IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIV. CASE NO. 2657/08**

In the matter between:

SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY LIMITED **Plaintiff**

And

LAMJOKOTELI PROPERTIES (PTY) LIMITED **Defendant**

Date of hearing: 6,11 and 12 August, 2009 Date of judgment: 16 October, 2009

Mr. Attorney K. Motsa for the Plaintiff
Ms. Attorney X. Shabangu for the Defendant

J U D G M E N T

MASUKU J.

[1] On 12 August, 2009, after hearing argument from the respective representatives of both protagonists above, I granted an application for summary judgment in favour of the Plaintiff and there and then indicated that reasons therefor would follow in the due course of time. Following below are those reasons:

[2] Serving before this Court is an opposed application for summary judgment in the amount of E 617, 405. 77; interest on the aforesaid amount at the rate of prime plus 3% per annum, calculated from 1 July, 2008 and costs on the scale as between attorney and client.

[3] The circumstances in which this application arose are common cause and can be briefly summarized as follows: The Plaintiff, to whom I shall henceforth refer as "SIDC", lent and advanced to the Defendant, an amount of E500,000.00. This amount was to be applied to the purchase of landed property in Mbabane. An agreement was entered into between the parties and it was reduced to writing.

[4] The Plaintiff, contending that the Defendant had breached some material terms of the agreement, approached this Court via a combined summons, claiming the relief set out in paragraph [2] above. Lastly, there was also a prayer for the declaration of certain property, described as Portion 536 (a portion of Portion G) of Farm 2, District of Hhohho, held by the Defendant to be declared specially executable.

[5] The Defendant, upon receipt of the summons, filed a notice of intention to defend, which prompted the Plaintiff to file an application for summary judgment. There is no

sustainable argument regarding the competency of the said application, nor a dispute regarding the fact that the Plaintiff duly complied with all the procedural requirements contained in Rule 32 of this Court's Rules. In view of the foregoing issues, the primary question to be decided is fairly straightforward and it acuminates to this: has the Defendant, in its affidavit resisting summary judgment, raised a triable issue or a *bona fide* defence which *prima facie* carries a prospect of success at the trial?

[6] Answering the above question necessarily requires the Court to have recourse to the issues raised by the Defendant in its aforesaid affidavit in order to determine whether they meet muster. In a nutshell, the Defendant's defence is one, which when put in its simplest terms amounts to this - the Defendant was being owed by the Plaintiff for legal services rendered and it was agreed *inter partes* that the amount owed by the Plaintiff to the Defendant for the said fees be set-off against the

Defendant's indebtedness to the Plaintiff for the amount presently claimed. This, it is claimed by the Defendant, has served to extinguish the Defendant's indebtedness, thereby constituting a valid and *bona fide* defence to the claim.

[7] What is the Plaintiffs response to what appears at first blush, to be a formidable defence? In its affidavit filed in reply in terms of Rule 32 (5) (a), the Plaintiff totally denied the allegations made in the affidavit resisting summary judgment. In particular, it denied that there was any set-off as alleged. What is of primary significance, is that the Plaintiff pointed out that it instructed the firm of Sibusiso B. Shongwe and Associates to carry out some legal work on its behalf and for which it duly paid the said attorneys. Proof of such payment is annexed to the replying affidavit.

[8] I have no hesitation at all in holding that the purported defence is nothing but red herring for the reason that not

only has the Plaintiff shown that it is false but there is no nexus created at all between the Defendant and the aforesaid firm of attorneys and which would entitle the Defendant to set-off its debt to the Plaintiff via the medium of an unconnected relationship with the firm of attorneys aforesaid. Based on the foregoing, I am of the firm view that this is a proper case in which to grant summary judgment. This is, however, subject to one

other issue that was belatedly raised by the Defendant in its heads of argument. I turn to it presently.

[9] In its heads of argument, dated 28 July, 2009, the Defendant appears to have departed in material terms from the contents of the affidavit resisting summary judgment as encapsulated above. It introduced a new issue altogether and which in my view, destroys completely the defence purportedly set out in its affidavit aforesaid. The Defendant stated that the parties had opened negotiations regarding the payment of the amount claimed by the Plaintiff. From the correspondence attached to the heads of argument, the propriety of which I stand in grave doubt, the Plaintiff refused to accept an offer made to it by the Defendant in full and final settlement of the Plaintiffs present claim.

[10] must be stated that the hearing of the summary judgment application was postponed at the instance of the Defendant on a few occasions in order to give

negotiations a chance. This, however, proved futile and the matter was eventually argued. It is clear from the posture belatedly adopted by the Defendant that the defence it set out in the affidavit was nothing but a smokescreen. In its letters attached to the heads of argument, it clearly accepted that it owed the Plaintiff the amount in question and there was no sustainable or arguable issue of a set-off.

[11] I have considered the propriety of the disclosure of the settlement negotiations by the Defendant. I am of the view that the "without prejudice" rule would ordinarily operate in the Defendant's favour in a case such as the present but the Defendant has, for reasons only known to itself, lifted the shield from disclosure otherwise provided thereby. See generally on the "without prejudice" rule and its proper application the case of *Abner Ndlovu v Motor Vehicle Accident Fund* Civ. Appl. No. 3961/08, (yet unreported). I cannot, in the circumstances, close my

eyes to the information volunteered by the Defendant in coming to a decision as to whether the Defendant has set out a defence liable to deflect the summary judgment application.

[12] The law relating to summary judgment and what a defendant faced with the calamitous consequences of a summary judgment application can do and the general approach of the Courts to the summary procedure is now trite. It has been set out in a number of local cases in this and the higher Court. See for instance *Musa Magongo v First National Bank (Swaziland) Ltd* App. Case No. 39/99; *Mater Dorolosa High School v R.M.J. Stationery* App. Case No. 3/05 and *S.C. Group of Companies v Construction Associates (Pty) Ltd* App. Case No. 41/08.

[13] I recently had occasion to comment thereon in the following terms in the case of *Alfor Peter John de Souza v Petros Dlamini* Ci. Trial No. 3053/07. At page 5 of the cyclostyled judgment, I commented on the summary judgment procedure in the following terms at para 7:

> "'It is trite learning that summary judgment is a swift, stringent and extra-ordinary remedy for the reason that it closes the door to a defendant in a

final and comprehensive fashion but before a full ventilation of the issues before Court. For that reason, the Court must, in granting the said remedy, be astute so as to ensure that a defendant who raises a triable issue or a defence that *prima facie* carries a prospect of success at trial, does not have the portals of the Court closed on his face, so to speak. Nor should the Court, on the other hand, allow a defendant who is cantankerous but has in essence no or a spurious or meritless defence, be allowed to delay a plaintiff who has an unanswerable case in the early enjoyment of the fruits of the judgment."

[14] It would appear to me, on the entire matrix of the evidence before me that the Defendant does not have a *bona fide* defence to the Plaintiffs claim. This is one case where summary judgment is the appropriate remedy and where the Defendant's ambivalent contestations on paper have done little to help it avoid the consequences of this procedure.

In the premises, I shall grant the following relief and which the Plaintiff applied for in its application for summary judgment:

[15.1] Payment by the Plaintiff of the sum of E617,405-77;

[15.2] Interest on the sum of E617,405-77 at the agreed rate of prime plus 3& per annum *a tempore morae* to date of final payment;

[15.3] Costs of the suit on the scale as between attorney and own client, including collection commission.

DELIVERED IN MBABANE IN OPEN COURT ON THIS THE 16th DAY OF OCTOBER, 2009.

T. S. MASUKU
JUDGE

Messrs. Robinson Bertram for the Plaintiff

Messrs. Sibusiso B. Shongwe & Associates for the Defendant