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HIGH COURT OF SWAZILAND

CIVIL CASE NO.775/03

In the matter between:

COUSIN CORPORATE INVESTMENTS (PTY) LTD	**PLAINTIFF**
VS	
LETITIA FOSTER	**DEFENDANT**
CORAM	**SHABANGU AJ**
FOR PLAINTIFF	**MR. L.R. MAMBA**
FOR DEFENDANT	**ADVOCATE FLYNN**

JUDGMENT

30TH JULY 2003

The plaintiff, Cousins Corporate Investments (Pty) Ltd commenced action proceedings before this Court by combined summons dated 10th April, 2003.

The plaintiff claims agent's commission arising from an agreement in terms of which the plaintiff accepted a mandate to sell certain shares and loan accounts on behalf of the defendant to an approved purchaser upon certain terms and conditions specified.

In other words the plaintiff agreed and undertook to be defendant's lawful agent in the disposal of or the sale of the said shares and loan

accounts. The plaintiff then pleads in paragraph 4 of the particulars of claim as follows:-

> **"In terms of clause 2.8.2 of the agreement and in the event that the plaintiff sold the shares and loan account for E11,000.000 (eleven million Emalangeni) or more, the defendant undertook to pay the plaintiff a commission of 5 percent on such sale."**

The plaintiff further alleges that through its instrumentality the defendant sold the aforementioned shares and loan accounts to Siphilile Investments (Pty) Ltd for a sum of E11,000.000 (eleven million Emalangeni). In paragraph six of the particulars of claim the plaintiff concludes that the defendant became liable to the plaintiff in the sum of E550.000 (five hundred and fifty thousand Emalangeni), this being the 5% in accordance with what the plaintiff has pleaded in paragraph 4 of the particulars of claim. The plaintiff proceeds to plead at paragraph 7 that the defendant has "in breach of the agreement" only paid the plaintiff a sum of E502,650 (five hundred and two thousand six hundred and fifty Emalangeni). From the aforegoing the plaintiff concludes that the defendant is indebted to it in the sum of E47,350.00 (forty seven thousant three hundred and fifty Emalangeni) which amount the defendant is alleged to have refused to pay notwithstanding demand. The aforementioned amount of E47,350.00 is the difference between the amount of E550,000 which the plaintiff concludes is due to it in paragraph 6 of the particulars of claim and the amount of E502,650.00 which has been paid by the defendant to the plaintiff.

The defendant filed a notice of intention to defend this action whereupon the plaintiff proceeded to move this application for summary judgment. The defendant has filed an affidavit resisting summary judgment whereupon it raises the following defences to the plaintiff's claim.

1. That plaintiff is not liable to the present plaintiff mainly because the agency contract on which plaintiff relies was not

between the plaintiff and the defendant but was between the defendant and one Hopewell Masimula.

2. That the defendant did not agree to pay the commission at the rate of 5% of the purchase price unless the said purchase price exceeded E11,000.000 (eleven million Emalangeni). In other words according to defendant's position the commission payable if the agreed purchase price was eleven million Emalangeni, was still at the rate of 4%.
3. Lastly, that the defendant has on a correct interpretation of the agency agreement overpaid the plaintiff, and as a result of the said payment the defendant has a counterclaim against the plaintiff.

The first defence raised by the defendant is based on some words added in manuscript above the typescript of clause 1.4 of the agency agreement. The added words read Hopewell Masimula. As a result of this added words the defendant argues that they were added in order to reflect an amendment agreed to by the parties in terms of which amendment Hopewell Masimula was being instituted as the agent in place of the plaintiff. It is significant that the name of the plaintiff is not cancelled. There is nothing even on a literal reading of that clause in light of the words which appear above them to indicate that the words "Hopewell Masimula" was intended to replace the words **"COUSINS CORPORATE INVESTMENT (PTY) LTD ("the agent")"**, which words were not even cancelled. Further at the end of the agreement it is expressly stated that the said Hopewell Masimula signed in his capacity as "Director of the Agent" and to this end Mr. Masimula states himself to be duly authorised by resolution. The defendant's defence as raised on this aspect of the matter seems to me to be fanciful and unrealistic. I am unable to hold that it is a ***bona fide*** defence to the plaintiff's claim.

The second defence raised by the defendant is somewhat similar in that it also relates to some writing by hand which is added to the typed writing of clause 2.8.1 and 2.8.2 of the agency agreement. The relevant portion of the typed version of clause 2.8 of the agency agreement would read.

> **"I undertake to pay to the agent commission at the following rates:**
> **2.8.1 4% (four percentum) of the purchase price which is E..... (.....Emalangeni) or more.**
> **2.8.2 % (five percentum) of the purchase price which is E..... Emalangeni or more."**

Then by hand the writing was added on clause 2.8.1 and 2.8.2 on the blank spaces 11 million (11,000.000) in reference to the purchase price which is described in Emalangeni. In clause 2.8.1 the words "or more" originally in typescript are crossed out and the 11,000.000 Emalangeni is preceded by the words "Less than" meaning that clause 2.8.1 would then read "... I undertake to pay the agent commission at the following rates: 4% (four percentum) of the purchase price which is less than E11 million (11,000.000 Emalangeni). Not only is each page of the agreement initialled at the bottom but above the handwritten "less than" the parties initialled their signatures. Then they went further to initial between the two subclauses above the handwritten 'more than' but next to the cancelled "or more" in clause 2.8.1. The plaintiff contends that the latter initials relate to the cancellation of the words "or more" in subclause 2.8.1. The plaintiff further contends that the initials referred to do not relate to the writing "more than 11 million" and that these words were not inserted by agreement of the parties in as much as their insertion not only vitiates the linguistic sense of clause 2.8 but is also absurd to the extent that whilst there would be commission payable in the event of a sale at a purchase price of less than E11,000.000 (eleven million Emalangeni) no commission rate would be specified in respect of a sale wherein the purchase price is eleven million Emalangeni (no more and no less). On the other hand the defendant contends that this could be what the parties had intended in signing the agreement or

that the 4% commission rate would still be applicable even when the purchase price was E11,000.000. The defendant contends that the issue arising in respect of the interpretation of clause 2.8 require clarification by a trial.

The third defence relating to the existence of a counter claim by the defendant really depends and is linked on the second defence raised. The main question therefore is whether the defendant's affidavit discloses a case which if proved at the trial may amount to a defence. It appears to me that the handwritten words in clause 2.8 of the agency agreement do raise an ambiguity and vagueness as to what the parties agreed to. It is quite possible as Mr. Mamba argues that clause 2.8.2 as viewed by the defendant does not make "linguistic sense" as he put it, but that would mean that the meaning of the clause is obscure or vague. The logical consequence of a possible finding that the clause is vague is not necessarily that the plaintiff is entitled to the relief it seeks. There is in any event also a dispute as to whether the handwritten words form part of the agreement.

In the light of this it may be useful to remind myself of the principles governing the approach of the court in a summary judgment application. The principles were stated by Corbett JA (as he then was) in the leading case of **MAHARAJ VS BARCLAYS NATIONAL BANK LTD 1976(1) SA418** at 425 as follows:

> **"Under rule 32(3) upon the hearing of an application for summary judgment, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the court by affidavit or, with the leave of the court, by oral evidence of himself or any other person who can swear positively to the fact that he has a *bona fide* defence to the action. Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefore. If the defendant finds security or satisfies the court in this way, then, ... the court is bound to give leave to defend and the action proceeds in the ordinary way. If the defendant fails either to find security or to satisfy the court in this way, then, ... the court has a discretion as to whether to grant summary judgment or not. (see GRUHN V.M. PUPKEWITZ & SONS LTD 1973(3) SA49AD at 58)."**

Later on the learned Judge concluded:

> **"In the present case the trial Judge found that there were material facts which the defendant 'could and should have dealt with' in his affidavit and without which the court was not able to come to a decision that he appeared to have a *bona fide* defence. 'In the result' the application for summary judgment was granted.** (I may mention, ***en passant***, that the learned Judge does not appear to have considered whether, despite the shortcomings of the affidavit, he should not exercise a discretion in defendant's favour)".

Firstly, it is important to note that Corbett JA (as he then was) in the abovementioned observations was discussing the approach of the court from the perspective of the old Rule 32 of the South African Uniform Rules of Court and that rule even though previously identical to our old Rule 32, is worded differently from our present Rule 32. What is clear from the observation by the learned Judge is that:-

1. the court has no discretion but to refuse summary judgment and grant leave to defend to the defendant once a ***bona fide*** defence is disclosed in the affidavit resisting summary judgment.
2. where however the defendant's affidavit falls short and fails to satisfy the court that he has a defence which is "***bona fide*** and good in law" then the court will not necessarily grant summary judgment but retains a discretion, (which it may still exercise in defendants' favour) whether to grant or refuse the summary judgment application. The new rule following the 1990 amendment though worded differently does not change the principles which the court should apply in dealing with applications for summary judgment, especially because of the extraordinary and stringent nature of the remedy. **See the present Rule 32(4).**

Further in hearing a summary judgment application and –

> **"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".** (See **MAHARAJ's case supra** page 426.)

In the present case there is a dispute relating to the wording of clause 2.8.2 of the agency agreement, namely whether the handwritten words which read "more than" preceding the "11,000.000 (11 million)" are part of the agreement. In the event the trial court will find that they are part of the written agency agreement (as they ***prima facie*** appear to be) then other questions arise in respect of which it may be inappropriate for me to say anything at this stage of the proceedings. Suffice it to say that these probabilities may either disclose a defence in favour of the defendant or show that the defendant has no defence. There is the fact which was alluded to by plaintiff's counsel that the defendant has paid in excess of the 4% but less than the 5% which factor according to counsel indicates more probably that the defendant was aware of his obligation to pay the commission at the rate of 5% contended for by the plaintiff. However this cannot assist the plaintiff in as much as the court cannot consider the probabilities at this stage.

In the circumstances, the summary judgment application is refused. The defendant is granted leave to defend. The defendant is ordered to file its plea within fourteen (14) days of this order. Costs of the summary judgment application are to be costs in the cause.

A.S. SHABANGU

Acting Judge