IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 976/2008

TILE LORD (PTY) LTD Plaintiff

And

WREBREN VAN HELDEN t/a

RUDOLF INVESTMENTS Defendant

Coram: S. B. MAPHALALA - J

For the Plaintiff: MISS K. MSIBI

For the Defendant: MR. K. MOTSA

JUDGMENT

26th September 2008

[1] The Plaintiff is suing the Defendant for the sum of E13, 930-00 plus interest and costs. The Defendant denies the claim and has raised an exception to Plaintiffs Particulars of Claim for the following reasons:

1. Plaintiff avers in paragraph 4 of its Particulars of Clam that it provided "labour for fitting of the same". This is *locatio conducto operis.*

2. However, the Plaintiff did not aver the relevant elements of its cause of action as it did not *inter alia,* avers:

2.1 The remuneration to be paid for such work;

2.2 The time for performance, and that the performance was done as required by it.

3. Furthermore, the Plaintiff avers that there was verbal agreement of sale for certain fitments and accessories.

4. However, even this cause of action is also defective as:

4.1. The purchase price of these items is not averred; and

4.2. Not stated whether or not the parties agreed expressly or tacitly on the purchase

price.

[2] To buttress the argument on the exception taken it is the Defendant's submission that the Plaintiffs action seems to be premised on the *locatio conductio operis.* That in such an action a Plaintiff will only succeed if he/she alleges and proves the amount of the remuneration payable and that remuneration was in terms of the contract. In this regard the court was referred to the case of *Dave vs Birrel 1936 TPD 192.* In this case, the Plaintiff has failed to allege the exact remuneration costs.

[3] On the performance it is contended for the Defendant that in order to sustain this cause of action the Plaintiff must further allege and prove that he/she has done all the work properly and to workmanship standard. In this regard the court was referred to the case of *Dalinga Beleggings (Pty)*

Ltd vs Antina (Pty) Ltd 1979 (2) S.A. 56. That *in casu* the Plaintiff has failed to allege that the work was done properly to workmanship standard.

[4] Furthermore, it is contended on behalf of the Defendant that in order to sustain a cause of action based on a contract of sale, the Plaintiff must allege and prove the

agreed or implied purchase price, (see *Burroughs Machines Ltd vs Chenick Corporation of S.A. (Pty) Ltd 1964 (1) S.A. 669.* In this action, the Plaintiff has failed to allege the agreed or implied purchase price.

[5] On the other hand the Plaintiff contends that its claim is not based on the principle of *locatio conductio operis,* but is a breach of contract in terms of Rule 18 (6) of the High Courts Rules of 1954. That Plaintiffs claim strictly complies with the provisions of Rule 18 (6) in that the Plaintiff alleged that the contract was express, where and when it was concluded and by whom it was concluded. The Defendant is now relying on the doctrine of *locatio conductio opens* as a means of avoiding payment of the balance outstanding.

[6] It is further contended for the Plaintiff that the Defendant accepted the terms of the contract and further went on to acknowledge indebtedness by making part payment of the debt. The Defendant has raised this defence as a means of avoiding making the rest of the payment. In this regard the court was referred to the case of *Modingwane vs Duplessis 1961 (2) S.A. 705 (T).*

[7] Where a claim is based and/or depends on a statutory regulation which has to be proved it cannot be excepted to

as disclosing no cause of action. For this proposition the court was referred to the textbook by *J.M. Nathan et al, Rules and Practice of the Supreme Court of South Africa, Juta 1965 at page 124.*

[8] In this regard the court was further referred to the case of *Ely Est vs Van Heymingen 1933 OPD 103* that such a question should be raised by way of a plea.

[9] Furthermore that in terms of Rule 18 (6) and (7) of the rules in a suit for breach of contract it is not necessary to state the specific remuneration and performance agreed on, if the same can be inferred from the terms of the contract. In the present matter it is inferred that the Defendant was to be involved for the purchase price.

[10] Having considered the arguments of the parties I am inclined to agree with the submission by Counsel for the Defendant that Rule 18 (6) of the High Court Rules does not apply to the fact of the matter. I was persuaded by what was contended by *Mr. Motsa* in this regard. Therefore I would rule in favour of the exception and further rule that Plaintiff be granted leave to amend the combined summons and the Particulars of Claim. In this regard I find the *dictum* in the case of *Natal Fresh Produce Growers Associate and Others vs Agrosever (Pty) Ltd and Others 1991 (3) S.A. 795*

apposite.

[11] In the result, for the afore-going reasons the exception is upheld and Plaintiff is granted leave to amend the combined summons and the Particulars of Claim. I further order that costs to be costs in the trial.

S.B. MAPHALALA

PRINCIPAL JUDGE