brutus v. Cozens 1972 (2) Act E- R 1297@ 1299 Lord Reid stated that the meaning of ordinwJ1 words is a question of fact, whilst the meaning to be attributed to enacted words in a statute* is *a question of law, as it* is *a matter of statutory interpretation. The primm:11 rule of statt1to1J1 interpretation or construction is that words must be given their ordinary, natural, primary grammatical*

meaning unless this makes no meaning at all or results in some absurdity or anomaly or injustice. The meaning must however, be in relation to a particular factual setting not in vacuo. "

[40] In my view, the words in Appellant's letter to Respondent lends only one interpretation, i.e., acknowledgement and indebtedness and undertaking to · pay by the stated time. Thus considered in its proper contextual setting and, mindful of the surrounding circumstances, Appellant undertook to pay the Respondent. Accordingly Advocate Vetten argument on this point should also fail.

GROUND 3 - COURT A QUO ERRED IN GRANTING SUMMARY JUDGMENT - CONTRARY TO WRITTEN CONTRACTUAL AGREEMENT

[41] Advocate Vetten argued that the Court *a quo* erred in ordering the Appellant to pay the sum of E770,263,60 (Seven Hundred and Seventy Thousand Two Hundred and Sixty-Three Ernalangeni Sixty Cents). The argument is that was contrary to the contractual obligations of the parties. It was argued that the agreement was that the Respondent will redeem its shares and upon redemption she will only be entitled to a conversion of the shares to the value of her investment.

[42] In other words, the argument goes that, even if it is accepted that the Respondent was entitled to withdraw her investment, she was not entitled to payment of the sum of £770,263.60 (Seven Hundred and Seventy Thousand Two Hundred and Sixty-Three Emalangeni Sixty Cents) but had

a right to a conversion of her portfolio to shares in the company which were yet to be calculated. No doubt this argument must be considered in the light of the context and prevailing circumstances as at the date of withdrawal of the investment.

[43] In my view, this argument totally ignores the context of Respondent's request and Appellant's reply thereto. In a nutshell, the Respondent, specifically requested that she be paid the value of her investment together with any accrned interest thereon. Such a request was accepted by the Appellant.

[44] Further the circumstances of this case, the Court *a quo* was in my view correct in finding that no triable issue was raised by the Appellant. The amount of the claim, being liquid and confirmed in the letter no information that could be said to constitute a bona fide defence or triable issue through the affidavit of Mr. Lukhele, the Respondent's Managing Director before the Court *a quo* on which it could possibly exercise a discretion of refusing the summary judgment.

[45] In the words of **Ekstcen J., in First Rand Bank v. Collett 2010 (6) SA 351 (A) 363:** -

> ***"a discretion to refuse S11mmaiJ1 judgment should be exercised not capriciously, or on the basis of mere con.juncture or speculation., so as to deprive the Plaintiff of the remedy of summary judgment before the Court from which it appears that the reasonable possibility exists that an injustice may be done, if judgment were so granted. See Brutenbacft v. Fiat SA (Edms) Bpk 1976 (2) SA 226 at 229 11.*** "

[46] *In casu*, there is no doubt as it seems to me, that in the Court *a quo* the Respondent failed to raise bona fide defences, in order to temporarily evade its obligations and to delay payment to the Respondent who had a valid for the withdrawal of monies paid and invested which money had acknowledged and unde1iaken to pay, but failed to do. In my view Appellant's alleged defence was conectly rejected by the Court *a quo*. The alleged defence is also rejected by this Couti.

[47] ln this appeal, the Appellant has said a lot about the company being in a restructuring exercise. For the sake of completeness, I state that I am not aware of any general principle of law, either in contract, or any other branch of the law, for that matter, that absolves a debtor from liability of a

party based on Appellant's asse1iions of in ability to pay.

[48] The point as raised in argument was whether a Court hearing a summary judgment application can in law refuse an admit ed liquidated claim and interfere with a Plaintiffs right to payment simply because the Defendant alleges that at the time of the hearing of the application for summary judgment, the party has no financial wherewithal or means to settle the judgement debt. It seems to me, that the answer to this is that the application cannot be refused norjudgment postponed until such time that the Defendant can pay such is the situation in the present matter. In the circumstances of this case, the Appellant can also not prevent judgment being granted in favour of the Respondent.

[49] In conclusion and ***in casu***, the Defendant failed to raise any triable issue in its papers to Plaintiffs summary judgment. The whole defence in my view was not bona fide and was a desperate di.latory move to delay judgment being granted and was meant to frustrate the Respondent.

[50] ln my view therefore, the alleged defence was correctly rejected by the Court ***a quo***. That defence is also rejected in this Court. Accordingly, the appeal should fail.

COURT A OOU'S ORDERS

[51] In the Cowi ***a quo***, Mamba J.. in granting summary judgment made an Order that the orders are granted "as prayed". In the summons the prayers were couched *inter alia* as follows: -

"1. Payment of the sum ofE770,263.60 at the applicable percentage of the investment value per month calculated from 1'[1] December 2002 to final payment;

2. Mora interest on the sum of E770,263.60 at *9'1/.*, **per annum calculated from date of summons to final payment.**

3. Further and/or alternative relief.

4·. Collection commission."

Below I consider each of the orders as granted.

COLLECTION COMMISSION

[52] In argument in this Court, Respondent's Attorney Mr. Simelane at the outset conceded, rightly in my view, that collection commission was not payable to the Respondent in this case. Accordingly, in line with the principles set out in the case of **Reid Attorneys v Law Society of Swaziland (2039/2012) [2014) SZHC 21 (07/03/2014),** which states that in appropriate circumstances a party cannot claim and recover costs as well as collection commission as that would constitute a double charge. A party should choose one and not both to avoid "double charges" therefor he Court *a quos* order in this respect stands to be corrected and set aside.

COSTS

[53] The general rule is that costs are awarded to the successful party in order to indemnify it for the expense to which it has been put through either to unjustly to initiate or defend litigation (as the case may be). (See **Texas Co (SA) Limited v. Cape Town Municipality 1926 AD 473@488).** This general rule is subject to the overriding principle that the Comt has a judicial discretion in awarding costs (see **Griffiths v. Mutual Federal Insurance Co. Limited 1994 (I) SA 595 A and Inter Agencies (pty) Ltd vs Corban Electronics (Pty) Ltd and two others (71/2019) [2019) SZSC 14 (9 l\1ay 2019)**

[54] *In ca.I'll* with regard to the Court's a *quo* order for granting Attorney and Client costs, 1 see no reason in principle to interfere with that Court's discretion in awarding costs at that scale. The Order in that respect is accordingly confirmed.

MORA INTEREST

[55] With regard to the order of mora interest at the rate of 9% per annum calculated from date of summons to date of final payment, I agree that in principle, a Defendant is in mora from the date of the letter of demand or where there has been no letter of demand from the date of service of the summons. **(West Rand Estates Ltd v. New Zealand Insurance 1984 (2) SA 888 (A).** *In casu* rnora interest was granted from the date of the service of the Summons. I see no reason to interfere with this Order. Accordingly, the Order in his respect is confirmed.

ORDER IN THIS COURT

[56] In the result: -

1. **Save for the correction and deletion of Order No. 3 regarding collection commission granted by the Court *a quo*, the Appeal is dismissed.**

2. **The Appellant is ordered to pay the costs of the appeal at an Ordinary Scale.**

A.M. LUKHELE
ACTING JUSTICE OF APPEAL

I agree,

M. MASUKU
ACTING JUSTICE OF APPEAL

I agree,

M. M. VILAKATI
ACTING JUSTICE OF APPEAL

FOR: Appellant:

Advocate D. Vetten
Instructed by S.V. Mdladla & Associates

FOR:
Respondent

S. M. Simelane
S. !VI. Simelane and Company.