

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

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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

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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 E1,000.00 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 plaintiff's limited success in this matter, I order that the costs be reserved for determination by the trial Court.

T.S .MASUKU

JUDGE