

THE HIGH COURT OF SWAZILAND

R.M.J. STATIONERY (PTY) LTD

Plaintiff

And

MATER DOLOROSA HIGH SCHOOL

Defendant

Civil Case No. 2265/2004

Coram: S.D. MAPHALALA-J

For the Plaintiff: MISS ZWANE

For the Defendant: MR. M. MABILA

JUDGMENT

(27/01/2005)

[1] Before Court is an opposed application for summary judgement where Plaintiff is suing for payment of a sum of E354, 092.- 20; interest thereon at the rate of 9% per annum a tempore morae and costs of suit at attorney and own client scale.

[2] The suit arose in this way: On or about 1st December 2003, at Mbabane the parties entered into an oral agreement, whereby Plaintiff duly represented by his Managing Director, Reuben Jele and Defendant being represented by the Principal, Jerome Dlamini agreed that Plaintiff was to supply the Defendant with books valued at E200, 056 - 75 and stationery valued at E174, 035 - 45. These materials were to be delivered to the Defendant either on the 13th December 2003, or after the 1st January 2004. Defendant had to effect payment of the sum of E374, 092-20 at the end of February 2004. Such payment was to be effected at Swazi Bank. Plaintiff duly delivered the aforesaid books and stationery totalling the sum of E374, 092-20 on the 5^h January 2004, to Defendant.

[3] The Plaintiff avers in paragraph 7 of its Particulars of Claim that Defendant in breach of the agreement, failed to pay the amount due and owing on the due date and subsequently paid the sum of E20, 000-00 in May 2004, which was applied towards the reduction of Defendants indebtedness to Plaintiff and after set off, the Defendant's indebtedness was reduced to E354, 092-20 which Defendant despite demand had failed and/or refused to pay to the Plaintiff.

[4] Plaintiff contends that Defendant has no bona fide defence to the action and that Notice of Intention to Defend and the affidavit resisting summary judgment have been filed for purposes of delay.

[5] The Defendant in the affidavit resisting summary judgment deposed to by the Headmaster Mr. Jerome Dlamini has raised a point of law in limine and also has advanced a defence on the merits.

[6] The point of law in limine is as follows:

' "The application for summary judgment and/or the Plaintiffs claim should be set aside and/or dismissed for non-joinder of (lie Swaziland Government and/or the Ministry of Education as 2nd Defendant..."

[7] To support the above point in limine, a brief background of the matter is set out in the same paragraph 1 as follows:

"At the beginning of the current school calender, the Ministry of Education informed schools in Swazifand to admit Orphaned and Vulnerable Children (hereinafter referred to as "OVC's" irrespective of whether they were able to pay for their tuition and ancillary fees as the, Swaziland Government was going to cater for the same, and this was widely published in both the print and electronic media.

Subsequent to the foregoing, the Defendant was approached by the Plaintiff represented by Reuben Jele and it (Plaintiff) offered to supply the Defendant with stationery and schoolbooks. The Defendant accepted the said offer on condition that payment thereof was to become due and payable. Upon receipt of payment (by Defendant) from the Swaziland Government as tlie said stationery and scliool books was to cater for the OVC's who are currently 65 in number at the Defendant, and this was expressly and clearly communicated to the Plaintiff who accepted the said condition and the Plaintiff as well knew that the Swaziland Government and/or the Ministry of Education was a parly to the transaction. In actual fact, it was indicated to Plaintiff that the Government had authorised the Defendant to enter into the transaction that the Government had undertook to cater for payment of the said goods.

Furthermore, the involvement of the Swaziland Court has been highlighted in several meetings with the Plaintiff and this includes one held with the Swaziland Development and Savings Bank which allegedly financed the Plaintiff in delivering the order".

[8] On the merits two possible defences are advanced at paragraph 7 thereof that Defendant has not failed to pay (lie amount owed in (hat same has not fallen clue. That a litigant cannot sue another for a debt which has not yet become due and that in casu the position is that as the Plaintiffs debt will only become due once tho Swaziland Government has paid Defendant and this is the risk Plaintiff voluntarily took when it entered into this transaction as it was made clear to it that the same was entered into with the express authorisation of the Swaziland Government and/or Ministry of Education who were going to finance the deal.

[9] The second defence is that there is variance in the amounts claimed i.e. E324, 600-00 in annexure "MDS1" and E354, 092-20 in the summons and that no explanation has been preferred to explain this discrepancy thus Plaintiff does not know the amount owed to it.

[10] In its Replying affidavit at paragraph 3.1 the Plaintiff avers that it never at any given point in time enter into an agreement with the Ministry of Education or Swaziland Government but that the parties to the agreement were the Plaintiff and Defendant. At paragraph 3.2 thereof Plaintiff further denies having agreed on payment being effected by Defendant upon receipt of payment from the Swaziland Government. Furthermore, at paragraph 8.4 Applicant avers that the variance in the amounts claimed that is E324, 000-00 as it appears in the letter of demand and E354, 092-20 is a typographical error. Without further ado in this regard, it appears to ine to be so, that this is merely a typographical error and as such nothing much turns on this point.

[II] In argument before me Mr. Mabila who appeared for the Defendant abandoned the point of law in limine that of non-joinder and therefore no further mention will be made on this aspect of the matter in

this judgment except to make an observation en passant that the legal authorities cited by Miss Zwane in this regard are apposite, more particularly the authority in Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th edition at page 173 where the learned authors state the following:

"It is generally not necessary to join interested persons who are not parties to an agreement sued on", (see also the case of Amalgated Engineering Union vs Minister of Labour 1949 (3) S.A. at page 637).

[12] The remaining question for determination therefore is whether the averment that the debt has not fallen due constitutes a bona fide defence within the prescribes of Rule 32 of the Rules of the High Court. From the facts advanced it is common cause that the amount owing is the sum of E354, 092 - 20. It is further common cause that Defendant paid a sum of E20, 000-00 by cheque dated the 24th May 2004 towards the liquidation of the debt of E354, 092-20 under the contract. The Defendant has paid part of the debt and therefore the Defendant's denial for indebtedness for part of the 'money claim is tantamount to a bare denial and unsubstantiated. Defendant cannot be heard to say that the amount under the contract viz E354, 092-20 is not due and payable when it has already paid E20, 000-00 towards the liquidation of the same debt in May 2004. It appears to me that Defendant is merely blowing hot and cold.

[13] For the afore-going reasons I find that Defendant has not put forth a bona fide defence as required by Rule 32 (1) of the High Court Rules and as a result I grant the application for summary judgment in terms of prayers 1, 2, and 3 of the Particulars of Claim.

S.B. MAPHALALA

JUDGE