

IN THE HIGH COURT OF SWAZILAND**M.T.N SWAZILAND LIMITED**

Applicant

And

THE "ONE" FRANCHISE OPPORTUNITY

Civil Case No. 1878/2005.

Coram	S.B. MAPHALALA - J
For the Applicant	MR. S. MDLADLA
For the Respondent	MISS T. HLABANGANA

JUDGMENT**9th February 2007**

[1] Before court is an opposed application for summary judgment based on a subscriber agreement between the parties.

[2] The said agreement states that the Applicant would provide network services and supply subscriber identity module (sim card) to the Defendant. The agreement shall commence on the date of activation of a sim card issued to the Respondent and shall continue on an unlimited period. The agreement further provides that in consideration for the provision of network services, sim cards and any other services supplied by the Applicant to the Respondent the Respondent shall pay to the Applicant the applicable charges whether or not the network service have, or are being used by the Respondent. The Applicant shall send monthly accounts (bills) to the Respondent, unless a query is raised in respect of the contents of such accounts (bill) within thirty (30) days from the date thereof, it shall be deemed correct.

[3] Pursuant to the aforesaid agreement Applicant provided network services and

supplied a sim card to the Respondent. According to the Applicant in breach of the agreement the Respondent failed to make payment of the monthly service charge and other charges during the period 1st April 2004 to 30th April 2005 and is indebted to the Applicant in the sum of E434, 931-84. A certificate of indebtedness in terms of Clause 9.8 of the agreement is attached marked "B".

[4] The Respondent on the other hand has filed of record an Answering affidavit resisting summary judgment stating, *inter alia*, that Respondent has a valid and *bona fide* defence to the claim in that the Respondent has been making payments to the Applicant on a monthly basis during the said period, save for the statement of account for December 2004, being statement number 0000043539 in the sum of E183, 006-84 and in terms of Clause 4.5 of the agreement a subscriber is entitled to query the bill within thirty (30) days hereof. The queries were made about the statement and to date no response has been received from the Applicant.

[5] The Respondent has further advanced four (4) counter claims against the Applicant on the basis that Respondent denies being indebted to Applicant in the amount claimed or at all.

[6] In arguments before me **Mr. Mdladla** for the Applicant contended that the amount of E184, 006-84 has not been successfully denied. There is no defence to the claim in so far as it turns on the question of law. The Defendant has not denied that it was not paid. She only states that she queried it, she does not prove that the query was sent and she does not state how much she owes and what she believes was the reasonable amount. At the very least, the court can order that this amount be paid.

[7] In respect of the balance of the amount, the Court was referred to annexure "B", page 14. In terms of the agreement, in particular Clause 8.8 which reads "A **certificate under the hand of any Manager of M.T.N. Swaziland Limited certifying the amount of any**

amount owing by the subscriber to M.T.N. Swaziland shall be sufficient proof for the purposes of enabling M.T.N. Swaziland to obtain any judgment or order against the subscriber".

[8] The question is that, is the agreement binding? If so, why should this term of the agreement which is not being contested or disputed not be applied by the Court.

[9] It is contended that these points are points of law. If a case can be decided on a crisp point of law, there is no reason at all why the point should not be determined in an application for summary judgment. See *Lovermore v White 1978 (3) 254 E*; see also *Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th edition*, page 446.

[10] Further, according to the Applicant, the point to be determined is whether it is open at this stage for the Defendant to deny the signed amounts without even indicating to court why the clause should be applied. Let alone contesting the applicability of the clause. Defendant is bound by the contract. The law states that let the signer be aware. The law of contract applies in full.

[11] It was contended for the Respondent that the opposing affidavit discloses a defence and the material facts relied upon are that payments were made to Plaintiff on a monthly basis during the said period, that is, from 1st April 2004 to 30th April 2005. The payment made within the said period in question amount to E1, 555, 526-45 and far exceed the amount claimed by the Plaintiff as evidenced by annexures "PT1" up to "PT12".

[12] Further, Defendant has advanced counterclaims based on the very same contract relied upon by the Plaintiff and these claims far exceed the amount claimed by the Plaintiff.

[13] In my assessment of the averments filed in this matter I have come to the considered view that the Plaintiff on the facts presented cannot obtain summary judgment as there are disputes of fact which can only be dealt with during the trial of this matter.

[14] It has been held that a *bona fide* defence is disclosed if the Defendant swears to a defence valid in law in a manner that is not inherently and seriously unconvincing. See *Herbstein and Van Winsen "The Practice of the Supreme Court" 4th Edition, 1997* *Juta's Co.* at page 442, *Breitenbach vs Fiat SA (EDMS) BPK 1976 (2) S.A. 226 (T)* at 228 B - C and *Maharaj vs Barclays National Bank Ltd 1976 (1) S.A. 418 (A)* at 426 A.

[15] In *casu*, Respondent has annexed proof of payments on a monthly basis in question thus disproving Applicant's claim that Respondent is in breach of the agreement by having failed to make payments during the period in question. A dispute of fact arises. To date Respondent's proof of payments have not been denied.

[16] It appears to me that issues have been raised which point to disputes of fact in that Applicant alleges to be owed a sum of E434, 931-84 for charges levies against Defendant during 1st April 2004 to 30th April 2005. Respondent alleges and has proven by submitting proof of payments made during the said period amounting E1, 555, 536-45.

[17] In the result, for the afore-going reasons the application for summary judgment is accordingly refused with costs.

S.B. MAPHALALA

JUDGE