

THE HIGH COURT OF SWAZILAND

SWAZILAND DEVELOPMENT FINANCE CORPORATION

Plaintiff

And

JOSIAH MAHLAMBI t/a MAHLAMBI TRANSPORT

Defendant

Civil Case No. 1094/05

Coram: S.B. Maphalala

For Plaintiff: Mr Z. Jele

For Defendant: In Absentia

JUDGEMENT

14th October 2005

[1] Before court is an opposed application for summary judgement where the Plaintiff is seeking payment of the sum of E170, 000.00 lent and advanced to the Defendant in terms of a written loan

agreement in August, 2004. The amount was to enable the Defendant to purchase a truck in accordance with the business plan submitted by the Defendant to the Plaintiff. Later the Plaintiff advanced a sum of E1 5, 000.00 to the Defendant to enable the latter to purchase a trailer.

[2] In terms of the Loan Agreement, the following conditions applied;

2. 1.1. The interest on the capital amount was to be a sum of 22% per annum. The interest was to be compounded monthly in arrears.

2. 1.2. The capital amount together with the interest was to be repaid within a period of 18 (eighteen) months at instalments of E1 1,174.00 per month. Both interest and principal amount were payable.

[3] Clause 4 of the Loan Agreement provided for an acceleration clause, which stated that in the event that the Defendant failed to pay any instalment on the due date, then the Plaintiff would be entitled to claim the full balance of the loan. Clause 8.2 provides that should there be a breach of the agreement, then Plaintiff may cancel agreement without notice to the Defendant.

[4] This matter was enrolled before me by the Registrar of this court in the "8.30 roll" of the 17th August 2005 where it was postponed in the absence of Defendant's attorney to the following day, being 18th August 2005. Again there was no attendance on behalf of the Defendant. In that event, allowed Mr Jeje to proceed to argue the matter on the merits and I thereafter reserved judgement.

[5] Reverting to the issue at hand, it is the Plaintiffs contention that the Defendant has breached the Loan Agreement in a number of respects. These are outlined at paragraphs 5.1, 5.2, 5.3, 5.3.1, and 5.3.2 of the Heads of Arguments furnished on behalf of the Plaintiff.

[6] In opposition thereto the Defendant has filed an Affidavit resisting summary judgement where it becomes apparent that Defendant does not dispute the Loan Agreement or the amount stated therein. Further at paragraph 3.2 of the said Affidavit Defendant admits that he is breach of the agreement on the basis that he is in arrears. Furthermore Defendant contends that there has been no cancellation and refers to paragraph 8.2.2. of the Agreement. The Defendant also contends that it should be excused from paying simply because it has a counterclaim for damages arising out of what it refers to as an unlawful attachment of the vehicle by the Plaintiff. It should be noted in this regard that no counterclaim has been instituted by the Defendant against the Plaintiff, all that is indicated is that there is an intention to institute such claim.

[7] The test of what constitute a bona fide defence in summary judgement application was enunciated in *Breytenbach vs Fiat S.A. (EDMS) BPK1976 (2) S.A.* at 226 to be as follows:

"The Defendant's contention in resistance to the Plaintiffs claim must come with sufficient degree of clarity, to enable the court to ascertain whether he was deposed to a defence, which, if proven, at the trial could constitute a defence to the action."

[8] The authors Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th Edition at page 442 put it this way:

"..... The Defendant 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".

[9] See also the case of Maharaj vs Barclays Bank 1976 (1) S.A. 419.

[10] It remains to be seen therefore, whether the defendant in the present case has advanced a bona fide defence to satisfy the requirements of Rule 32 and furthermore whether the counter claim can be sustained on the facts presented.

[11] On the first question raised in paragraph [10] above, it appears to me that the Defendant has not raised a bona fide defence as required by the Rules. I say so because of the following; Firstly, the Defendant has not disputed the Loan Agreement and the amount stated therein. Secondly, at paragraph 3.2 of Defendant affidavit resisting summary judgement Defendant admitted that he was in breach of the agreement on the basis that he is in arrears. Thirdly, the Defendant's contention that there has been no cancellation of the agreement is not based on a proper reading of the relevant clause, being clause 8.2 thereof. The Defendant has not quoted the said clause in full in his affidavit and thus giving an incomplete picture. Clause 8.2 thereof reads as follows:

"In the event of the breach of this agreement, Swaziland Development Finance Corporation shall be

entitled, without prejudice to any other rights that Swaziland Development Finance Corporation may have in terms of this agreement or in law, to cancel this agreement without notice to the borrower. Upon cancellation, the total amount due for the loan will become due and payable by the borrower immediate effect and Swaziland Development Finance Corporation will be entitled to recover from the borrower any damages suffered by Swaziland Development Finance Corporation in consequence of the breach and the cancellation of this agreement."(my emphasis).

[12] It is clear from a reading of the above-cited clause that it provides for cancellation without notice. It appears on the facts advanced that Plaintiff has cancelled the agreement.

[13] Coming to the second question that of the counterclaim the Defendant has averred in paragraph 6 of his affidavit resisting summary judgement as follows:

"COUNTERCLAIM

6.1 On or about the 14th March, 2005 the Plaintiff unlawfully attached and took into its possession my motor vehicle being a Volvo Truck (herein after referred to as a Motor Vehicle), which was being utilised for business purposes.

6.2. As a result of the unlawful attachment, I have lost a contract with AS & M Transport t/a Motor Services which ought to have been with effect from the 16th March 2005 until December 2005.

"6.3. The material terms of the contract included inter alia, that I would be paid an amount of E76, 000.00 per month. (SEE ANEXURE C)

6.4. I did approach the Plaintiff to try and explain that the had been no business for the three months wherein I had defaulted but would be able to pay the balance of the arrears i.e. E33,000.00 by the end of March. However the Plaintiff refused to release the Motor Vehicle amicably.

6.5 As a result thereof I have a Counter - Claim against the Plaintiff for the amount of E75, 000.00 based on loss of business."

[14] It is trite law that a counterclaim must be valid in law i.e. it must comply with the requirements of pleadings in terms of Rule 18 (10) of the Rules which provides the following:

"(10) A Plaintiff suing for damages shall set them out in such a manner as will enable the defendant Reasonably to assess the quantum thereof:

Provided that a Plaintiff suing for damages for personal injury shall specify the date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any is claimed for -

(a) medical costs, and hospital and other similar expenses, and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of-

(i) the earning of income, stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do;

(ii) the enjoyment of amenities of life, giving particulars and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent."

[15] The present counterclaim does not comply with the said Rule and as such is not good in law. A claim for damages must set out sufficient particularity of the claim, how it is constituted. Where the Defendant's counterclaim appears to be substantially less than the main claim, the counter claim does not constitute a bona fide defence to the action; at it appears in casu. (See Groenewald vs Patterbosch Farms (Pty) Ltd 1976 (1) S.A. 548 and also LAWS A Vol.3, First Edition at page 159 paragraph 278).

[16] In this regard I am in total agreement with the submissions made on behalf of the Plaintiff that the proposed counterclaim has not prospects of success because there was no unlawful attachment of the vehicle but rather a voluntary surrender of the vehicle. The vehicle has been surrendered to the Plaintiff after the Defendant had been found to be in breach of clause 7.1.5 of the Agreement. The truck was released to the Defendant after he had provided a satisfactory insurance certificate in terms of the order in case No. 1005/2005.

[17] In the result, for the foregoing reasons the application for summary judgement in terms of the Notice of Application claim "A" and "claim "B" is granted.

S.B. MAPHALALA

JUDGE