THE HIGH COURT OF SWAZILAND

SIBUSANIDLAMINI

Plaintiff

And

ZAMEKILE INVESTMENTS (PTY) LTD Defendant

Civil case No 2050/2003

Coram S.B. MAPHALALA – J

For the Plaintiff MR. S. DLAMINI

For the Defendant MR. M. NXUMALO

JUDGEMENT

(04/02/2004)

Before court is an opposed application for summary judgment.

The application is based on a claim by the Plaintiff against the Defendant for the recovery of the sum of E45, 000-00 being in respect of the purchase price of a restaurant business sold to the Defendant by the Plaintiff as a going concern in February 2003.

It is common cause from the papers filed of record that an agreement was entered into between the parties on or about February 2003, in terms of which it was agreed, inter alia, that;

4.1 The purchase price for the business would be the sum of E70,000-00;

4.2 A deposit of E30, 000-00 would be paid by the 3rd March 2003;

4.3 The balance of E40, 000-00 would be paid in four monthly payments of E10, 000-00 each beginning from the end of March 2003.

It was further agreed by the parties that the Defendant would purchase the Plaintiff's restaurant business as a going concern.

In fulfilment of the aforesaid agreement, the Defendant paid the first E10, 000-00 instalment directly to the landlord.

It is also common cause that on the 11th March 2003, and pursuant to this agreement, the Defendant took over its fixtures and fittings, office furniture, chairs and tables, pots, cutlery and stock in trade and started trading on the 11th March 2003, under the same name and style Mandlakhe Restaurant.

The causa in this case is that according to the Plaintiff, the Defendant is in breach of the agreement, the Defendant failed to pay the agreed amounts and has only paid the sum of E25, 000-00 leaving a balance of E45, 000-00 which amount is due, owing and payable.

The Defendant opposes the application for summary judgment and has filed an affidavit to that effect. The defence is found in paragraph 3 (a) of the said affidavit. It reads as follows:

"I admit that during February 2003,I entered into an oral agreement with the Plaintiff for the sale of a business Mandlakhe Restaurant the subject matter of this claim. However the agreement was terminated when the Plaintiff was ejected from the premises by the landlord where the business was located during March 2003.

b) As I was interested in the business I approached the landlord a Mr. Diamond with a view of setting up my own business. I then signed a lease with the owner of the premises and set up my business which is independent from that of the Plaintiff. I attach hereto a copy of the agreement marked "PD1".

The question for determination in the present application is whether, by entering into a new lease with the landlord, the obligations of the Defendant in terms of the sale agreement were discharged.

According to Mr. Dlamini for the Plaintiff the above is a crisp point of law in respect of which the authorities are unanimous that the summary judgment court can deal with, as the trial court would eventually be in no better position than the summary judgment court to decide the said legal question. The court in this regard was referred to the cases of Lovemore vs White 1978 (3) S.A. 2354 E, 260H-261 A and that of Hendel vs Josi 1986 (4) S.A. 838 (D) 845 C-E.
It was argued for the Plaintiff that in casu a contract of sale existed in that there was i) consensus ad idem between the parties, ii) the thing sold, a defined and ascertained subject matter (merx); and iii) the price was fixed by the parties. In this regard the court was referred to Hackwill G.J.R. in Mackevrten's Sale of Goods in South Africa, (5th ED) at page 5 for the three essentials of a contract of sale.

Further, it was contended that the Plaintiff cannot have been ejected in March 2003, as in April 2003 she was still a tenant.

It was furthermore contended that the Defendant has clearly failed to disclose a bona fide dispute of fact. The Defendant's affidavit resisting summary judgment is needlessly bald, vague, laconic and sketchy. To support this view Mr. Dlamini cited the cases of Swaziland Industrial Development Company Limited vs Zamikwakhe (Pty) Ltd and Karleen Ashraf- Civil Case No. 3988/2000 (unreported) and the case Breitenbach vs Fiat (EDMS) BPK 1976 (2) S.A, 226, 229 A where Colman J states the following:

"All that is required is that the Defendant's defence be set out so badly, vaguely or laconically that the court, with due regard to all the circumstances, receives the impression that the

Defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller and clearer version of the defence which he claims to have".

The Defendant argues au contraire that the Plaintiff did not deliver the merx which then terminates the agreement thus entitling the Defendant not to pay. To this end the court was referred to the textbook by A J Kerr, The Principles of the Law of Contract, (6th ed), at page 575.

Further, it contended for the Defendant that the Plaintiff misled the Defendant that she had a business to sell when in fact the business closed down prior to delivery to the Defendant who had paid part of the deposit. In this regard the court was referred to A J Kerr (supra) at page 105 where the following appears:

"Thus a person who has signed a document which the other party claims to be a contract containing the rights and duties described therein is not bound if, he or she, can show that he or she was misled as to the nature of the document or as to the terms which it contains by some act or omission of the other contradicting part".

The third point made by the Defendant is that he has advanced a bona fide defence in its affidavit to satisfy the requirements of Rule 32 (5) (a) of the High Court Rules. The court was referred to Herbstein et a l, The Civil Practice of the Supreme Court of South Africa, (4th ED) at 442 and 445 to support the Defendant's case.

According to Herbstein (supra) at page 445 "... the court retains a discretion to refuse summary judgment even if the requirements of paragraphs (a) and (b) of sub-rule (3) are not met by the Defendant. It has been said that while it is not clear in accordance with what criteria this discretion will be exercised, an important factor weighing with the court is the extraordinary and stringent nature of the remedy accorded a Plaintiff by Rule 32, and that it is only when there is no reasonable doubt about the plaintiff's claim that the application should be accended to" (my underlying). For this proposition the learned authors refer to a judgment by Corbett J in Arena & another vs Astra Furnishers (Pty) Ltd 1974 (1) S.A. 298 (C) at 304 F-305 in fin.

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In casu I am persuaded by the arguments advanced on behalf of the Defendant that the issues raised in this matter are triable. It would appear to me that it is a triable issue whether or not the Plaintiff misled the Defendant that she had a business to sell when in fact the business closed down prior to delivery to the Defendant. Secondly, there is a dispute of fact as to whether or not the merx was delivered. In this regard the Defendant maintains that it was not. Thirdly, the Plaintiff contends that the premises were only shut down by the landlord a month into the Defendant's occupation of the premises and operation of the business. The Defendant on the other hand holds a contrary view. Therefore, following what is said in Herbstein (supra) it cannot be said there is no reasonable doubt about the plaintiff's claim in the present case.

In the premise, the application for summary judgment is dismissed with costs and that the matter proceeds in the normal way.

S,B. MAPHALALA

JUDGE