

THE HIGH COURT OF SWAZILAND

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!
SWAZILAND NATIONAL PROVIDENT FUNDBOARD

! Plaintiff

!'

! And

EAGLE WATCH SECURITY SERVICES (PTY) LIMITED

! Defendant

Civil Case No. 2388/2004

S.B. MAPHALALA-J

MISS L. KUNENE

MR. J. MAVUSO

Coram

For the Plaintiff For the Defendant

JUDGMENT

(24/03/2005)

[1] Before court is an opposed application for summary judgment for payment of the sum of E8, 293-50 together with interest on the aforesaid amount at the rate of 9% per annum a *tempora morae* to date of final payment and costs of suit. The amount

sought is in respect of penalties for late payment of contributions for the period from

January 2001 to November 2001, May 2002 to December 2002, and May 2003 to

January 2004, which amount the Defendant has failed and/or refused and/or neglected to make payment of the aforesaid sum despite demand.

[2] The Plaintiff is a legally corporate, duly established in terms of Section 4 of the Swaziland National Provident Fund Order of 1974 having its principal place of business at Lidlelantfom/ ni! Building.cnr Ngwane and Martin Streets, Manzini district of Manzini, Swaziland. The Plaintiff is empowered by the provisions of the said Order to collect contributions from employers as prescribed by Section 14 (3) read with Section 21 (2) of the said Order.

[3] The Defendant is a duly employer required to make such contributions for its eligible employees and is a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland having its principal place of business at Malkenis, Tin ;mkhu Farm, Stall Market, MaJkerns, district of Manzini, Swaziland.

[-1] It is common cause that the Defendant is a contributing employer in terms of

the provisions of the Regulation of Contributing Employer's Order of 1975. In terms of the Order, the contributing employer is obliged to pay into the Plaintiff within twenty-one (21) days after the end of the month in which the last day of the relevant contribution period falls. The Order further stipulates that every statutory contribution due to the Board and in the event a contributing employer defaults in making timely payment of the statutory contribution, a penalty of 7.5% of the amount unpaid shall be added to the contribution for each month or part of a month during which the contributions remains unpaid after the date in which payment was due.

[5] The Plaintiff avers in paragraph 7 of its declaration thereof that the Defendant is in default as it has not forwarded timely the statutory payment to the Plaintiff for a period between January 2001 to November 2001, May 2002 to December 2002,

May 2003 and January 2004. As a result of the Defendant's conduct, it is liable for penalties amounting to H8, 293-50 which amount is computed as it appears on the invoices annexed marked Annexure "SNPF3". The Plaintiff demanded payments of these invoices by presenter' them to the Defendant.

[6] The Defendant in i ; affidavit resisting summary judgment in paragraph 5 and 8 thereof states that it has < **bona fide** defence as follows:

- a) The Plaintiff has failed to identify the eligible employees whose contribution is alleged to have not been paid timely by the contributing employer. There is no link between Plaintiff's Annexure "SNPF3" and the monthly contribution lists forwarded under cover of Plaintiff's reply to further particulars requested by the Defendant in a letter dated the 9th September 2004 addressed to Plaintiff's attorneys.
- b) The Plaintiff has failed to stipulate the months in which the Defendant is alleged to have failed to pay its contribution timely (which is denied)
- c) The Plaintiff has failed to show how it arrives at the claimed amount of E8, 293-50, in the present case why this amount is said to be due from the Defendant who denies having made any late payment of contributions.

[7] In argument **Miss Kmiene** for the Plaintiff submitted that the above defence is not based on material facts; the allegation of the cause of action being the statutory penalty. The only defence available in a claim of this nature other than technical defences which do not address the matter further are:

- i) Defendant had paid statutory contributions in question;
- ii) That the said employee's are no longer in its employment;
- iii) That there has been a miscalculation of the penalty due.

[8] In support of the above argument the court was referred to what was said by Coman J in **Reitenbach v Fiat S.A. (EDMS) BPK1976 (2)** at 226-228 as follows:

"What he has really done is to state the nature of his defence, but not the facts relied upon in support of it, which were presumably a series of payments by him. The Defendant does not even allege that he had paid all rent which according to the Plaintiff's Particulars of Claim, became payable to it ..."

"That in my judgment, is less than can be expected from the Defendant in summary judgment

proceedings. It lacks the foarhgh'mess, as well as the particularity, that a candid disclosure of a defence should embody".

[9] The court was further referred to the cases of *Crede vs Standard Bank of S.A. Ltd 1988 (4) S.A. 786 (E)*, *Connolly and others NNO vs National Aviation Insurance Brokers (1983) (l'ty) Ltd 1990 (I) S.A. 904 (W)*; and that of *Maharaj vs Barclays National Bank 1976 (1) S.A. 418 (A)* on what qualifies as a *bona fide* defence.

[10] *Mr. Mavuso* argued *per contra* that the Defendant has fully disclosed the nature and grounds of its defence and the material facts relied upon in as much as it has shown [ih.it](#) the Plaintiff has failed to set out its cause of action in its declaration. In its replying affidavit, it has also failed to address the issue. Therefore as *per* the *dicta* in *Arcnd and another vs Astra Furnitures (Pty)Ltd 1974 (1) S.A. 298* at page 305 "The court can only grant summary judgment if on Hie papers before it, it has no reasonable doubt that the Plaintiff is entitled to judgment and feels able to say that the Defendant has got no defence which may possibly succeed...".

[11] The authority in *Ilerbstein and Van Winsen, The Civil Practice of the Superior Court in South Africa, 3rd Ed* at page 302 was further cited in support of the above proposition that it is only where there is no reasonable doubt about Plaintiff's claim that the application should be acceded to.

[12] *Mr, Mavuso* further applied for costs in the event the court rules in favour of the Defendant relying on the *dicta* in the case *of Premier Finance Corporation Ltd vs Steenkunp and others 1974 (3) S.A. page 141*. The argument in this regard is that the Plaintiff acted at its peril in applying for summary judgment in this matter as it was, from the onset aware that the penally invoices do not in anyway relate to the eligible employees and have not been able to show how the amount of E8, 293-50 has been computed.

[13] Having considered the pros and cons of the present application I have come to the conclusion that what the Defendant has really done in the present case is to state the nature of its defence, but not the facts relied upon in support thereto. I agree with the submissions by Counsel for the Plaintiff that all that the Defendant has

before court is a defence of a supposed failure on the part of (he Plaintiff to furnish contributions lists and months in which such default is alleged. The Defendant has a

duty to keep records of the contribution lists and receipts of payments. It appears from the record that the Defendant was furnished with the required documents as seen in pages 23 to 40 of the Book of Pleadings. Therefore on this basis the Defendant's defence has no foundation. I agree with the submissions by *Miss Kunene* that a proper defence by the Defendant would have been one wherein the Defendant would have furnished the court with proof of its timeous payments of contributions and its eligible employees which would have gone to the core of the cause of action of statutory penalty.

[14] Further, I agree with Plaintiffs Counsel that the Defendant's defence is not based on the material facts of the allegation of the cause of action being the statutory penalty. The only defence available in a claim of this nature other than technical defences which do not advance the matter further are: a) Defendant has paid the statutory contribution on the months in question; b) that the said employees are no* longer in its employment; and c) that there has been a miscalculation of the penalty due.

[15] Furthermore, it would appear to me that the contention by the Defendant that there is no link between annexure "SNPF3" of pages 56 to 63 of the Book of Pleadings has no foundation in fact. Annexure SNPF3" contains copies of invoices which depict payments made by the Defendant which clearly show how the penalty has arisen on account of overdue payment in respect of the months in which the Plaintiff basis its claim of the Defendant's default as well as the computation of the total penalty due. In this regard annexure "SNPF3" is directly linked with the contributing list as it contains a record of the number of the overdue months upon the Defendant having made late payments and the penalty levied for such default.

[16] In *casu* it appears to me that the comments by Colman j in *Breitenbach* case (*supra*) are apposite that "what he [Defendant] has really done is to state the nature of his defence, but not the facts relied upon in support of it..."

[17] In the totality of what I have said above I find that in the present case the Defendant has not advanced a *bona fide* defence as required by the rule and I therefore grant the application for summary judgment with costs.


~~S.B. MATHALALA~~
JUDGE