

**IN THE HIGH
COURT OF ESWATINI**

JUDGMENT

HELD AT MBABANE

Case No. 848/2018

In the matter between:

SWAZILAND DEVELOPMENT

SAVINGS BANK

PLAINTIFF

And

**INDVUNDVUNDVWANE YANGIDZI INVESTMENT
(PTY) LTD**

1st DEFENDANT

RICHARD GWINI DLAMINI

2nd DEFENDANT

In consolidation with:

Case No:846/18

**SWAZILAND DEVELOPMENT AND
SAVINGS BANK**

And

MANDWAMBANE FARMS (PTY) LTD

1st DEFENDANT

JOSEPHINE GINA

2nd DEFENDANT

BRENDA GINA

3rd DEFENDANT

Neutral Citation: Swaziland Development and Savings Bank v. Indvundvundwane Yangidzi Investment (Pty) Ltd and another; In consolidation with Swaziland Development and Savings Bank v. Mandwambane Farms (Pty) Ltd and others (848& 846/2018)[2018] SZHC 267(21st November 2018)

Coram : J.S Magagula J

Date Heard : 15 November 2018

Date delivered : 21 November 2018

[1] These are consolidated applications for Summary Judgment. In case No. 848/18 the Plaintiff seeks an order for:

“ a) Payment of the sum of E5 765 526.46

b) Interest on the sum of E5 765 526.46 at the rate of prime per annum from the date of issue of summons to date of final payment.”

[2] In case No. 846/18 the Plaintiff seeks an order in respect of two claims as follows:

Claim 1

a) Payment of the sum of E5 112 046.46

b) Interest on the said sum of E5 112 046.46 at the rate of prime less 3% per annum from date of issue of summons to date of final payment.

Claim 2

a) Payment of the sum of E247 703 -88;

b) Interest on the sum of E247 703 -88 at the rate of prime plus 3% per annum calculated from the 28th February 2018 to final date of payment.

[3] In both matters the Plaintiff also seeks an order for costs on the Attorney and own client scale as well as an order declaring certain numerous immovable property executable. All the applications are supported by affidavits verifying the claims contained in the particulars of claim and disputing that there is any triable issue in respect of the claims and that Notices of Intention to defend have been filed solely for purposes of delaying finalization of the proceedings.

[4] In both matters the defendants have filed affidavits resisting Summary Judgment and both matters raise virtually the same defences. This is what prompted the matters being consolidated and heard simultaneously.

[5] It appears from the papers filed in court that the Plaintiff's claims arise from loans advanced by the Plaintiff to the Defendants for purposes of operating agricultural businesses on certain different farms. When the Defendants failed to honour their obligations under the loan agreements the Plaintiff entered into agreements with the defendants in terms of which the Plaintiff took over the operations of the farms with the aim paying itself from the proceeds of the business and thereafter handing back the farms to the Defendants. To this end the Plaintiff entered into Management contracts

with the 2nd Defendant in Case No. 848/18 and with one Wilmort Gina in respect of case No. 846/18. From the papers it appears that these individuals entered into these agreements with the Plaintiff as independent contractors. It does not appear that they were representing the other defendants in their engagements with Plaintiff.

- [6] The agreements to take over and operate the farms were not disclosed by the Plaintiff in its particulars of claim nor in the applications for Summary Judgment. This fact was only revealed in the affidavits resisting Summary Judgment.
- [8] In respect of case No. 848/18 the Defendants maintain that during the period that the Plaintiff operated the farms it received revenue in excess of E4 885 767.16 from sales. Under case No. 846/18 Defendants maintain that the Plaintiff received revenue in excess of E5 977 442.41 from sales. The Defendants in both cases maintain that they do not know what the Plaintiff did with the money and why it did not pay itself from such proceeds. The Defendants accordingly maintain that they are not indebted to the plaintiff in any amount.
- [9] In response and in its replying affidavits the Plaintiff maintains that the defendants know very well what the money was used for as some meetings were held in which it was reported that the farms were not making enough money to repay the bank loans. Plaintiff further maintains that the deponents to the affidavits resisting summary judgment were involved in the management of the farms and they know how money was being used. Plaintiff has also attached to its replying affidavit some reports purporting to be financial reports on the operations of the farms by the plaintiff. The defendants dispute the contents of such reports and they do not accept them.

[10] What complicated matters further is that the reports were only filed with the replying affidavits thus affording no opportunity to the defendants to deal with them.

Also, the Plaintiff's contention that the defendants know how collected revenue was used since the deponents to the affidavits resisting summary judgment were involved in the operations of the businesses, overlooks the fact that the first defendants in both cases are companies. These companies were not involved in the operations of the businesses after the plaintiff took over operations. The deponents to the affidavits resisting summary judgment were engaged by the Plaintiff in their personal capacities, not as representatives of the companies.

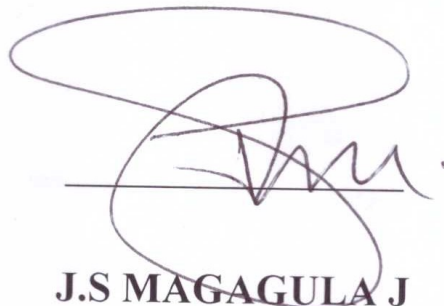
[11] It appears to me therefore that the defendants have raised triable issues with regard to the amounts claimed by the Plaintiff. They deny that they are indebted to the Plaintiff in the amounts claimed and they clearly state their reasons for disputing the alleged indebtedness. They state that the plaintiff has not accounted to them how much revenue was generated during the time of operation of the businesses by the plaintiff, nor has the plaintiff demonstrated how this money was used. They dispute the reports filed with the replying affidavit and maintain that they desire an opportunity to deal with such reports in a trial.

[12] I must say that I am not satisfied that this is a proper case for summary judgment to be granted. In this regard I need only refer to Herbstein and Winsen, THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA page 302, 3rd edition where the learned authors state:

“ The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an extra ordinary one which is very stringent in that it closes the door to the defendant and that it will only be accorded to a plaintiff who has, in effect, an unanswerable case. Some of the decisions come close to limiting a plaintiff’s resort to this remedy to cases where defendant’s action in giving notice of intention to defend is equivalent to an abuse of the process of the court.”

[13] I am not satisfied in *casu* that the plaintiff has such a clear case. For the foregoing reasons the following order is made in respect of both matters:

- a) Summary judgment is refused;
- b) The defendants are granted leave to defend
- c) Costs shall be costs in the cause.



J.S MAGAGULA J

For the Plaintiff: K. Motsa

For the Defendatnts: S. Gumede