THE HIGH COURT OF SWAZILAND

ELIAS MAHLALELA T/A TSEMBASIVE FOODLINER

Plaintiff

And

SWAZILAND UNITED BAKERIES

Defendant

Civil Case No. 3738/2005

Coram:	S.B. MAPHALALA - J
For the Plaintiff:	MR. M. SIMELANE
For the Defendant:	MR. M. SHABANGU

JUDGMENT

(9th June 2006)

[1] The Applicant has instituted an application for summary judgment for recovery of his rebate emanating from an agreement entered into between the parties. The terms of the agreement giving rise to the application are the following:

> **Clause 5: A rebate of E0.40 for confectionary sales and a rebate of E0.10 for all bread sales shall be forwarded.**

[2] It is alleged by the Applicant that in breach of the agreement, and as at 31st May 2004, the Defendant failed to remit a sum of E2, 434-00 to the Plaintiff. In June 2004, the Defendant failed to remit E7, 875-20. In July 2004, the Defendant failed to remit Ell, 524-40. In August 2004, the Defendant failed to remit Ell, 866-40 and in September 2004, the Defendant

failed to remit E10, 880-00. The Applicant has only been paid E6, 089-35 and E3, 436-00 since the commencement of the contract. These facts are common cause between the parties. In support of the Applicant's case the court was referred to the cases of *Trust Bank of Africa Ltd vs Wassernaak 1972 (3) S.A. 138* and *Erasmus, Superior Court Practice,* page *B l - 224.*

[3] On the other hand the Respondent is of the view that there are disputes of fact in this matter that would call for evidence to be given during a trial. That such disputes are more evidence in Plaintiffs replying affidavit where almost all the allegations made in the Respondent's affidavit resisting summary judgment are denied, and in Applicant's words, "Defendant is put to strict proof thereof. Therefore, Respondent has taken the position that such proof can properly be adduced or shown during a trial. In this respect the court was referred to the contents of paragraphs 2, 3, 4, 6,7.1, 8, 9.1, 10, 11, 12 and 13 at pages 36 to 41 of the Book of Pleadings. In support of this position the court was referred to numerous cases including that of *Maisel vs Strul and others 1937 CPD 128, Shangadia vs Shangadia 1966 (3) S.A. 24R at 25 F 26A, Breitenbech vs Feit (EDMS) BPK 1976 (2) S.A. 226 (T) at 229F, Modest Kamenga vs Allen Mango - Civil Case No 1034/2003 and Maharaj vs Barclays National Bank Ltd 1976 (I) S.A. 418 (AD).*

[4] It is trite law that the procedure provided by the rules in summary judgment application has always been regarded as one with a limited objective to enable a Plaintiff with a clear case to obtain swift enforcement of his claim against a Defendant who has no real defence to that claim. The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an extraordinary one which is "very stringent" in that it closes the door to the Defendant, and which will thus be accorded only to a Plaintiff who has, in effect, an unanswerable case. Some of the decisions come close to limiting a Plaintiffs resort to this remedy to cases in which the Defendant's conduct in giving Notice of Intention to Defend is equivalent to an abuse of the process of court. (See folio no. 7 of *Herbstein and Van Winsel, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *435* and the cases cited thereat). It remains to be seen *in casu* whether the exacting test

enunciated in the above-cited legal authorities has been met by the Applicant.

[5] The Rule requires that:

> a) Affidavit should be made by the Plaintiff himself or by any other person who can swear positively to the facts;
> b) The deponent to the affidavit must verify the cause and the amount, if any, claimed; and
> c) The affidavit must contain a statement by the deponent that in his opinion there is no *bona fide* defence to the action and the Notice of Intention to Defend had been delivered solely for purposes of delay (see *droup Areas Development Board vs llassirn and others 1964 (2) S.A. J27 (T).*

[6] The Applicant's averments in support for summary judgment is found in its affidavit at paragraph 3.2 thereof to the effect that *in casu* there is no *bona fide* defence to its claim and Defendant has entered appearance to defend solely for purposes of delaying the action. In particular as can be seen from the Defendant's own statement of account being annexure "EMI" the sums of money that should have been paid out to him but was not.

[7] The sum of El5, 744-25 reflected as outstanding from him is without merit as he is not involved with running of the business of the Defendant, all that accrues to him in the sum of 40 cents per unit which had been sold. For the month of August 2002, the Defendant failed again to comply with its contractual obligations in failing to remit to him the sum of El 1, 866-40, a copy of the statement of account prepared by the Defendant is annexed hereto marked "EM2". For the month of September 2004, the sum of E10, 880-00 was calculated by the Defendant and held to be due to him, and again the Defendant deducted the sum of E10, 304-00 for what it called outstanding. This was also not in accordance with the contract. The sum of E576-06 was stated as money due to him, but never paid out. A copy of the statement is annexed marked "EM2".

[8] The opposition as reflected in the Defendants affidavit resisting summary judgment runs *in extenso* as follows from paragraph 4 to 6 of the said affidavit:

4. The Defendant opposes summary judgment herein the grounds set out herein on below:

4.1 I deny that the Defendant has no *bona fide* defence to the Plaintiffs claim and that it has filed Notice of intention to defend merely to delay the Plaintiffs claim

4.2. The background to the agreement between the parties, annexure "A" to the declaration is that Defendant saw a business opportunity to sell its product in the Lomahasha area. It however did not have the necessary trading licence to operate a stall or container there. Plaintiff had such a licence. This resulted in the agreement annexure "A" between Plaintiff and Defendant.

4.3. In implementing the agreement between the parties, it was agreed that Plaintiff would only be entitled to the forty-cents rebate per tray of confectionary sold through the container at Lomahasha, but would otherwise not be involved in the operations of the business where he had no role to play.

4.4. In violation of this agreement, the Plaintiff started interfering with the business and preventing it from operating smoothly.

4.5. In pursuance of this and without the consent and/or knowledge of the Defendant and during the months of May to July 2004, Plaintiff went to the stall situate at Lomahasha market and removed stock worth E15, 744-25 allegedly to sell at Mbuzini area. Plaintiff never accounted for the proceeds of such sale to the Defendant.

4.6. During this period. Plaintiff would have been entitled to E21, 833-60. Defendant set-off the sum of E15, 744-25 owed to it by Plaintiff leaving a balance of E6, 089-35 which was paid to the Plaintiff. The full record of this transaction is shown in annexure "SUl" hereof.

4.7. In August 2004, the Plaintiff did the same thing when he without Defendant's permission and contrary to the agreement helped himself to Applicant's stock worth E6, 517-00 and never accounted for the proceeds thereof. From the stock released to Plaintiff that month, la-would have been entitled to a total rebate in the sum of E1l, 866-40. Acting on behalf of Defendant I deducted the sum of E6, 517-00 from this amount leaving out a sum of E5, 349-00, which I had meant to pay to the Plaintiff.

4.8. Due to the fact that in September 2004 although Plaintiff was due a sum of E10, 880-00 from rebates, Plaintiff owed Defendant further monies from his having helped himself without permission to Defendant's stock in the sum of EI0, 304-00. Defendant applied the sum of E5, 349-40 to reduce the Plaintiffs indebtedness to it. During this month Plaintiff also took a sum of E3, 436-00 from Defendant's stall without permission. Defendant deducted these amounts from the sum of E10, 880-00.

4.9. Notwithstanding such warnings and eventual cancellation of the agreement, Plaintiff confirmed with its unbecoming conduct of helping itself to Defendant's stock without permission. As a result of this conduct, Plaintiff is currently indebted to Defendant in the sum of E13, 804-42, which Defendant intends recovering by means of a counterclaim to these proceedings. This amount forming the basis of this counter-claim is over and above the monies already applied by the Defendant which had as shown in "EM2" left a sum of E576-00 as being due to the Plaintiff.

4.10. When 1 explain how the monies were applied, Plaintiff insists the Defendant should not set-off but should have paid him directly and sued him later. I submit that a set-off does not require that but entitles the creditor to withhold whatever monies due to debtor without firstly obtaining its permission so long as the debt is liquid and due. I further submit that these proceedings by Plaintiff arc nothing but an attempt to enforce Plaintiffs above-mentioned contention which [submit is bad at law.

5. In the circumstances [reiterate that Defendant has a *bone fide* defence against Plaintiff who as shown

above it does not owe any monies. I submit that in the contrary it is Plaintiff who owes Defendant the sum of money above stated, which monies shall recover by means of a counter-claim in these proceedings.

6. I therefore pray that Plaintiff application for summary judgment be dismissed with costs, with Defendant being allowed to enter and defend the main matter.

[8] In my assessment of what is averred in the above-cited paragraphs it cannot be said *in casu* that the Applicant has unanswerable case. Therefore the application for summary judgment is refused as it is debated whether the amount being sought by the Applicant is the amount to be granted in the judgment in view of the claims by Respondent as outlined above in paragraph [7] *(supra).*

[9] In the result, application for summary judgment is refused with costs and the matter to proceed to trial.

S.B. MAPHALALA
JUDGE