

THE HIGH COURT OF SWAZILAND

PREMIER PANEL BEATERS & SPRAY PAINTERS

Plaintiff

And

LEONARD MOHALE

Defendant

Civil Case No, 2237/2003

Coram

S.B. MAPHALALA – J

For the Plaintiff

MR. S. SIMELANE

For the Defendant

MR. A LUKHELE

JUDGMENT (20/08/2004)

Before court is an opposed application for summary judgment where Plaintiff is claiming for payment of E5, 047-72, interest and costs. The said amount is in respect of certain mechanical services and repairs carried by the Plaintiff at the instance of the Defendant.

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Plaintiff alleges that during the period of November 2001 and March 2002 it rendered methanical services and supplied mechanical parts to two of the Defendant's vehicles namely, a Toyota Hilux LDV registration no. SD 977 LG and a Toyota Camry Sedan, registration no. SD 960 KG at the Defendant's own instance and request.

The affidavit in opposition to the application raises a defence that Defendant never dealt with the Plaintiff but one Peter Asara who was paid in full for the work done. The work was done by the said Peter Asara, an employee of the Plaintiff. That in fact he did not enter into any agreement with the Plaintiff.

In argument it was contended for the Plaintiff that the job card annexed to the replying affidavit clearly shows that the Defendant has perjured himself under oath in stating that he never had any dealings with the Plaintiff. Therefore, in the circumstances the Defendant's defence cannot be said to be bona fide as required by the provisions of Rule 32 of the Rules of Court. Further that the contents of the affidavit resisting summary judgment are a contradiction of the parole evidence rule and are inadmissible.

Arguments were advanced au contraire that the Defendant has raised a valid and bona fide defence to the plaintiff's claim. It was contended in this regard that in the present case there is a dispute of fact on the papers filed as to who carried on the work. Such a dispute cannot be determined in a summary judgment application.

In my assessment of the evidence on affidavits and the arguments advanced for and against the application for summary judgment I am inclined to hold that the Defendant in the present case has not put forth a bona fide defence within the meaning of Rule 32. For the court to make the decision whether the Defendant has set out his defence all the Defendant needs to show is; firstly, whether the Defendant has disclosed the nature and grounds of his or her defence; and secondly, 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 bona fide and good in law (see *Maharah vs Barclays National Bank Ltd 1976 (1) S.A. 418 (A)* at 427). Whether the defence is bona fide or not depends upon the merits of that defence in the Defendant's affidavit (see

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Silverleaf Pastry and Confectionary Co. (Pty) Ltd Jourbert 1972 (1) S.A. 125 (c) at 129). '

In the present case the defence advanced in Defendant's affidavit resisting summary judgment falls far short of the requirements of the rule. Firstly, the Defendant has not buttressed his claim that work was done by the said Peter Asara by stating the mode and full particulars of payment to the Peter Asara. The averments advanced in this regard are vague and insufficient to resist summary judgment.

Secondly, the averment contained in paragraph 6 of his opposing affidavit that "at no stage did I enter into any contract with the Plaintiff as alleged or at all" is clearly incorrect and borders on perjury when viewed against the background of the annexed job card signed by the Defendant himself. This document together with the invoices annexed to the plaintiff's Particulars of Claim marked "A", "B", "C" and "D" establishes beyond any doubt that there was in the past a relationship between the Defendant and the Plaintiff, For Defendant to somersault at this stage and disown this relationship smacks of chicanery of the highest order and calls into question his bona fides in the defence he has advanced. As a result of this I am inclined to agree with the Plaintiff at paragraph 3.1 where Plaintiff states that "the Defendant is further aware that Peter Asara has since left the country and he is now taking advantage of that situation". This appears to be the only explanation for this blatant denial by the Defendant.

All in all I am in agreement with the submissions made by Mr. Simelane for the Plaintiff.

In the result I grant judgment in favour of the Plaintiff in terms of prayers 1, 2, and 3 of the plaintiff's declaration.

S.B MAPHALALA

JUDGE