

THE HIGH COURT OF SWAZILAND

Civil Case No.3052/03

In the matter between:

SEPHO PAULOS MHLANGA

Plaintiff

And

NORMAN MASINGA

Defendant

CORAM

MASUKU J.

**For the Plaintiff For
the Defendant**

**Mr M. Mabila Mr
T.A. Dlamini**

**JUDGEMENT
15th June 2004**

This is an application for Summary Judgement and in terms of which the Plaintiff claims the following: -

- (1) Payment of the sum of E29, 000.00
- (2) Interest thereon at the rate of 9% per annum, calculated from date of Summons to date of final payment
- (3) Costs of suit

The claim arises from an agreement allegedly entered into between the parties and in terms of which the parties entered into an oral agreement on the 18th April, 2001, at Ntfontjeni, for the sale of a Toyota Dyna 4 Ton truck to the Plaintiff by the Defendant. The *pretium* was E29, 000.00, which was paid in the following manner; two payments of E13, 000.00 on the 18th April and June, 2001, respectively, into the Defendant's bank account with Standard

Bank Swaziland Limited, Pigg's Peak Branch. A further cash payment of E3,000.00 was given directly to the Defendant by the Plaintiff.

The Plaintiff alleges that notwithstanding his compliance with his part of the agreement, the Defendant failed to deliver the motor vehicle and in that light, the Plaintiff accepted repudiation and claimed a return of the amount paid to the Defendant.

In opposing the application for summary judgement, the Defendant deposed to the following allegations:- That he was approached by the Plaintiff in March, 2001, seeking to purchase the vehicle described above. He advised the Plaintiff that he had applied for a loan and had put up the vehicle in question as security and the sale of the vehicle to the Plaintiff would therefor be conditional upon the loan not being approved. Before the bank could advise on the success or otherwise of the loan, the Plaintiff made the first payment of E13,000.00 into the Defendant's account. The bank later approved the loan, with the vehicle put up as security. It is the Defendant's case that he unsuccessfully tried to advise the Plaintiff of these developments but could not locate him until the second instalment of E13,000.00 had been made.

In view of these developments, the Defendant claims that he thereupon purchased a truck from a Mr Moses Motsa, for E15,000.00, repaired it for an amount of E3,000.00. He alleges that the Plaintiff was offered this truck and he liked it and as a result, signed the job card in respect of the repairs referred to above. The Plaintiff later somersaulted, claiming that he did not want the Nissan any more on account of advice that the Nissan is prone to mechanical troubles.

The Defendant further stated that he had paid an amount of E10,000.00 back to the Plaintiff, an allegation that is not denied. He denies being liable for the balance of E18,000.00 spent on the truck by him in view of the allegations appearing above in relation to the Nissan truck.

The Law Applicable

Summary judgement, it has been recognised is a drastic remedy, which must only be granted where the Court is convinced that the Plaintiff has an unanswerable case and that the

Defendant has filed the Notice to Defend solely, for purpose of delaying the Plaintiff in enjoying the fruits of the judgement.

In MUSA MAGONGO VS FIRST NATIONAL BANK OF SWAZILAND APP. CASE NO.39/99, Tebbutt J.A. had this cautionary word to say about Summary Judgement and the most anxious consideration the Court must exercise in deciding to grant the remedy:-

"Moreover, this is a summary Judgement in which, if it is granted, the door is finally and irrevocably closed to the defendant. It has been held time and again in the Courts of this Country that in view of the extraordinary and stringent nature of Summary Judgement proceedings, the Court will be slow to close the door to a defendant if a reasonable possibility exists that an injustice may be done if judgement is granted."

In BARCLAYS BANK LTD VS SMITH 1975 (4) SA 765 (D & DLD) at 684, Booysen J. outlined the duty of the Defendant in seeking to avoid the granting of the remedy. He stated the following:-

"It is clear that a defendant in summary judgement proceedings need not satisfy the Court on a balance of probabilities that he has a defence but merely has to raise a fairly triable and arguable issue. "

Applying the law to the facts

The question for determination is whether the facts alleged by the Defendant *in casu*, do constitute a fairly triable and arguable issue. It is clear from the Defendant's affidavit that he alleges that there was a new agreement in terms of which the Plaintiff abandoned his interest in the earlier truck and exhibited an interest in the Nissan truck. It is alleged that he viewed it, was happy therewith and eventually signed the job card in respect of the repairs effected thereon, an *inducium* so the Defendant alleges, that the Plaintiff was prepared to accept the Nissan truck in the place of the Toyota Dyna.

In terms of the provisions of Rule 32 (5) (a), the Plaintiff may, with the leave of Court deliver an affidavit in reply. There are pertinent and triable issues raised by the Defendant *in casu*

and which the Plaintiff did not seek to deny by asking for leave to file a replying affidavit. In particular, the fact that the Plaintiff saw the later truck, was happy with it and also signed the job card in respect of the repairs are telling and merited, a reply in the absence of which I am satisfied that the Defendant has raised a fairly triable issue and which carries a prospect of success at trial. A valid and *bona fide* defence has thus been disclosed by the Defendant *in casu*.

It is however worth noting that whatever defence the Defendant may have relates to the amount of E18,000.00. It is common cause that an amount of E10,000.00 was refunded to him by the Defendant. It is clear in the premises that the Defendant has no *bona fide* defence in relation to an amount of E1,000.00.

Conclusion

I therefor grant summary judgement to the Plaintiff in respect of the said amount of E 1,000.00 but order, the balance of the claim to be ventilated in a trial and in respect of which the Defendant be and is hereby granted leave to defend.

Notwithstanding the Plaintiffs limited success in this matter, I order that the costs be reserved for determination by the trial Court.



T.S. MASUKU