IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 714/2016

In the matter between:

G.S. CHIYANDA **Plaintiff**

AND

SIMUNYE PLAZA (PTY) LTD **Defendant**

Neutral citation: *G.S. Chiyanda Property Consultants and Simunye Plaza (PTY) LTD* [714/2016] *[2018] SZHC 127 (14th June, 2018)*

Coram: FAKUDZE, J

Heard: 3rd May, 2018

Delivered: 14th June, 2018

Summary: *Civil Procedure – Application for Summary Judgment – Plaintiff claims payment of monies as a result of Defendant's negligence in late submission of Income Tax to Swaziland Revenue Authority – Further claims payment resulting from two aborted meetings between Plaintiff and Defendant – Defendant disputes claim and resists grant of Summary Judgment on basis that there are triable issues on who should submit taxes to Swaziland Revenue Authority – Defendant further alleges that it attended both meetings and same were cancelled at the instance of Plaintiff – Court observes that there are triable issues, particularly that taxes are made mention of in Article 6 of Agreement and in the definition of "operating expenses" in Article 1.2.5. – It is therefore not clear whether taxes are part of expenditure or part of "Operating expenses." On the issue of the two meetings, the Defendant has not filed minutes to establish who was or was not in attendance – Application for Summary Judgment dismissed and costs to be costs in the main proceedings.*

JUDGMENT

BACKGROUND

[1] On or about the month of April, 2016, the Plaintiff issued out summons against the Defendant for monies owed in respect of services rendered by the Plaintiff to the Defendant amounting to Fifty Six Thousand Six Hundred and Forty Seven Emalangeni and Seventy five Cents (E56 647.75).

[2] The Defendant then filed a claim in Reconvention for the amount of Two Hundred and Fourteen Thousand Eight Hundred and Ninety Four Cents arising out of (a) Plaintiff's neglect failure and/or refusal to pay or remit at all correct amount of tax due to the Tax Authorities by the Defendant arising out of the Defendant's ownership of the property, and (b) expenses in respect of arranged meetings between the parties that the Plaintiff failed to attend without notice.

[3] The Defendant contends that it was the duty of the Plaintiff to pay and remit its own taxes arising out of its ownership of the property. The Defendant

further contends that it attended the meetings and it was the Plaintiff that insisted on the attendance of the Director, Mr. Thulani Mkhaliphi.

THE PARTIES' CASE

The Defendant's case who is Plaintiff in the counter claim

[4] The Defendant states that clause 6 of the service contract between the Plaintiff and Defendant provides that all rates taxes, insurance premiums, service charges, other local authority charges, maintenance and repair costs, legal fees, auditors' remuneration, telephone, fax, petty cash, security, cleaning, landscaping running costs, travelling, wages and salaries and such other charges and the remuneration in accordance with clause 5 shall be for the account of the owners but shall in the first instance be paid by the manager from monies collected by it in terms of clause 3.31. The manager shall bear its own administration costs and salary and wage costs of its employees and servants engaged in carrying out duties in terms of the agreement and all costs of advertising and marketing of areas to let in terms clause 3.2.4.

[5] The Defendant further states that the Plaintiff was retained as Manager of the Defendant's property from 1st April 2014. It is common cause that the tax year in the country ends on the 30th June of each year. In terms of Annexure "SP1" (which is the Tax Statement), the tax in respect of which penalties and interest is being claimed is in August 2015. It stands to reason that the penalty and interest therefore is for the previous Tax year of 2014.

[6] In addition, the Plaintiff further caused the Defendant to suffer loss by not attending meetings without notice that had been arranged by the parties which the Defendant then had to pay for at the Simunye Country Club and Fedics separately.

[7] As indicated earlier, the Plaintiff filed Summons for payment of monies owed following the rendering of services by it. The Defendant filed a claim in Reconvention which claim is now the subject of this litigation. The Plaintiff filed a Notice to Defend and the Defendant filed an Application for Summary Judgment. The Plaintiff has filed an Affidavit Resisting the granting of Summary Judgment.

[8] As far as the Summary Judgment Application is concerned, the Defendant states that it is trite law that if a party has no defence in a matter but decides to file a Notice to Defend, so as to delay proceedings, the other party may file for Summary Judgment. The matter between the Defendant and the Plaintiff is not triable as there are liquid documents available in respect of the Defendant's counter claim and the documents stand as an indisputable proof of the said claim against the Plaintiff, hence there is no dispute of fact.

[9] The Defendant further states that 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 obliged 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.

[10] The Defendant alleges that in all cases where Summary Judgment is being resisted, sufficient facts and particulars must be given to show that there is a triable issue. In the case at hand, the general allegation is that it is not clear how the figure was reached. This is devoid of facts and particulars sufficient

to have the matter referred to trial. The Defendant does not say why it thinks the computation is wrong and how it should be calculated. The case made by the Plaintiff does not qualify for dismissing the Defendant's claim. The claim must therefore be upheld with costs.

The Plaintiff's case who is Defendant in the counter claim

[11] The Plaintiff states that the Defendant has failed to present a clear case and a triable issue has been raised which can be dealt with if the matter is referred to trial. The triable issue emanates from the wording of the contract especially clauses 1.2.5 and 6 which oblige the Defendant to pay. Clause 1.2.5 deals with the definition of "operating expenses" and is inclusive of tax; clause 6 deals with expenditure. The Defendant further contends that the words "first instance" in clause 6 is a triable issue as it is not clear as to its time frame. Summary Judgment must therefore be refused.

[12] The Plaintiff further states that the duty on the part of the Defendant to pay its taxes is by operation of the law. Therefore the Plaintiff cannot be penalised for the Defendant's defaults in so paying the taxes.

[13] The Defendant finally states that not only are taxes paid by the Defendant by virtue of the contract between the parties but they are classified as administration costs. According to the **Oxford Advanced Learners' Dictionary 7th edition at page 18**, "administration" means the activities that are done in order to plan, organise and run a business, school or other institution.

[14] On the issue of the alleged loss resulting from the Plaintiff's employees to attend the meetings between the parties, the Plaintiff argues that these meetings were cancelled by the Defendant who insisted that the quorum cannot be formed in the absence of Mr. Thulani Mkhaliphi who is the one of the Defendant's Directors. Representatives from Ndallawa and Company as well as Tricia Munroe attended all the meetings that had been scheduled. This claim is therefore fictitious and the Defendant cannot claim in respect of this issue. The Plaintiff then pleads with the court that the Summary Judgment Application be dismissed because the Plaintiff has clearly proven that there are triable issues which can only be resolved by oral evidence.

THE APPLICABLE LAW

[15] The Rule relating to Summary Judgment is ably described by Mamba J. in **Sinkhwa SemaSwati Ltd t/a Mister Bread V P.S.B. Enterprises Civil Case No. 3839/09 at page 8** where His Lordship says:

> *"The Rule relating to Summary Judgment…… has been designed to prevent a plaintiff's claim based upon certain causes of action from being delayed by what amounts to an abuse of the process of the court. In certain circumstances therefore, the law allows the plaintiff after the defendant has entered appearance, to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole, or part thereof from laying his defence before the court."*

[16] The Learned Judge further observed that:

> *"The remedy provided by the Rule is extra ordinary and a very stringent one in that it permits a judgment to be given without trial. It closes the door of the court to the defendant. Consequently, it should*

be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no bona fide defence, on the other hand it is reluctant to deprive the defendant of his normal right to defend except in a clear case."

[17] In **C.S. Group of Companies V Construction Associates (Pty) LTD Civil Case No. 41/2008**, the Learned Chief Justice Banda, as He then was, equally observed at page 14 that:

"*It has also been held that courts should be slow to close the door to the defendant if a reasonable possibility of a defence exists to avoid an injustice."*

[18] In the Supreme Court Case of **Musa Sifundza V Swaziland Development and Savings Bank, Civil Case No. 67/12** at paragraph [8] it was held that:

"[8] It is well recognised that Summary Judgment is an extra-ordinary remedy. It is a very stringent one for that matter. This is

because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for purposes of delay."

Court's observation and conclusion

[19] It is trite that it is not sufficient merely to give conclusions and inferences from the given facts. It is the primary fact from which those conclusions and inferences can be drawn which should be set in the affidavit. If, therefore, sufficient primary fact and particulars are given from which, if true would give rise to a defence, then there is a triable issue and the Application for summary judgment should be denied.

[20] In the case of **Mater Dorolosa High School V R.M.J Stationery (PTY) LTD Appeal Case No. 3 of 2005** the test to apply in determining whether Summary Judgment should be granted or not was formulated as follows:

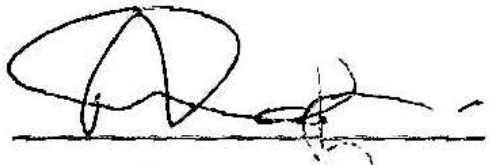
"That it would be more accurate to say that a court will not "merely" be slow to close door to a defendant, but will infact refuse to do so, if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiff's claim the court cannot deny him the opportunity of having such an issue tried."

[21] In respect of the case at hand, it is the Plaintiff's case that clause 1.2.5 of the contract classifies taxes as "operating expenses." It further provides for rates, insurances, maintenance and repairs, gardening maintenance etc. Towards the end of clause 1.2.5 there are the words "as designated by the owners." This suggests that clause 1.2.5 does allow for operating expenses provided they are designated accordingly. Clause 6 on the other hand states that expenditure including taxes shall be for the account of the owners but shall in the first instance be paid by the manager from monies collected by it in terms of clause 3.3.1. This according to the Plaintiff is a triable issue. This court is in agreement with the Plaintiff that the issue of taxes needs to be clarified. It is not clear whether it forms part of operational expenses as designated by the owners in terms of clause 1.2.5 or is part of the Expenditure as reflected in clause 6. It is also worth verifying, through oral evidence, how before the

contract was entered into between the Parties, this issue was dealt with by the Defendant and previous property managers.

[23] The other alleged triable issue pertains to the use of the term "first instance" in clause 6. The Plaintiff states that it is not clear what the term mean particularly when one considers the tax year at the Swaziland Revenue Authority. The Plaintiff further states that the issue of payment for refreshments is also triable in that they attended both meetings which were cancelled by the Defendant. This court is also in agreement with the Plaintiff that "first instance" should be clarified. Likewise, on the issue of payment for refreshments, the Defendant has not replied to the Plaintiff's Affidavit Resisting Summary Judgment. The Replying Affidavit would have helped address the issue. The Defendant has not even attached the minutes of both meetings to add weight to its case.

[24] I am of the view that the Plaintiff has established that it has a bona fide defence. Summary Judgment is therefore refused. Costs of this Application shall be costs in the main action.



FAKUDZE J.

JUDGE OF THE HIGH COURT

Plaintiff: O. Nzima

Defendant: T. Nkomonde