IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CONSOLIDATED CASE NO.: 64 & 65/2017

In the matter between:

MBULUZI GAME RESERVE (PTY) LTD PLAINTIFF/APPLICANT

And

IRON WOOD (PTY) LTD **1ST DEFENDANT/RESPONDENT**

COMBRETUM PROPERTIES **2ND DEFENDANT/RESPONDENT**

Neutral Citation: *Mbuluzi Game Reserve vs. Ironwood (Pty) Ltd and Another Consolidated (64 & 65/17) [2018] SZHC 198 7th September 2018*

Coram: **MLANGENI J.**

Heard: **6th August 2018**

Delivered: **7th September 2018**

Summary: *Civil procedure – summary judgment application - applicable principles discussed.*

Summary judgment application – defendant's opposition based on the Plaintiff's failure to exhaust internal remedies as stipulated in various agreements between the parties – on the papers the debt not being denied – whether the defendant had discharged the onus placed upon it to establish a good and bona fide defence to the Plaintiff's claim.

Held: *The objection based on jurisdiction ought to have been raised initio litis, and cannot be a ground to oppose summary judgment where the claim is not denied on the merits.*

Held, further, that the defendant had failed to establish a good and bona fide defence to the Plaintiff's claim.

Summary judgment granted.

JUDGMENT

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[1] In January 2017 the Plaintiff sued out a summons against the First Defendant, under case No. 64/2007, claiming payment of E103, 888.00 in respect of **"monthly outstanding levies",** together with interest and costs. At the same time, and under case no. 65/2017, it sued out a summons against the Second Defendant, claiming payment of E34, 630.00 for outstanding levies, together with interests and costs. Both defendants filed notices to defend. Thereafter the Plaintiff, in both matters, filed declarations followed by applications for summary judgment.

[2] In both matters the foundation of the claims is various sets of documents – a memorandum and articles of association of the Plaintiff, an agreement of sale of shares between the Plaintiff and the respective Defendants as well as something described as a **"use agreement".** The cause of action, based in contract, is to be discerned from these documents, read together. It is therefore surprising that the Plaintiff instituted the proceedings through simple summons, and the declarations – Which are in four (4) pages, surely demonstrate that the claims are not suitable for simple summons. This error in judgment may appear to be innocuous and inconsequential, but the truth is that it escalates the costs of litigation unnecessarily. It is clearly important for Plaintiffs' counsel to reflect properly upon the nature of its client's case and issue appropriate process from the onset.

[3] In both matters the applications for summary judgment were opposed, and the matters came before me for legal arguments in respect of the summary judgment applications. On the 13th July 2018 counsel for both sides applied for the consolidation of case numbers 64/2017 and 65/2017. An order was granted for the consolidation of the two matters, and a date was allocated for them to be heard as one. As I write the judgment it now appears to me that the order for consolidation may have been sought and granted in error, in that the parties are not the same in both matters. The fact that the relief sought in the different matters is similar and the factual circumstances are also similar is not enough to justify consolidation. This, however, has become inconsequential because at the hearing of legal arguments I was informed by counsel that the debt in respect of case number 64/2017 had since been extinguished. In the result, this judgment deals only with case number 65/2017 which is against Combretum Properties (Pty) Ltd.

[4] In this jurisdiction the law relating to summary judgment is as settled as the National Anthem. There is hardly anything new that may be added to the erudite discourses that have been made over the years on the subject. It is accepted that although the remedy is stringent in nature, effectively closing the door to a litigant who may have something to say, its true value is in avoiding a long and costly trial in circumstances where the defendant has no real and *bona fide* defence – where, in other words, the Plaintiff has an unanswerable claim against the defendant. Masuku J[1]., quoting Tebbutt J.A[2], has expressed the law in the following terms:-

> **"…….summary judgment is an extra-ordinary stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial…..It is for that reason that in a number of cases…….it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case; …..It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him".**

[5] The remedy has limited application. This is seen in the strict parameters laid down by Rule 32 (2) (a) – (d). For the benefit of the researcher, I reproduce the relevant sub-rule fully herein:-

> **"(2) This rule applies to such claims in the summons as is only:-**

[1] In Swaziland Development Finance Corporation v Vermaak Jacobus Stephanus, Civil Case No. 4021/07, at para 6.
[2] Economy Investments v First National Bank of Botswana Ltd, 1996 BLR 828 at page 83.

a) On a liquid document;

b) For liquidated amount in money;

c) For delivery of specified movable property ;

d) Ejectment;

together with any other claims for interest and costs".

[6] A defendant who seeks to resist summary judgment must, in the affidavit opposing summary judgment, disclose fully the nature and grounds of his defence. This does not mean that the defence must be articulated in an exhaustive manner. What it does mean is that the averments made in the opposing affidavit must be such that, if proved at the trial, they would constitute a valid defence. The test is pretty much the same as in applications for rescission based on Rule 31 (b) and the Common Law. In VARIETY INVESTMENTS (PTY) LTD v MOTSA[3] the court of appeal, per Aaron JA as he then was, observed that the word **"fully"** should not be given a literal meaning. All that is required is that **"the statement of material facts be sufficiently full to persuade the court that what the defendant has alleged, if proved at the trial, will constitute a defence to the Plaintiff's claim."[4]**

His Lordship proceeded as appears below:-

"What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy,

[3] 1982-1986(1) S.L.R. 77.

[4] At page 81, para D of the Judgment.

that will constitute material for the court to consider in the requirements of *bona fides*."

[7] In the case of BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENTS CORPORATION LTD AND ANOTHER[5], Dunn J., as he then was, stated that it is not enough for a defendant to simply allege that he has a *bona fide* defence to the action. **"He must allege the facts upon which he relies to establish his defence. When this has been done, it is for the court to decide whether the facts, if proved, would in law constitute a defence to the Plaintiff's claim and also whether they satisfy the court that the defendant in alleging such facts is acting *bona fide.*"**

[8] More recently, in the case of MTN SWAZILAND v ZBK SERVICES AND ANOTHER[6]**,** Ota J. Made the following remarks:-

> **"……a court seised with a summary judgment application is enjoined to scrutinize the affidavit of the defendant resisting application, to see if it discloses a *bona fide* defence or triable issue pursuant to rule 32 (4) ……The defendant is required to satisfy the court through his affidavit that he has a good defence to the action <u>on the merits[7]"</u>** (my emphasis).

[9] I stated earlier in this judgment that the Plaintiff's claim is for payment of outstanding monies in the form of a levy in terms of a contract

[5] 1982-1986 (1) S.L.R. 406.
[6] Civil Case No. 3279/2011.
[7] At para 13 of the judgment.

between the parties. The affidavit resisting summary judgment is in the extent of eighteen paragraphs. I chrystallise the contents of the affidavit below:-

9.1 The spirit of the agreements between the parties does not envisage the institution of legal proceedings for the collection of the levy.

9.2 In terms of a certain clause 16 of one of the agreements, titled "**use agreement"**, which is annexure Combretum 2 to the affidavit resisting summary judgment, the right of a party to approach court is specifically and expressly restricted to cases where a party seeks an interdict or urgent relief, otherwise disputes **"in connection with this agreement, including cancellation thereof…… must be determined in terms of Clause 18 of annexure B."**

Clause 18 of annexure B repeats, *verbatim,* the contents of Clause 16 of the use agreement in respect of dispute resolution.

9.3 In essence, the jurisdiction of the court is sought to be ousted unless and until certain internal remedies have been exhausted. These include giving written notice to the defaulting party. If the dispute is not resolved within fourteen (14) days the aggrieved party is to refer the dispute **"to an expert appointed mutually by the parties or failing mutual agreement, by the Chairman of the Swaziland Institute of Chartered Accountants, who shall act as a sole arbitrator".**

9.4 At paragraph 14 of the Affidavit the defendant avers as follows:-

> **"I have already mentioned that another sister company to the Defendant, also owns Unit 13 in the Game Reserve. That company too had fallen into arrears in respect of its levy. Labouring under the impression that my companies were entitled to be given notice before any action in respect of the owing levy was taken, I opened negotiations with the Manager of the Game Reserve for payment of the outstanding levy. A verbal agreement was reached that, both companies should make periodic payments towards settlements of the outstanding levy……"**

9.5 At paragraph 15 the deponent states thus:-

> **"On the strength of the verbal agreement, my companies have paid, to date, in total an amount of E46,630.00 ……".**

9.6 At paragraph 17 the deponent avers the following:-

> **"It is therefore my humble contention that the Plaintiff, if at all had the right to institute the proceedings to claim the levy, is not entitled to summary judgment as the amount claimed has been reduced by a considerable amount of E11, 940.00 ……".**

[10] According to my understanding of the matter, what purports to be the basis for resisting summary judgment is in two prongs, as appears below:-

10.1 That the Plaintiff has come to court pre-maturely, without exhausting internal remedies.

10.2 That an amount of E11, 940.00 has already been paid towards reducing the balance owed.

[11] Has the defendant established a *bona fide* defence to the Plaintiff's claim, or has it filed notice to defend solely for purposes of delay?

[12] The argument that the Plaintiff has come to court prematurely is clearly dilatory in nature. It constitutes what is otherwise referred to as a plea in abatement, and should properly be raised *initio litis*. If it was raised at that stage the result might well be different. This being a summary judgment application, it stands to be decided on the basis of principles applicable to summary judgment, nothing less and nothing more. To do otherwise would result in adulteration of well-established principles and send our jurisprudence backward. If, for instance, I were to grant leave to defend, all that the defendant will say at the trial, on this particular aspect, is that the Plaintiff has come to court pre-maturely and must go back to exhaust internal remedies. This is exactly what summary judgment is intended to obviate, unnecessary delay to a Plaintiff who has a case that is unanswerable on the merits.

[13] I am by no means saying that parties who voluntarily enter into agreements and assume obligations, in this case written agreements for that matter, are at liberty to renege as it suits them. They are

certainly bound, to the extent that such agreements are not illegal. But as I understand it, the point about exhausting internal remedies is essentially an objection to the court exercising jurisdiction at that stage – pre-maturely, as the argument goes. Such objection must be raised *initio litis*, right at the beginning. If raised at that stage, different considerations come into play. In my view, if it is raised as a ground for opposing summary judgment it is out of place and of no consequence.

[14] I am mindful of the judgment of Maphalala P.J., as he then was, in the case of SAMKELISIWE PETERSON v LHR (PTY) LTD t/a BIETEGO INVESTMENTS[8], where an application for summary judgment was dismissed. I respectfully disagree with the ratio *dicidendi* in respect of the limitation clause therein. However, the final outcome in the matter is amply justified by the fact that there was a triable issue whether the amount claimed was due and payable at that time, this dispute directly relating to whether so-called **"phase one"** of the construction project was complete or not. In the face of such a dispute, it cannot be said that the Plaintiff's case was unanswerable.

[15] It has been stated, in any event, that **"the rule that requires a party to first exhaust local remedies before resorting to the courts, is applied sparingly because generally an aggrieved person should have unrestricted access to the courts to seek redress"[9].**

[8] Civil Case No. 551/2015.
[9] Per Hlophe J. in Sandile Myalo Dlamini v Major General Jeffrey Tshabalala, Civil Case No. 4227/10 at para 50

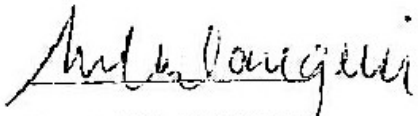
[16] But even more significantly, on the facts before me the defendant does not anywhere deny the debt. It's deponent states at paragraph 17 of the opposing affidavit that as a result of payments that have already been made, the debt has been reduced **"by a considerable amount of E11, 940.00 ….."** A reply was not filed by the Plaintiff, hence I am entitled to assume that it is not denied that the debt has been reduced by E11, 940.00.

[17] I have come to the conclusion that the defendant's case does not pass the acid test. It has not alleged facts which, if proved at the trial, would constitute a defence on the merits. If anything, the debt is admitted in so many words, and some amount has been paid towards reducing it. There is therefore no basis in fact and in law why I should not grant summary judgment, taking into account the amount that is said to have been paid.

[18] I therefore make an order in the following terms:-

Summary judgment is hereby entered against the Second Defendant for:-

i) Payment of E91,948.00
ii) Interest thereon at the rate of 9 percent per annum calculated from date of judgment to date of final payment.
iii) Costs of suit.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Plaintiff/Applicant: **Mr. Maseko**

For the Defendant/Respondent: **Mr. Nkomondze**