



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 161/2015

In the matter between:

**SWAZILAND COMPETITION COMMISSION**

**Applicant**

**VS**

**DAVIDSON DISTRIBUTORS (Pty) Ltd**

**Respondent**

**Neutral citation:** *Swaziland Competition Commission v Davidson Distributors (Pty) Ltd (161 /2015) [2015] SZHC 192 (2 November 2015)*

**Coram:** FAKUDZE, J

**Heard:** 22 October, 2015

**Delivered:** 2 November 2015

**Summary:** *When summary judgment should not be granted – Held existence of triable issues suffices to refuse summary judgment. Appeal upheld with costs.*

**JUDGEMENT**

## **BACKGROUND**

- [1] This an Appeal from the Magistrates Court of Mbabane under civil case 1579/15 against an order issued by the learned magistrate in the *court a quo*.
- [2] The background to this appeal is that the Appellant issued a tender for the supply of desk calendars and carry folders. The Respondent submitted a bid and was accepted as the preferred supplier. As part of the terms of the tender, the Respondent was to produce or provide a sample to the Appellant for its approval before mass printing of the calendars and folders.
- [3] The Respondent submitted the sample to the Appellant. However the sample for the calendars was not acceptable to the Appellant and thus the order in relation to the calendars was cancelled. The sample for the folders was accepted and the Respondent was given the go- ahead to print them and was paid for the same.
- [4] The Respondent then sent an invoice to the Appellant in the sum of E2, 850.00 which it was said was for the cancellation of the orders for the calendars. The Appellant's employee was requested to sign the invoice and send back to the Respondent a signed copy thereof. Appellant's employee, Mzwandile Lukhele, who received the invoice, advised the Respondent by email that he had received the invoice and the email was couched in the following words – "I hereby acknowledge receipt of the cancellation invoice. Also kindly be notified that payment is suggested to be made once in for the statement you will issue after completion of the folders."

## **ACTION PROCEEDINGS**

- [5] Failure by the Appellant to pay for the cancellation fee caused the Respondent to issue Summons demanding the payment of E2, 850.00 plus interest of 6% per annum. Appellant filed a Notice of Intention to Defend. Subsequent to the filing of the Notice, the Respondent filed an application for summary judgment. The Appellant filed an application resisting summary judgment. The summary judgment application was argued in the *court a quo* and the court found in favour

of the Respondent. The *court a quo* ruled that there was no *bona fide* defence and the Respondent was entitled to summary judgment.

#### NOTING OF APPEAL

[6] Following the ruling of the *court a quo*, the Appellant filed a Notice of appeal in which Notice he alleges that –

(a) **The *court a quo* erred in fact and in law in finding that there was an acknowledgement of debt made by the Appellant in favour of the Respondent.**

(b) **The *court a quo* erred in fact and in law by granting the summary judgment application against the Appellant whereas there are triable issues regarding the cause of action and the quantum of the claim against the Appellant.**

#### CONSIDERATIONS IN THE GRANTING OF SUMMARY JUDGMENT

[7] Before dealing with the merits of the appeal that is before this Court, it is in order to first deal with the considerations for granting summary judgment. These considerations were ably spelt out by **Ota J. as she then was, in Supa Swift (Swaziland) (Pty) Ltd v Guard Alert Security Services Ltd Case No. 4328/09** in the following fashion or parlance-

*“A summary judgment is one given in favour of a plaintiff without a plenary trial of action. The normal steps of filing all necessary pleading, hearing of witnesses and addresses by counsel, thereafter before the court’s judgment are not followed. The procedure by way of summary judgment is resorted to by a plaintiff, where obviously there can be no reasonable doubt that the plaintiff is entitled to judgment and where it is not expedient to allow the defendant to defend for mere purposes of delay. It is for the plain and straight forward, not for the devious and crafting. Rather than suffer unnecessary delay and expense which attend a full trial and plaintiff may therefore apply to*

*the court for instant judgment if his claim is manifestly unanswerable both in fact and in law.”*

- [8] The long and short of Justice Ota’s analysis is that where there is no reasonable doubt that the plaintiff is entitled to judgment and the defendant has defended for mere purposes of delay, summary judgment should be allowed. In the Supa Swift Case (*Supra*) her Ladyship goes on to say that -

*“Summary judgment therefore by its characteristic features, shuts the door of justice in the face of defendant who may otherwise have a triable defence. Thus the wise caution which has been sounded in the ears of the courts over the decades is to approach this application with the greatest of trepidation. This is to prevent fore closing a defendant who may otherwise have a triable defence from pleading to the plaintiff’s case.”*

- [9] The Supreme Court has on several occasions pronounced itself on when summary judgment should be granted. In the case of **Mater Dorołosa High School v R.J.M Stationery (Pty) Ltd Appeal Case No. 3 of 2005**, the court said that-

*“It would be more accurate to say that a 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 exists 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.”*

It follows from what has been said above that the main consideration in the granting of summary is the existence of a triable issue. A triable issue constitutes a bona fide defence. Immediately the defendant shows that there is 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 issue tried.

## **BORNE OF CONTENTION BETWEEN THE PARTIES**

[10] It is common cause that the Appellant and the Respondent entered into an agreement for the supply of calendars and folders. It is also common cause that the samples were presented to the Appellant for scrutiny and approval. The Appellant approved the samples for the folders and the Respondent produced same and was accordingly paid by the Appellant. The Appellant did not approve the samples for the calendars and the agreement ceased to exist with respect to them. Respondent then sent an invoice claiming E2,850.00 as cancellation fee.

[11] Appellant's counsel argues that there was no agreement for the payment of cancellation fees. He further argues that in paragraph 7 of the Declaration, Respondent alleges that the claim is for "incurred expenses for coming up with the samples and presentation thereof." A similar admission is made by the Respondent in paragraph 5.1 of his reply to the application resisting summary judgment where he says that -

*"While damages needs to be proved in court the Plaintiff states that there is no need to prove same because several promises had been made to pay which was evidenced by the acknowledgment of debt."*

[12] Counsel for Appellant submits that the invoice that was sent by Respondent was not a liquidated amount in money because it is not clear how the total of sum of E2, 850.00 was arrived at. He finally submits that the e-mail that was sent by Mzwandile Lukhele, whose contents were referred to earlier, only acknowledged receipt of the invoice and the other part of the e-mail pertained to the payment for the folders. Counsel argues that the contents of the e-mail would have to be clarified by the author Mzwandile Lukhele and that can only happen if oral evidence is led. Counsel concludes by saying that there are triable issues. These triable issues are that there was no agreement to pay cancellation fees and the contents of the e-mail are in dispute.

[13] Counsel for Respondent contends that the contents of the e-mail address not only the acknowledgment of the invoice but goes further to make an undertaking to pay for the cancellation fees and the folders. Respondent further argues that his case is strengthened by the fact that the invoice is marked with the words “Mzwandile, please action.” Counsel for Respondent contends that if there was nothing to be actioned in the form of payment, there was no need for such instruction to be directed to the said Mzwandile. Counsel further contends that an agreement was entered into between Mancoba Mabuza who represented Appellant and Lindelwa Dladla who represented Respondent. Counsel then concludes that the *court a quo* was correct in granting summary judgment in favour of the Respondent. This Court should therefore uphold the Ruling of the *court a quo*.

#### **COURT’S FINDINGS AND CONCLUSION**

[14] Having read the papers and listened to the arguments by counsel for both parties, this court is inclined to agree with the Appellant that there are triable issues in this case. The first triable issue is whether or not there was an agreement to pay for the expenses incurred by the Respondent in the preparation of the samples. This part cannot be decided on the papers because it is common cause that the agreement to produce the samples and all the other aspects of the tender was not reduced to writing so as to enable the *court a quo* and this Court to scrutinise its contents. *The Parole Evidence Rule* cannot be invoked in this instance. Oral evidence would have to be led to determine this issue. It is also not in dispute that the Appellant and the Respondent entered into the oral agreement but what is in dispute is whether or not there would be fees payable to Respondent in the event of cancellation.

[15] The other triable issue is whether the invoice forwarded to Appellant amounts to a liquidated claim in money or not. This will help answer the question whether the granting of summary judgment by the *court a quo* was appropriate or not. Appellant argues that the invoice does not indicate how the sum of E2, 850.00 is arrived at. It is therefore an illiquid claim. As observed earlier, the Respondent seems to agree

with the Appellant on this point when he says in paragraph 5.1 of his reply to the affidavit resisting summary judgment that -

***“5.1 While damages needs to be proved in the court, the Plaintiff states that there is no need to prove same because several promises had been made to pay which was evidenced by the acknowledgement of debt.”***

Respondent does not state in his reply who made the several promises to pay. It is not clear whether these promises were verbal or in writing. He only capitalises on the acknowledgement of debt which acknowledgement is subject to various interpretations. Respondent also alleges in Paragraph 7 of his Declaration that the amount claimed “is for expenses incurred for coming up with the samples and presentation thereof.”

- [16] The last triable issue is the purported acknowledgement of debt by Appellant’s employee. Unless oral evidence is led to prove what is it that was being acknowledged, the acknowledgement will remain a matter for speculation not only on the part of the parties, but even on the part of the *court a quo* and this Court.
- [17] Respondent’s counsel has referred me to authorities in the bundle of authorities to support his case that the court a quo was justified in granting summary judgment in his favour. I have had time to go through them and all that these authorities are dealing with is the fact that you cannot deny the authority or capacity of an employee to bind the employer in cases where a third party is involved. The authorities would have helped the Respondent a great deal if the borne of contention was Appellant’s employee’s authority to contract on behalf of the Appellant. Both counsel for Appellant and Respondent seems to agree that Mancoba Mabuza represented Appellant but Appellant denies that there was an agreement to pay for the cancellation fees. The cancellation of the fees payment is the heart of this matter that this court is invited to *adjudicate* upon. In the light of all that has been said above, this Court upholds the appeal with costs.

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**M.R. FAKUDZE**

**JUDGE OF THE HIGH COURT**

For Appellant: **N. Manzini**

Respondent: **K. Magagula**