IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1675/2015

In the matter between

BUSALIVE BHEMBE **Plaintiff**

and

BASIL MTHETHWA **Defendant**

Neutral citation: *Busalive Bhembe v Basil Mthethwa* (1675/2015) [2016] SZHC 125 (19 July 2016)

Coram: **MAMBA J**

Heard: **15 July, 2016**

Delivered: **19 July, 2016**

[1] *Civil Law and Procedure – Application for Summary judgment – what defendant needs to allege to successfully resist such application: a triable issue or that for some other reason the matter must be referred to trial – as per rule 32(5) of the rules of this court.*

[2] *Civil Law and Procedure – application for Summary judgment – plaintiff claiming payment of a sum of E40 000-00 allegedly granted by him to defendant as a loan. Defendant denying that such sum was a loan and claiming that it was payment for services rendered by him to a company of which the plaintiff was the managing director. Working relationship between the said company and the defendant at the relevant time established. Real dispute whether amount claimed loan or not. This is a triable issue and summary judgment refused.*

[1] This is an opposed application for Summary judgment. After hearing argument or submissions on the application on 15 July, 2016, I refused the application and I indicated then that my written reasons for that judgment will be handed down later. These then are my reasons for judgment.

[2] By summons dated 02 November 2015, the plaintiff claimed inter alia, for payment of a sum of E40, 000-00 by the defendant. After the defendant filed his notice of intention to defend the action, the plaintiff filed and served his declaration and this was followed by this application for Summary Judgment. I point out of course that this application was filed on 26 February 2016 after the defendant had filed his plea on 05 February 2016. Whilst this step of filing the Summary Judgment application after the plea is not impermissible in terms of the law and applicable rules; (see *Comprehensive Car Hire (Pty) Ltd v Bongani Mamba (62/2009) [2012] SZHC 247 (19 October 2012)*) it is not desirable that a plaintiff or litigant should wait for a long time after filing his declaration or the filing of the notice of intention to defend, as the case may be, before embarking on such application. Besides, it is always desirable in my judgment, for a party desiring to file an application for summary judgment to first deal with the defendant's plea where such has

been filed. It is certainly untidy to just go ahead and file such application and treat the plea as a nullity or non-issue.

[3] Where the plaintiff is of the view that the plea filed by the defendant does not disclose a defence, or that for whatever reason it is not an answer to the plaintiff's claim, the plaintiff should, in my judgment move the necessary application to get that plea out of the way and thus pave his way for the application for summary judgment. This was of course not done in the present proceedings. Nothing, however, turns on this issue herein.

[4] The cause of action stated by the plaintiff in his declaration is that he loaned the amount claimed to the defendant on 22 April 2015. Although it is not stated in the declaration when this amount had to be repaid or became due and payable, the allegation is made that it is now due and payable. Evidence from the bank, in the form of a transfer from the plaintiff's bank account to the defendant's name has been filed in support of the said payment.

[5] In his defence, the defendant admits that he received the said amount on the relevant date. He states, however, that this payment was not a loan but was payment for services rendered by him to a Company run and

managed by the plaintiff. The name of the Company is Unicorn Concepts (Pty) Ltd. Its managing director is the plaintiff.

[6] The defendant avers that he, together with the aforesaid Company were involved in the construction or erection of flats and bedsitters at Thembelihle Location for a client. The tender for the works had been granted by the client to Unicorn Concepts (Pty) Ltd who subsequently subcontracted part of the works to the defendant. The defendant was engaged by the said Company to do the excavation and levelling of the ground at the building site. This, the defendant did and accordingly charged the said company for these services and thus the payment of the sum of E40 000.00 which is the subject matter of this application.

[7] It is not insignificant that the plaintiff does not deny the existence of the agreement or contract between the defendant and the said Company. Plaintiff's assertion is that the bank transfer referred to above was from his personal account and was a personal loan to the defendant. He denies that this was payment for services rendered by the defendant to Unicorn Concepts (Pty) Ltd.

[8] The law governing Summary judgment has been consistently stated in numerous cases before this Court and the Supreme Court in this

jurisdiction. In *Benedict Vusi Kunene v Mduduzi Mdziniso and Another (1011/2015) [2016] SZHC 40 (12 February 2016)* this 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 **Swaziland Flooring and Allied Industries Limited v WSL Construction (Pty) Ltd (24/2014) [2015] SZHC 08 (05 January 2015)** this court stated the following:

'[12] In **Swaziland Tyre Services (Pty) ltd t/a Max T. Solutions v Sharp Freight (Swaziland) (pty) Ltd (381/2012) [2014] SZHC 74 (01 April 2014),** this court stated as follows:

'[6] In *Swaziland Livestock Technical Services v Swaziland Government and Another,* judgment delivered on 19 April 2012 Ota J said:

"…in the case of **Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007.**

"It has been repeated over and over that summary judgment is an extraordinary 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 that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far…"

See Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa

Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3830/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.

The rules have therefore laid down certain requirements to act as checks and balances to the summary judgment procedure, in an effort to prevent it from working a miscarriage of justice. Thus, Rule 32 (5) requires a Defendant who is opposed to summary judgment, to file an affidavit resisting same, and by rule 32 (4) (a) the court is obligated to scrutinize such an opposing affidavit to ascertain for itself whether "…**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".**

It is now the judicial accord, that the existence of a triable issue or issues or the disclosure of a *bona fide* defence in the opposing affidavit, emasculates summary judgment, and entitles the Defendant to proceed to trial. As the court stated in **Mater Dolorosa High School v RJM Stationery (Pty) Ltd (supra)**

"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."

Case law is also agreed, that for the Defendant to be said to have raised triable issues, he 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."

Again in **SINKHWA SEMASWATI t/a MISTER BREAD BAKERY AND CONFECTIONARY v PSB ENTERPRISES (PTY) LTD** judgment delivered in February 2011 (unreported) I had occasion to say:

"[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 by 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 rules 32 (4)(a) requires the defendant 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 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 the defendant's affidavit or evidence to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, 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 the whole claim or part thereof. The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.

[4] A close examination or reading of the 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 the present rule, the primary obligation for the 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 INVESTMENTS (PTY) LTD v MOTSA, 1982-1986 SLR 77 at 80-81** and **BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER**, 1982-1986 SLR 406 at page 406H-407E 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 facts 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] 1QB258; [1968]3 ALL ER 632**, the court pointed out that the words "that there ought for 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 a trial. …

Circumstances which might afford "some other reason for trial" might be, where, eg 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 full light of publicity.""

See also *First National Bank of Swaziland Limited t/a Wesbank v Rodgers Mabhoyane du Pont, case 4356/09* delivered on 08 June 2012 where I pointed out that:

"[7] In **Sinkhwa Semaswati** *(supra)* I referred to the differences between our current rule and the old rule on this topic and I do not find it necessary to repeat that here, suffice to say that the old rule required the defendant to disclose fully the nature and grounds of his or her defence and the material facts relied upon therefor. Emphasis was placed on a defence to the action. The current rule entitles a defendant to satisfy the court "…that there is an issue or question in dispute which ought to be tried" or that for some other reason the matter should be referred to trial."

These remarks are applicable in this case.'

[9] Again in *Webster Print (Pty) Ltd v David Manica t/a Manica Attorneys (493/2014) [2015] SZHC 30 (5 March 2015)* this court stated:

> '[8] In *National Motor Company Ltd vs Dlamini Moses 1987-1995 (4) SLR 124 at 128a – 129c* Dunn J stated as follows:
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> 'Subrules (1) and (3) are relatively straightforward and do not represent a major departure from their predecessors, with the exception of subrule (3) which now permits of evidence "material to the claim" being set out in the supporting affidavit. Subrule (4)(a) introduces the requirement of the defendant satisfying the court that there is an issue or a question in dispute which ought to be tried or that there ought for some other reason to be a trial. The issue or question may be one of fact or law. The requirement of setting out a defence which is both *bona fide* and good in law is not set out under this subrule although the absence of such a defence is one of the averments which a plaintiff is obliged to make under subrule 3 (a).
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> The question to be decided is as to how far a defendant need go before he can be said to have satisfied the count under the amended rule, 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. Copied as the amended rule is from the English Rules I have had to look to English texts and decisions (such as are available in the High Court Library) for guidance.

Order 14 of the English Rules is set out and discussed in *The Supreme Court Practice*, 1991 Volume I at 140 paragraphs 14(1) to 14(11). The leading decisions dealing with the Order 14, rules 3 and 4 (our subrules (4) and (5) the learned authors state that a defendant may show that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount due which require the taking of an account to determine, or any other circumstances showing reasonable grounds of a *bona fide* defence. The learned authors continue to state:

"The former Order 14, rule 1(a) entitled the defendant leave to defend if he satisfied the court 'that he had a good defence to the action on the merits.' Rule 3(1) has replaced those words by the words 'that there is an issue or question in dispute which ought to be tried. These words accurately reflect the previous case law which, speaks of a 'triable

issue' but no doubt the collocation of words 'defence on the merits' will continue to be used."

The learned authors assert, citing relevant decisions that:

"The defendant's affidavit must condescend upon particulars, and should as far as possible deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim and in the latter case it should specify the part."

In *The Lady Anne Tennant v Associated Newspaper Group Ltd (1979)*

FSR 298 (cited by the learned authors at 148) Megarry VC stated:

"A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and micawberism."

The learned authors again stress that:

"In all cases, sufficient facts and particulars must be given to show that there is a triable issue."

On the English authorities available to me, it is clear that the test applied under Order 14 (from which our amended rule 32 is copied) is the same as that applied by this Court and the South African courts under the original rule 32. It is clear from the English authorities that despite the absence of a specific reference to a *bona fide* defence under Order 14, a defendant is obliged to set out such a defence in order to satisfy the requirements of the subrule. The principles and approach in our decided cases must in the circumstances, continue to apply in applications under the amended subrule.'

Subject to what I stated in *Sinkhwa Semaswati (supra)* about the scope and extent of what the defendant may raise in terms of the current Sub rule, I respectfully agree with these remarks by the learned judge.'

[10] In the present application there is certainly an issue whether the amount claimed by the plaintiff from the defendant was a loan or not. There defendant has, in my judgment raised a triable issue pertaining or relating to the payment that was made to him by the plaintiff. Should this matter be decided in favour of the defendant during the trial, it would afford him a complete defence to the plaintiff's claim. That is what makes it a triable issue or matter. Lastly, one cannot ignore the working relationship

that existed between the parties at or immediately before the payment of the claimed amount was made.

[11] For the foregoing reasons, the application for Summary Judgment is hereby refused. The costs of this application shall be the costs in the trial.

MAMBA J

For the plaintiff: Mr. O. Nzima

For the defendant: Mr. N. Mabuza