THE HIGH COURT OF SWAZILAND

In the matter between:

METRO CASH AND CARRY (PTY) LTD t/a MANZINI LIQUOR WAREHOUSE

AND

ENYAKATFO INVESTMENTS (PTY) LTD t/a BEMVELO BOTTLE STORE **Defendant**

CORAM **MASUKU J.**

For the Plaintiff For the Defendant **Mr K. Motsa Ms S. Mdluli**

JUDGEMENT
26th July, 2004

This is an application for summary judgement and in which Plaintiff claims the following relief:

1. Payment of the sum of E67 653.05 in respect of goods sold and delivered;

2. Interest thereon at the rate of 9% per month to the date of final payment; and

3. Costs of suit on the scale as between attorney and own client including collection commission.

This action was commenced by a simple summons. After the delivery of a Notice to Defend, the Plaintiff filed a Declaration and in terms of which it formulated its claim as follows: That

pursuant to an oral agreement entered into by the Plaintiff, duly represented by its Sto Manager, Patrick Nxumalo and/or other authorised representative's, and the Defendant, dul represented by Thulani Mndvoti, the Plaintiff undertook to sell liquor and related products t< the Defendant for the festive season of the year 2003.

The terms of the agreement were that the goods would be sold and delivered to the Defendant at the latter's request and instance; the said goods would be sold to the Defendant at the Plaintiffs agreed prices, alternatively usual prices from time to time; the sale would be on cash basis alternatively, the Defendant would make payment to the Plaintiff for goods purchased within thirty (30) days after receipt of the statement issued by the Plaintiff.

The Plaintiff avers that during December, 2003 to January, 2004, pursuant to the aforesaid oral agreement recorded above, it sold goods which the Defendant accepted. In proof of the goods sold, the Plaintiff annexed documents reflecting the date, description, quantity, weight and amount of the goods sold.

The Plaintiff further annexed a letter received from the Defendant, dated 25th February, 2004, in which the latter acknowledged that it owed an amount of E78, 683.05 to the Plaintiff and that payment was not made due to theft of money by some of the Defendant's staff. The Defendant undertook to settle the outstanding amount in monthly instalments of E6, 500.00, commencing from the end of March, 2004.

In response to the application for summary Judgement, the Defendant denied that it has no *bona fide* defence and filed the Notice to Defend for purposes of delay. It admitted the oral agreement recorded above but denied any liability arising there from on the grounds that the said agreement was novated by a subsequent oral agreement in terms of which the Plaintiff approved a credit facility for the Defendant, in terms of which it could only purchase goods to the value of E20, 000.00 and payment would be required before more goods could be sold and delivered on credit. The Defendant alleges therefor that the goods could not have been continuously sold and delivered to it in excess of the approved limit.

In the Replying Affidavit filed by the Plaintiff in terms of the provisions of Rule 32 (5) of the Rules of the High Court, as amended, the Plaintiff annexed a written credit application in terms of which it extended credit to the Defendant on the 11th August, 2003, before the oral

agreement referred to was entered into. The Plaintiff denies the existence of the on agreement in respect of the E20, 000.00 facility alleged by the Defendant. The Plaintiff state: that the oral agreement it referred to was strictly for the festive reason as the amount owed by the Defendant was at that stage above the credit limit of E35, 000.00 approved by the Plaintiff as recorded above.

When the matter served before me for argument of the application for summary judgement, Ms Mdluli informed the Court that the Defendant had paid the entire amount claimed and that she had in her possession the relevant documents in proof of that assertion. Appreciating the stringent nature of summary judgement and the harm the Defendant stood to suffer if judgement was entered, I granted the Defendant leave to file a supplementary affidavit to which the relevant documentation could be attached and ordered the Defendant to pay the wasted costs. I also afforded the Plaintiff an opportunity to file an affidavit in response thereto. I will deal with the receipts annexed by the Defendant in due course.

The Law Applicable

It is necessary, before considering this matter, to have recourse to the authorities in relation to this matter. This will be done in order to eventually decide, on the papers, whether the Defendant has made out a *bona fide* defence in its papers.

According to the learned authors, Erasmus, *et al* "The Superior Court Practice", Juta & Co, 1997, at page, Bl -206 the Rule relating to Summary Judgement operates in the following manner.

> *"The rule was designed to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the Court. In certain circumstances, therefore, the law allows the plaintiff after the defendant has entered appearance, to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. This procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the Court.*

The learned author's continue as follows:

> *"The remedy provided by the rule is an extra ordinary and a very stringent one in that it permits a judgement to be given without a trial. It closes the doors of the Court to the defendant. Consequently, it should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence, on the other hand, it is reluctant to deprive the defendant of his normal right to defend, except in a clear case. "*

It is clear from the foregoing that in such applications, the Court is called upon to bring its wisdom and judgement to bear and to balance between the need of a plaintiff to obtain a speedy remedy on the one hand, thus debarring a defendant with a meritless claim from delaying that relief, and a defendant, on the other, who can show on the papers that he has a triable issue for the Court to consider and which *prima facie* carries some prospect of success at trial.

In satisfying the Court that he has a *bona fide* defence to the claim, the defendant must, according to Corbett J.A. in MAHARAJ VS BARCLAYS NATIONAL BANK LTD 1976 (1) SA 418 (A.D.) at 426 do the following: -

> *"where the defence is based upon facts, in the sense that material facts are alleged by the plaintiff in the 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 ofprobabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) 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 both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgement, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversies in the past. It connotes, in my view, that, while the defendant*

need not deal exhaustively with the facts and evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a ***bona*** *fide defence. "*

Applying the law to the facts.

It now falls for me to consider whether the Defendant *in casu* has succeeded in meeting the requirements set out by Corbett J.A. above. In doing so, I will examine the nature and grounds of the defence disclosed with a view to ascemining whether the same are *bona fide* and good in law. I will deal with the defences raised by the Defendant immediately below: -

(a) Novation

In regard to novation, the Defendant's contention is that where the parties agree on a new contract, the new contract replaces the old one completely. In this regard, the Defendant further submitted in its heads of argument that by entering into a new contract, the other party accepts repudiation of the first contract and such contract no longer becomes operative or enforceable. The Court was in this regard referred to the case of ACACIA MINES LTD VS BOSHOFF 1958 (4) SA 330 (AD).

The Defendant in its reliance on novation, contends that whilst admitting the existence of the oral agreement relating to the sale of liquor and related products to it by the Plaintiff, it contends that a subsequent oral agreement in terms of which it was extended a credit facility of not more than E20, 000.00 was entered into. Its argument is that the earlier oral argument was replaced and superseded by the later agreement.

According to Schalk van der Merwe *et al*, "Contract General Principles", 1st Ed, Juta, 1993, at page 374, novation is an agreement whereby one obligation or more is extinguished and replaced by a new obligationary relationship. It will be necessary, in dealing with this question, to consult the authorities regarding how novation takes place. It will then be necessary to determine whether *in casu* novation did take place.

In ELECTRIC PROCESS ENGRAVING AND STERIO CO. VS IRWIN 1940 A.D. 22t af226, Centlivres J.A., cited with approval the remarks of de VTlliers C.J. in EWERS V£ THE RESIDENT MAGISTRATE OF OUDTSHOORN AND ANOTHER (Foard 32), where the following appears: -

> *"The result of the authorities is that the question is one of intention and that, in the absence of any express declaration by the parties, the intention to effect novation cannot be held to exist except by way of necessary inference from all the circumstances of the case."*

In the work of van der Merwe *et al, (supra)* at page 375, the following is recorded on the subject:-

> *"Of central importance for an effective novation is the requirement of animus novandi, an intention to replace an existing obligation with another. The existence of an intention to effect a novation is a matter offact, and the onus ofproving it rests on the party who alleges novation. "*

A reading of the papers would to my mind show that there was no express declaration by the parties from which one could find the *animus novandi.* The next question would then be whether the *animus* can be inferred from the attendant circumstances of this case. This it must be recalled, is an *onus* that rests on the one who alleges novation, in this case, the Defendant.

It is worth considering that in its affidavit resisting summary judgement, the Defendant admitted the existence of the oral agreement relating to supply of goods during the festive season. There is no denial that delivery of goods was effected in that period in the excess of an amount of E60, 000.00. The Defendant proceeds to allege that after that indebtedness, a new oral agreement was then entered into in respect of which it was to be afforded a credit facility with a limit of E20, 000.00. Can this agreement, in the absence of an express declaration, be said from the circumstances, to have novated the earlier oral agreement?

In this regard, there are certain factors that militate against such a conclusion. First and foremost, the indebtedness resulting from the earlier agreement was substantial and would have received specific attention in any novation, including one based on inference. No business

entity would forgo such a large sum of money without entering into a specific agreemen relating thereto.

Secondly, the Plaintiff denies the existence of the second oral agreement in the nature and terms alleged by the Defendant. The Defendant unfortunately does not state where the said contract was entered into and who represented the parties to that agreement. It also lacks very necessary information relating to the date of such agreement, which could enable the Court to assess the proximity of this agreement to the earlier one.

It is also worth considering in this regard that the Plaintiff, in its Replying Affidavit, annexed an application for a credit facility by the Defendant, which was approved by the Plaintiff. It is dated 11th August, 2003, a few months before the oral agreement in respect of the festive season was to be entered into. It is worth recalling that the maximum amount of the credit facility was E35, 000.00 and would appear to have been valid at the time the oral agreement for delivery of goods during the festive season was entered into. It beats reason, regard had to the aforegoing, for another oral agreement to have been entered into. The need, purpose or wisdom of entering into the alleged second oral agreement is in my view highly doubtful and would on a balance of probability fail, given the sequence of events and the matrix of the evidence before Court.

The most cataclysmic reason for finding against the alleged novation is the letter dated 25th February, 2004, written by one Sandra Smith, a Director of the Defendant. In that letter, the Defendant admitted owing an amount at the time totalling sum E78, 683.05 and offered to settle the same in monthly instalments of E6, 500.00, commencing by the end of March 2004. How and why this letter was written, if indeed a novation had taken place according to the Defendant's version is an unexplained or unexplainable mystery. It is well to poignantly mention that although this letter was annexed to the Plaintiffs Affidavit in support of Summary Judgement and marked "M2", the Defendant did not find it necessary or desirable to explain the circumstances surrounding the writing of a letter, which although written on paper, constitutes a weight on the Defendant's neck, sufficient to draw it deep into the pools of summary judgement.

I can, with no iota of hesitation, in view of the aforegoing, state that the alleged defence of novation, proffered by the Defendant is unsustainable and is bad in law. The Defendant has,

on this score, failed to disclose a *bona fide* defence. It had an *onus* to discharge, regarding th(existence of *animus novandi,* but it has in my view dismally failed to discharge that *onus.*

(b) Payment of the sum allegedly due

As indicated earlier, the Defendant, was granted an opportunity to file a supplementary affidavit and to which it annexed certain receipts in proof of its allegation that it had paid the amount due in full.

It should be pointed out to the Defendant's detriment, that two of the receipts annexed were in relation to transactions with the Plaintiffs sister shop in Mbabane. They do not in anyway assist the Defendant. Mr Motsa suggested that these were filed in order to mislead the Court in finding that the payments in question had been effected. No explanation for the inclusion of these receipts was forthcoming from the Defendant and Mr Motsa's submissions cannot in the circumstances be regarded as idle talk. This is moreso, in view of the other anomalies drawn to the Court's attention by Mr Motsa's meticulous attention to detail.

Among the receipts filed by the Defendant, and which fall within the dates refened to in the Plaintiffs declaration, are two receipts apparently printed by the computer for E8, 000.00 and E12, 477.90, respectively. The receipts reflect the respective dates of the payments as being 6th December, 2003 and 1st December, 2003. In order to obfuscate and mislead the Court, the Defendant has inserted new dates for these receipts by hand, these being 6th December, 2003 and 31st December. This was not explained by the Defendant either, but certainly detracts materially from the Defendant's *bona fides* as a party and from the *bona fides* of its defence. This attempt to mislead the Court must be condemned in the strongest possible terms.

The Plaintiff, in response to the receipts filed by the Defendant, then filed a comprehensive list of all the purchases and payments made by the Defendant from the Plaintiff. This summary includes all the legitimate receipts filed by the Defendant in support of its claim. Notwithstanding that these have been taken into account, it is clear that the Defendant stands indebted to the Plaintiff in the reduced amount of E63 803.90. I take to be not without significance the fact of the writing of the letter by the Defendant acknowledging its indebtedness to the Plaintiff as recorded above.

The learned authors, van Nierkerk *et al*, in their work entitled, "Summary Judgement -Practical Guide", Butterworths, 1998, state the following at page 1-5,6: -

> *"Prompt relieffor a plaintiff at the expense of a defendant denied the normal trial procedures carries with it inherent risks. In the application of the remedy, therefore, it is of critical importance that there be an equitable balancing of the legitimate expectation of a plaintiff's claim on the one hand against the right of a defendant to a proper adjudication of his defence by means of the ordinary trial procedure, on the other."*

I have anxiously considered the above excerpt in dealing with this matter. In bringing these conflicting interests to an equilibrium, I find that the Plaintiff is entitled to the remedy as the Defendant's defence is without merit. Summary judgement is therefor entered for the Plaintiff in the amount of E63 803.90, interest thereon at the rate of 9% per month from the date of issue of the summons to date of final payment. Costs are also granted in the Plaintiffs favour at the scale applied for, being on the attorney and client scale.

I would also wish to formally record my indebtness to both attorneys for their industry and relevant and incisive heads of argument. They have made my work easier and burden lighter.

T.S. MASUKU
JUDGE