IN THE HIGH COURT OF SWAZILAND

CASE NO. 2115/99

IN THE MATTER BETWEEN:

NOKUTHULA GAMEDZE — Plaintiff

and

EPHRAEM THWALA — Defendant

CORAM : MASUKU J.
FOR PLAINTIFF : MR W.E. MKHATSHWA
FOR DEPENDANT : M J.S. MAGAGULA

JUDGEMENT
5th MAY, 2000

By Simple Summons dated 26th August, 1999, the Plaintiff instituted action for payment of a sum of E 7,000.00 being the balance of the purchase price of a motor vehicle sold by the Plaintiff to the Defendant, interest thereon and costs. The Defendant filed a Notice to Defend the action. In response thereto, the Plaintiff filed a Declaration.

In the Declaration, the Plaintiff stated that on 19th September, 1998 and at Mbabane, she entered into a written agreement of sale in respect of which she sold and delivered a motor vehicle to the Defendant. The terms of the sale were the following:-

(i) that the purchase price was E57,000.00. The Defendant was to pay a deposit of E50,000.00 on signature of the agreement.

(ii) the balance of the purchase price was to be liquidated in two monthly

instalments of E3,500 (three thousand five hundred Emalangeni) on each of the succeeding months of October and November, 1998.

(iii) that the vehicle was sold "voet stoots".

The Defendant paid the deposit as agreed but neglected or refused to pay the balance thereof, namely the amount of E7,000.00. The Plaintiff then proceeded to apply for summary Judgement which was opposed by the Defendant.

In an Affidavit resisting summary judgement, the Defendant stated that the said vehicle had latent defects which were known to the Plaintiff, but which the Plaintiff did not disclose to the Defendant at the time of the sale. The latent defects alleged are that the vehicle failed to drive evenly on the road and it would lose balance due to a damage to the chassis which resulted from an accident in which the vehicle plunged into a ditch on its way to Durban.

It is further alleged that from the said accident, the engine was also damaged and a piston was not functioning properly. Furthermore, the engine tappets were making some strange noise as a result of which the Plaintiff was approached. The Plaintiff did not disclose the story behind the malfunctions, content only to advise the Defendant that the tappets needed oiling.

In its Replying Affidavit, the Plaintiff denied that the vehicle had the latent defects alleged of which she knew and omitted to disclose. It further stated that by operation of the "voetstoots" clause, the Defendant had no defence. The Plaintiff further stated that the vehicle was subjected to a road worthiness test in which the latent defects alleged would have been detected. Lastly, the Plaintiff stated that it was significant that the alleged defects were only raised when demand for purchase price was made and not before, thus casting doubt on the genuineness of the alleged defects.

This necessitated the Defendant applying for and being granted leave to file a supplementary affidavit to deal with the last allegation. The supplementary affidavit was never filed by the Defendant's attorneys as undertaken. On the date to which the matter was postponed for finalizing the hearing of the Summary Judgement

application, none of the parties' representatives attended Court. As has now become the rule and not the exception with some attorneys of this Court, Mr Mkhatshwa and Mr Magagula not excepted, no apology or explanation was tendered to Court for the non-appearance of the attorneys on the date agreed to by the parties. I then decided to deal with the matter on the basis of the papers before Court and the substantial argument then advanced. I did this so as not to cause the litigants to incur further unnecessary costs for the summary judgement, especially since it is my view that the matter can be decided on the papers notwithstanding the absence of the supplementary affidavits.

According to the provisions of Rule 32 (2), Summary Judgement applies to claims, in the following catergories; (a) liquid document, (b) a liquidated amount in money, (c) delivery of specified movable property or (d) ejectment. The claim in question falls under catergory (b).

Summary judgement has been described as a very stringent and extra ordinary procedure in that it closes the door of the Court on the face of the defendant. Summary judgement, in view of the foregoing is granted only in circumstances where it is clear on the papers that the Plaintiff has an unanswerable case.

According to Herbstein and Van Winsen, "The Practice of the Supreme Court of South Africa, Fourth Edition, Juta, 1997, at page 442, the defendant must set out his defence fully. The learned authors proceed to state as follows;-

> *"This has been held to mean that while the defendant need not deal exhaustively with facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable a court to decide whether the affidavit discloses a* ***bona fide*** *defence. A* ***bona fide*** *defence is disclosed if the defendant swears to a defence, valid in law, in a manner that is not inherently or seriously unconvincing. In other words, the affidavit must set out facts that, if proved at the trial, would constitute a defence to the plaintiff's action.*

In one judgement, considered to be a *locus classicus* on the subject, Corbett J.A., in **MAHARAJ v BARCLAYS NATIONAL BANK LTD 1976 (1) SA 418 (AD) at 426 A,** stated the responsibility of a Defendant in summary judgement with devastating candour and absolute clarity. The learned Judge stated as follows:-

> *"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the Court by affidavit that he has a **bona fide** defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is : (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed, the defendant appears to have, as to either the whole or part of the claim, a defence which is both **bona fide** and good in law. If satisfied on these matters the Court must refuse summary judgement, either wholly or in part as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a **bona fide** defence .... At the same time, the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea: nor does the Court examine it by the standards of pleading."*

Having set out the law applicable from the above-cited authorities, one needs to turn to the facts of the matter as earlier set out in order to decide whether the Defendant has met the criteria so eloquently set out by Corbett C.J.

The Defendant *in casu* has raised the defence that the "voetstoots" clause, on which the Plaintiff relies should not avail because there were certain latent defects fully known to the Plaintiff which she did not want to disclose to the Defendant at the time of the sale. Allegations of an accident which occured in Durban whilst the *merx* was still in the Plaintiff's ownership and possession are made coupled with the resultant latent defects. The Plaintiff has not responded to the allegations relating to the accident at all in the reply. The Defendant has stated amounts expended in restoring the *merx*, to a good state of repair and pristine condition.

In view of the aforegoing, the Defendant has in my view alleged facts which constitute a defence. He has fully disclosed the nature and grounds of the defence, together with the material facts upon which it is predicated. It is also worth mentioning that having regard to the facts alleged by the Defendant, it appears that he has a defence which is *bona fide* and good in law. It would be inappropriate nor advisable for the Court to attempt at this forum to decide these issues, or, as stated by Corbett C.J., to attempt to determine whether or not there is a balance of probabilities in favour of one or the other party. These are, in my view, issues that would best be ventilated in a trial. I am not convinced that the Plaintiff has in the papers an unanswerable case.

In view of the foregoing, I find it appropriate, in view of the nature of the remedy sought and the effect it has on the Defendant, to refuse summary judgement. The Defendant is granted leave to defend the main action. Costs of this application are to be determined by the trial Court.

T.S. MASUKU
JUDGE