



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.431/2014

In the matter between:

STANDARD BANK (SWAZILAND) LTD

Applicant

vs

DESERT CHARM (SWD) (PTY) LTD

Respondent

Neutral citation: *Standard Bank (Swaziland) vs Desert Charm (Swd) (Pty) Ltd (431/2014) [2014] [SZHC 380] (10th October 2014)*

Coram: **MAPHALALA PJ**

Heard: 17th May 2014

Delivered: 10th October 2014

For Applicant: Miss N. Msibi

For Respondent: Mr. M. Mthethwa

Summary: (i) *Before court is an Application for Summary Judgment based on a Fleet Management Agreement between the parties for payment of a sum of E50,562.26 and costs.*

- (ii) *The Respondent's contend **inter alia** that the circumstances of this case raise a triable issue on account that 2nd and 3rd Respondent are no longer directors of the 1st Respondent.*
- (iii) *Further, that Plaintiff did not give the 1st Defendant prior intention to cancel the agreement as required in terms of clause 7.2 of the Agreement.*
- (iv) *In the result, the court finds that there is a triable issue and refuse the Application and costs referred to the trial of the matter.*

Decided cases referred to:

1. **Standard Bank of South Africa (Pty) Ltd vs Else Hand (South African High Court, Johannesburg Case No.34066/10;**
2. **Mater Dolorosa High School vs RMJ Stationery (unreported) Civil Case No.3/2005.**

JUDGMENT

Application

- [1] On the 20 May 2014 the Plaintiff filed a Notice of Application for Summary Judgment before this court against the Defendants on the following terms:

- “(a) Payment of E50, 562.26 (fifty thousand five hundred and sixty two Emalangeni and twenty six cents);**
- (b) Interest at the rate of 9% per annum *tempore morae*, from date of service of summons to date of final payment;**
- (c) Cancellation of the Fleet Management Agreements between the parties;**
- (d) Costs of suit on the scale of attorney and own client;**
- (e) Further and/or alternative relief as the Honourable Court deems fit.”**

[2] The Plaintiff filed an affidavit in support of the Summary Judgment of one May Leibbrandt who is the Business Development Manager of the Plaintiff setting out the cause of action thereto.

Opposition

[3] The Defendants oppose the Applicant and has filed an affidavit resisting the Summary Judgment of the 2nd Defendant one Margaret Louise Beaver stating therein the material averment in defence including a point of law at paragraph 3 thereof to the following legal proposition:

“I am advised and verily believe that the Application for summary has been in judgment is bad in law in that it has been instituted after the lapse

of the time within which Plaintiff would have filed any pleading and seeks to raise an exception. I am advised and verily believe that by instituting the application for summary judgment after the lapse of the time within which it would have filed any pleading Plaintiff is seeking to avoid the consequences of not filing any pleading timeously by resorting to the Summary Judgment procedure in that there is no time limit fixed for its institution.”

- [4] The 3rd Respondent also filed an affidavit resisting summary judgment deposed to by one John Christopher Mordant also raising a similar point of law raised by the 2nd Respondent as outlined above in paragraph [3] on this judgment.

The arguments

- [5] The attorneys of the parties appeared before me on the 20th June, 2014 where Miss Msibi appeared for the Plaintiff and filed comprehensive Heads of Arguments. The Defendants were represented by Mr. M. Mthethwa who also filed useful Heads of Arguments. I am grateful to both attorneys for their professionalism in this matter. I shall sketch in brief the summary of each party's submission for a better understanding of the issues for decision by the court in the following paragraphs.

(i) The Plaintiff's arguments

[6] The attorney of the Plaintiff Miss Msibi commenced the arguments of the parties and filed very comprehensive Heads of Arguments for which I am grateful.

[7] I shall summarise the salient features of the Plaintiff's Heads of Arguments to aide a better understanding of the issues for decision by this court.

[8] The nub of the case for the Plaintiff is found in paragraph 7.8 of the Heads of Arguments of Miss Msibi to the following legal argument:

“2.8 The allegation that the 2nd and 3rd Defendants are not bound by the Suretyship Agreement by virtue of the fact that they entered into same in their capacities as directors of the 1st Defendant and are no longer such and the fact that they allege that prior notice was required to be given to the 1st Defendant prior to cancellation of the agreement amounts to a bar denial and cannot therefore be taken to be a bona fide or valid defence.

See: **NATIONAL MOTOR COMPANY LTD v DLAMINI MOSES** 1987 – 1995(4) SLR 123

SWAZILAND DEVELOPMENT FINANCE CORPORATION v MZUZU CONSTRUCTION (PTY) LTD & THREE (3) OTHERS (20/2011) [2012] SZHC 117 (16 June, 2012)

**BARCLAYS NATIONAL BANK LTD v TRANB BARCLAYS
NATIONAL BANK LTD v KALK 1981(4) 814 291 (W)."**

[9] Miss Msibi for the Plaintiff further contended at paragraph 7.12 of her Heads of Arguments that the point of law taken by the Defendants regarding the lapse of the **dies** within which the Plaintiff ought to have filed the Application for Summary Judgment does not afford him a defence to the Application for the following reasons:

“2.12.1 If the Plaintiff by filing the application for Summary Judgment had taken an irregular step, which is denied, the Defendants ought to have surety field a Notice in terms of Rule 30;

2.12.2 The Defendants themselves took a further step by filing the 2nd and 3rd Defendants Affidavits Resisting Summary Judgment in opposition of the application and cannot turn around and say that the application is band in law.”

[10] The attorney for the Plaintiff in the final analysis applied that an order be granted as prayed in the Application for Summary Judgment.

(ii) The Respondent’s argument

[11] The attorney for the Defendant also filed comprehensive Heads of Arguments citing pertinent cases on the subject for which I am grateful. I shall also in like manner outline a snap shot of the important arguments on the point for decision.

[12] The gravamen of the Defendant's arguments is outline in paragraph 8 of the Heads of Arguments of the attorney to the following:

“8. The 2nd and 3rd Defendants denied that there had no good and bona fide defence to the Plaintiff's claim and that the Notice of Intention of Defend and Plea have been filed solely for the purposes of delaying the action and alleged inter alia as follows:

8.1 That they have good and bona fide defence as alleged in the plea field herein the contents of which they confirmed and adopted in opposition to the Application for Summary Judgment.

8.2 That the allegation that they bound themselves in their capacities as directors of 1st Defendant and are no longer directors and are therefore not bound does afford them a defence to the deed of suretyship between the parties in that it is a principle of the law that a surety's liability will not be extended beyond the capacity which it was undertaken.

8.3 That they entered into the Deed of Suretyship in their capacities as directors of the 1st Defendant in order to enable the 1st Defendant to be afforded the Fleet Management Facility.”

[13] Further arguments are advanced in paragraph 9 on the applicable law. In paragraph 14 to 40 on the application of law to the facts of this case. I shall revert to these arguments later on as I consider the competing arguments of the parties.

[14] The court was also referred to a **plethora** of decided cases on the subject including the Court of Appeal case of **Mater Dolorosa High School vs RMJ Stationery (Pty) Ltd (unreported) Civil Appeal Case No.3/2005.**

[15] Finally, Defendant contends that on the basis of the above arguments that the Application for Summary Judgment be dismissed with costs.

The court's analysis and concessions thereon

[16] Having considered the arguments of the attorneys of the parties to and from I am inclined to agree with the arguments of the Defendants that Defendants have raised a triable issue to resist this Application. I say so for a number of reasons I shall outline below.

[17] Firstly, it would appear to me that the Respondent's attorney is correct on the question of law that the Plaintiff did not give the 1st Defendant prior

Notice of Intention to cancel the agreement as required in terms of clause 7.2 of the Agreement. It is trite law as stated in the South African case of the **Standard Bank of South Africa (Pty) Ltd vs Else Hand (South African High Court, Johannesburg) Case No.34066/10** to the legal proposition that a party wishing to rely on the cancellation of an agreement because its breach must allege and prove the breach of the agreement; that the right to cancellation has occurred because the breach was material or in the event agreement contains a cancellation clause, that its provisions have been complied with; and that clear and unequivocal Notice of Rescission was connected to the other party, unless the agreement dispenses with such Notice.

[18] Secondly, I agree with the arguments in respect of the 2nd and 3rd Defendant that in looking at the circumstance under which a guarantee was given and the position of the various parties the fact that the guarantee herein was given by the Defendant when they were still directors of the 1st Defendant is a fact or circumstance which the court cannot ignore.

[19] I agree with the 1st and 2nd Defendant's contentions at paragraph 34 of the Heads of Arguments of the attorney for the Defendants that the Defendants, have, by raising the fact that they are no longer directors of

the 1st Defendant have raised an issue that is relevant to the Plaintiff's claim.

[20] I further agree with the arguments of the attorney for the Defendant in paragraph 39 of the Heads of Arguments to the following legal proposition:

“39. There is a reasonable possibility further that the Defendants have a good defence in that:

39.1 The particulars of claim allege that they are the directors of the 1st Defendant when they are in fact not the 1st Defendant's directors.

39.2 The Plaintiff failed to give 1st Defendant prior written notice of the intention to cancel the agreement as required in terms of clause 7.2 of the agreement.”

[21] On the points *in limine* raised by the Respondent I agree that they ought to succeed on the arguments of the Defendant's attorney.

[22] Finally, I am in agreement with the Defendant's contention that this case raises a triable issue and therefore, Application for Summary Judgment is accordingly dismissed and that costs referred to the trial of the matter.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE