IN THE HIGH COURT OF SWAZILAND

Swaziland National Provident Fund

V

C & M Properties (Pty) Ltd. C & M Sales (Pty) Ltd.

Case No. 678/98

Coram	S.W. Sapire, CJ
For Plaintiff	Mr. P. Flynn
For Defendant	Mr. H. Fine

JUDGMENT

(15/03/99)

This is an Application for Summary Judgment.

Plaintiff claims payment of El 866 769.00, interest, an order declaring immovable property executable, and costs. The combined summons is a formidable document to which is attached copies of the documents on which the plaintiff relies. Having regard to the nature of the defences raised the prolixity was justified.

Plaintiff's claim is for repayment of monies lent and advanced by the plaintiff to the first defendant in terms of a written agreement, the loan being secured by a mortgage of immovable property and guaranteed in terms of a surety ship by the second defendant.

The Defendants gave notice to defend the action instituted against them by the service of the summons. The Plaintiff in turn has applied for summary judgment to which the defendants have replied filing an affidavit. The Plaintiff completed the complement of documents with a further affidavit.

PROVIDENT FUND

Michael Temple, who describes himself as the director of both defendants, attests the defendants' affidavit. In the affidavit a number of spurious statements are made and untenable arguments are advanced which are said to be bone fide defences to the plaintiff's claims.

The first point raised is that because there is no resolution of the directors attached to the agreement of loan he Temple did not have authority to conclude the agreement. He does not say that he did in fact not have authority. A resolution of directors does not have to be in writing. Temple does not allege that he was in fact unauthorized. There is little to be said in favour of this point and it was not urged in argument.

In paragraph 6 of the respondent's affidavit another specious defence is alluded to. The deponent suggested that because an insignificant portion of the loan had not been advanced and because in terms of the agreement the loan was repayable in installments commencing after the whole amount had been advanced, the claim for repayment was premature. This argument overlooks the fact that the plaintiff relies on the non-payment of interest after demand as the basis of foreclosure. There is no answer to this.

Temple also submitted in paragraph 6

".... that the First Defendant after diligent search has found (sic, surely he intended ' not found') and is not aware of any notice of default and therefor the installment or interest is not due."

The replying affidavit establishes that demand for the payment of interest was made.

Counsel who appeared for the defendant's did not attempt to argue the viability of these defences or the good faith in which they were raised. This not only confirms that but also for the contents of paragraph 12 of the affidavit no defence is available to the defendants, but also is a factor in considering the good faith of the counterclaim alleged in paragraph 12. It was on the basis only of this counterclaim that counsel for the Defendant's resisted summary Judgement. Paragraph 12 reads

" The First and Second Defendants have a counterclaim against the plaintiff in that

12.1 On or about March 1998 N M Shabangu who was under the employ of the Plaintiff uttered and published Defamatory statement where in the Plaintiff said the Defendants cheated when they obtained the loan in question herein
12.2 The said word were false and known to be false but none the less were uttered and published to as number of people during the farewell function of Mr Shabangu at Malkeras.
12.3 As a result of the said defamatory words defendants suffered damage in he sum of E2 500 000,00(Two and Half Million Emelangeni)"

The Defendants it should be noticed do not allege that Shabangu was acting within the course of his employment and within the scope of his authority as servant or agent of the Plaintiff in uttering and publishing the statement. There are accordingly no allegations on which vicarious liability on the part of the plaintiff can be inferred. This in itself is fatal to the alleged counterclaim

The amount of the claim for damages, is to say the least vastly unrealistic and seems to relate more to the size of the Plaintiff's claim than to any realistic assessment of loss the Defendants or either of them may have suffered. This strengthens the impression that the counterclaim has been fabricated, at least in so far as the amount is concerned, to provide a makeshift defence to Plaintiffs claim and a basis in the absence of anything else, upon which to resist summary judgement. Temple does not suggest that he personally or either of the defendants previously made demand in respect thereof

An illiquid counterclaim may in some circumstances, be an answer to a claim for summary judgment.

See TRUTER v DEGENAAR 1990 (1) SA 206 (T) The headnote of which reads

"Practice - Applications and motions - Application and counter-application launched - Adjudication of- Should be adjudicated pari passu

- Although Rule 22(4) of Uniform Rules of Court is limited to actions only, it did not amend the existing law that both actions and motions and their counterclaims and counter-applications should be adjudicated pari passu

- Court has, however, a discretion to depart from the Rule - Court's discretion not limited to cases where counterclaim or counter-application is frivolous or vexatious and intended merely to delay judgment -Discretion a wider one and reasons which would move a Court to exercise it in favour of a plaintiff/applicant not capable of pre-definition. "
In the same case Murray J is quoted as having said in Du Toit v De Beer 1955 (1) SA 469 (T)
"The common law authorities considered by Bok J in Hesse and Ritter's case appear to approve of the principle that where reciprocal claims by the parties exist, the proper course is to decide all these claims pari passu so as to adjudicate upon them all and then arrive at the decision as to who on balance is the really successful party and consequently in truth the creditor. The raising of an illiquid counterclaim may not in strict law be a defence to the claim in convention, but the defendant is entitled to plead it as an answer to a claim for immediate judgment on an admitted claim in

convention: it is in the nature of a dilatory plea - 'I owe your claim but ought not to be compelled to pay it now seeing that you owe me more on another ground and I should have the opportunity of proving this '. Bok J points out that the common law authorities sanctioned this procedure, though it was not an absolute rule, and the Court in its discretion might dispose of the main claim first. Cases where the claim is one in the Supreme Court for provisional sentence for payment subject to security de restituendo or if summary judgment is

asked in the magistrate's court under Rule 21 occur to one's mind as cases where this dilatory plea might not be upheld.'

The allegations in paragraph 12 of the Defendants' affidavit resisting summary judgment do not persuade me that the plaintiff's application should be disallowed and the defendants are given leave to defend. I come to this conclusion because

1. The counterclaim is alleged in terms so vague that the bone fides thereof are not manifest
2. In the absence of an averment the Shabangu was acting in the course and scope of his employment when he made the defamatory statement, the allegations of the counterclaim are insufficient to maintain an action against the plaintiff based on vicarious liability. In plaintiff's answering affidavit it is stated that Shabangu retired from the employment of the plaintiff on 31st December 1997. And accordingly was no longer an employee of the plaintiff when the alleged defamatory statement was made.
3. The amount of the counterclaim is so palpably and grossly exaggerated that doubt is cast on the bone fides in which the claim is made. No facts have been alleged from which it can be ascertained that the amount of damages which may have been suffered approaches the substantial amount of plaintiffs uncontested liquid claim.
4. The alleged counterclaim arose after the defendants had already defaulted in the payment of interest and demand for repayment of the loan had already been made.
5. No demand or other intimation of the counterclaim seems to have been made prior to the filing of the affidavit resisting summary judgment.
6. If the Defendants or either of them has a genuine counterclaim, this not having been established on the allegations in the papers before me the claim may still be pursued in another action. Neither convenience nor public policy requires that the plaintiffs claim should be stayed

I therefore grant summary judgment in favour of the plaintiff as claimed in the notice of application, that is

1.1 Payment by the Defendants jointly and severally the one paying the other to be pro tanto discharged
1.1.1 of the amount of El 866 769,00
1.1.2 interest on the said amount at the rate of 16 % per annum from 26th August 1997 to date of payment, and
1.1.3 of El41 531,02 in respect of interest accrued prior to that date
1.2 Costs of the suit

1.3 And as against 1st defendant, the property hypothecated in terms of mortgage bond No. 198/1995 is declared to be executable.

S W Sapire