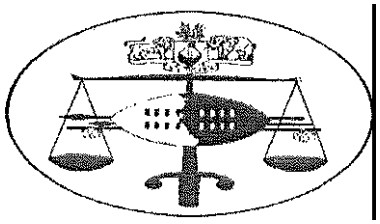

IN THE HIGH COURT OF

ESWATINI JUDGMENT

I : 1tter Between: Case No. 807/2021

V.DLAMINI Plaintiff

l

,/JENT **LIMITED** Defendant

]\ , 1tation ***Evart V. Dlamini v ECSPONENT Limited (807121) [2021} SZHC 178***

C **M. Dlamini J**

24th September, 2021

C **5th October, 2021**

P, imine . *Raised from the bar, thereby denying deponent to rectify it, rejected following dictum in Shell Oil case.*

1 ,'e defence: ***[W]hatever defence defendant raises in the same affidm•it is of no evidential value in light of the admission of default on its part. The law cannot allow defendant to approbate and reprobate at the same time, as it were.*** [23]

S ·y: By means of a Summary Judgment Application the plaintiff seeks against the defendant payment of his investment plus returns and proportionate interest thereof. The defendant contends, *inter alia,* that the claim is not yet due.

The Parties

[The plaintiff is an adult male liSwati ofMankayane, region ofManzini. The defendant is a company duly formed and registered in terms of the company laws of the Kingdom. Its principal place of business is Ezulwini, region ofHhohho.

P:uticulars of Claim

The plaintiff pleaded that on or about 26th October, 2015, he entered into a partly verbal and written agreement with defendant. The main terms of the agreement was that plaintiff would invest the sum ofEl00 000 with defendant. This sum would mature after five (5) years. At maturity, plaintiff would receive E200 000 from defendant.

[Plaintiff subsequently, on the same day of26 October, 2015, deposited the said sum of E100 000 with defendant. In October, 2020, the date of maturity, defendant refused or failed to pay plaintiff the sum ofE200 000 or any sum at all.

[Plaintiff decided to engage defendant on his failure to pay him and on 18 February, 2021 plaintiff dispatched a letter of demand. Defendant decided to respond to the letter of demand by undertaking to pay plaintiff the sum claimed within twenty-one (21) working days. Defendant undertook to pay a proportionate interest following the indulgence from plaintiff. On 26th February, 2021 defendant advised plaintiff that the total payment due to him inclusive of the accumulative prop01tionate interest would be E206, 416.17.

After the lapse of twenty one days indulgence, defendant, by means of a correspondence sought a further indulgence often (10) working days. However, ten (10) days lapsed without any payment forthcoming to plaintiff. Plaintiff reso1ted to legal action and demanded payment of E206 416.17, accumulated proportionate interest as of 26th February 2021 to final elate of payment; interest at the rate of9% per am1um and costs of suit.

Defendant's Affidavit Resisting Summary Judgment Application

In order not to burden this judgment, it is apposite to refer to the affidavit resisting summary judgment application later in this judgment. I shall capture it under adjudication of the merits.

Adjudication

Defendant's *Point in limilie*

[On the hearing date, the defendant raised a *point in limine* that the plaintiff failed to attach the written contract between the parties and therefore the application ought to be dismissed. The court was refened to a judgment by **Daffue J**[1] in that regard.

[: This *point in limine* must fall on a number of grounds. Firstly, unlike in the quoted **ABSA** case, where the *point in limine* was raised in the affidavit resisting summary judgment, *in casu* the point was raised from the bar. Clearly, defendant ought to have raised this point in his affidavit resisting summary judgment. This would have given plaintiff the opportunity in his reply to annex the document complained of, if relevant. Litigation by ambush is not countenanced in our jurisdiction. **Tebbutt JA**[2] was faced with the submission that the deponent to the founding affidavit failed to attach the company resolution authorising him to institute legal proceedings. This was challenged in the answering affidavit. The deponent (Mr. Nkabinde) in his reply, then attached the resolution, albeit signed after the date of the founding affidavit. The *court a quo* rejected the resolution, emphasising that a litigant stood or fell on his founding affidavit and that it was too late to cure the defect in the replying or supplementary affidavits. His Lordship **Tebbutt .JA** held:

> *"It is now ·well established that when a factual issue which appears in the founding affidavit is challenged or denied by the*

, Ltd V Rene Haynes NO & 4 Others Case No. 1986/004794/06

, <.12iland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal Case No. 23/2006

respondent in the answering affidavit, the courts will allow the applicant ***to clarijj1 or rectify*** *the issue in a replying affidavit.* "[My emphasis]

[' The learned Justice of the Appeal Comi cited a number of cases in suppmi of this view and concluded that matters must be disposed on the bases of their substance and not form. Litigation was not a game of chess.

[Secondly, from reading both the particulars of claim and defendant's affidavit resisting summary judgment application, it is clear that there is no dispute over the existence of the contract.

[Thirdly, plaintiff has attached the share certificate following his investment policy with the defendant. The court takes judicial notice that such share certificate is issued by entities such as in defendant's standing after an investor has paid the investment sum. This ce1iificate is *prima facie* evidence of the contract of investment by plaintiff.

[Fourthly, the ABSA case can be differentiated from the case at hand. The court in the ABSA case espoused that a written contract must be attached to a combined summons. The court's reasons to insist on the written contract despite a copy of the mortgage bond attached was clearly outlined at paragraph 19 of the said judgment. It is as follows:

"In casu ***the attached mo'rtgage bond refers in several paragraphs to the written agreement(s) entered into***

between the parties indicating <u>inter alia</u> that aspects such as repayment of the loan, interest and breach of contract are set out in these documents. *I am not prepared to grant relief without having had sight to these underlying agreement(s).* "

In other words the court could not reach a conclusion without reference t the underlying contract following that the clause of mortgage bond agreement attached referred to the underlying contract. *In casu,* the position is not so contended. Worse stjll as it shall more fully appear later in this judgment, the material terms of the contract are not in issue. For the above, the *point in limine* raised by defendant from the bar must fail.

Issue

My duty 1s to examme the affidavit resisting summary judgment application for a *bona fide* defence. Has the defendant raised a *bona fide* defence to the particulars of claim? Or further, are there any dispute of material and relevant facts *in casu?*

Merits

Defendant, having averred that it had a *bona fide* defence to the plaintiff's claim, immediately deposed as follows:

"5.1 ***<u>I do not deny that I am in defltult to the Plaintiff' in the sum ofE206, 416.17 (TwdIIundred and Sixty Thousand Four Hundred and Sixteen Emalangeni Seventeen Cents)</u>.*** *1 state however that based on the agreement*

between the parties. [sic] The Defendant is not in breach of the terms of the agreement as clearly set out in the prospectus which details the guiding terms of the agreement between the parties. I state fitrther that the amounts that have been invested with defendant are not due, owing and payable as alleged by the Plaintijj'.3

From the very first sentence of its defence, it is needless to point out that the defendant admits liability to the plaintiff's application of the sum claimed. This piece of evidence coming from the defendant itself cannot be ignored by this comt as it fortifies the plaintiff's claim that the defendant is in default in terms of the agreement.

In its paragraph 6[4] which follows paragraph 5 as quoted above, defendant chose to attest:

"I state in light of the foregoing that the Defendant recently had a change in its shareholding and the new shareholders have had to rectify problems that had been caused by old management on the Defendant's investment processes. I state that as the Defendant is under new Nfanagement, there has been a restructuring process that has been ongoing and to which the Plaintiff is well aware. The restructuring process for the Defendant in effect means that the Defendants [sic] assets are there, but are not liquid as the rebuilding process of the Defendant includes refinancing of the Defendant and its

', page 31 in the book of pleadings
JiA

processes. This as a result handicaps the Defendants ability to service its client's redemptions that have fallen due as in the case of the Plaintiff. It is *in light of these developments that the Defendant has fallen in default.* "

[Now having admitted default, the defendant in its next paragraph elected to explain the circumstances that precipitated the default at its instance as can be gleaned from its pan1graph 6 at page 3 lA. It stated that there had been new management who came up with the strategy to restructure defendant. The restructuring exercise was to resolve *'problems'* in defendant. Further, in as much as defendant has assets, such assets are *'not liquid'* following that defendant had to divert finances in order to cater for the restructuring exercise.

[1 Surely, by any stretch of imagination, the above cannot be a defence, let alone a *bona fide* one, to the plaintiffs claim. The last line, *"It is in light of these developments that Defendant has fallen in default,* "at the instance of the defendant, adds more weight to the plaintiffs prayer for an order against the defendant.

[2 On the plaintiff's deposition that the defendant twice undertook to pay his claim by correspondences attached to his application, the defendant averred:

"I state that in light of the foregoing terms and in light of the prospectus clearly detailing the terms upon which the parties agreed when entering into the said contractual agreement. [sicJ The terms unequivocally make it an obligation that in the

event

the Defendant is in Default the linked loan units will be converted into ordinary shares. This will happen pursuant to a notification by a Client that there has been a default. It must be highlighted that upon such notification the all outstanding linked loan units, dividends, interest and capital shall convert into ordinary shares. ***Pursuant to the letter of demand from the Plaintiff's Attorneys the defendant in a bid to ensure that the defendant is***

{{/forded his redemption and in good faith made an undertaking that same would be provided within 21 <u>days</u>. <u>It</u> must be noted that pursuant to this <u>the defendant continued to be in default.</u> This is mainly a result of the ongoing restructuring process, a process which will be once completed in the Plaint ff full benefit and advantage. [My emphasis]

[: Clearly, from the bolded wording of the defendant, defendant admits that it undertook to pay plaintiff within twenty-one clays of his letter of demand. It further admits that it was in default in terms of the twenty one days. It is not clear why defendant came to court to resist plaintiffs claim in light of the above admission attested by defendant in its affidavit resisting summary judgment application.

[2 I must, of course, state that defendant did in its paragraph 6 (repeated numbering) and 7 deposed that upon default by it to pay plaintiff, the agreement was to the effect that plaintiffs shares changed from *"linked loan nits, dividends, interest and capital"* to ordinary shares. However, this defence, if at all, flies in the face of

defendant's several admission of default. The two letters of response to the plaintiffs correspondences

of demand do not attest to this position of a defence. In other words, if this was a *bona fide* defence by defendant, defendant would have so authored as a response to the letters of demand. Further, defendant would not have admitted default as reflected in its affidavit resisting summary judgment application serving before this comi. In the result, whatever defence defendant raises in the same affidavit is of no evidential value in light of the admission of default on its part. The law cam1ot allow defendant to approbate and reprobate at the same time, as it were.

Prayers

['. It was pointed out that the prayers in the particulars of claim and the application for summary judgment application differed. Prayer b) of the particulars of claim reads:

> *"Payment of the proportionate interest accrued to the amount of E206, 416.17 ji•om 26th February, 2021 to date of final payment. "* [5]

[2 Prayer 2 of the summary judgment application reads:

> *"interest in the sum of E206,416.17 at the rate of9% per annum compoundecl, a tempore morae to date of final payment. "*

[2 There was no distinct prayer in the summary judgment application for interest at the rate of 9% per annum *a temporae morae* as was in the particulars of claim. Obvious, the plaintiff merely combined the two

prayers from the combined summons, namely prayer b) (on proportionate interest) and c) (on 9 % interest *a temporae morae)* to make one prayer in the summary judgment application. During submission, plaintiff's Counsel asked that the court grants the prayers in the combined summons. No prejudice is occasioned to the defendant in that regard. This .is more so as the correspondence admitted, authored and addressed by defendant to plaintiff admitting liability initiated the propo1iionate interest accrued over the period of none payment. The correspondence partly reads:

> *"2. rVe confirm that on or about the 26th of October 2015 the company received an investment of the sum of El00,000 (one Hundred Thousand Emalangeni), under Class E share Certificate (No. E 00280) from your client.* ***We confirm further that the said investment portfolios were and or are redeemable with interest, in the month of 25 November, 2020.***
>
> **3.** *rVe conjirmfitrther that as at the month of November 2020, the redeemable amount for both classes is the sum of E 2000000.00 and to date the redemption value of the aforesaid amount is the sum E206 416.17.*
>
> **4.** *We advise that the company is and has always been committed to paying all redemptions due to its*

clients including your client. We advise further that; ***the***

company is committed to paying the interest accrued beyond the aforementioned due date." [6]
[My emphasis]

[In the result, I must enter as follows:

[26.1] The plaintiff's application for summary judgment succeeds;

[26.2] The defendant is ordered to pay plaintiff the following smns:

[26.2.1] E206 416.17;

[26.2.2] Proportionate interest accrued to the sum of E206 416.17 from the 26th February, 2021 to date of final payment;

[26.2.3] Interest at the rate of 9% per annum *a tempore morae;*

[26.2.4] Costs of suit.

M. DLAMINI .J

he plaintiff **K. N. Simelane of KN Simelane Attorneys in association with Henwood and Company**

. i1e defendant: S. **V Mdladla of** S. **V. Mdladla Associates**

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