HELD AT

MBABANE

CIV. TRIAL NO 3053/07

In the matter between:

ALFOR PETER JOHN DE SOUZA **Plaintiff**

And

PETROS DLAMINI **Defendant**

Date heard: 18 June, 2009.

Date of judgment: 19 June, 2009.

Mr. Attorney B. W. Magagula for the Plaintiff Mr.

Attorney B.J. Simelane for the Defendant

J U D G M E N T

MASUKU J.

[1] This is an application for summary judgment. The legal issue for determination, however, falls within a very narrow compass. It acuminates to this: does a defendant, who faces a suit predicated on a liquid document raise a proper defence to an application for summary judgment if he raises a counterclaim which does not, however, raise a direct defence to the Plaintiffs claim, based as it is, on the aforesaid liquid document?

[2] The background to this application for summary judgment can be summarized as follows: By a simple summons dated 20 August, 2007, the above-named Plaintiff sued the Defendant for payment of an amount of E340, 967.25. This amount was based on an acknowledgment of debt signed by the Defendant on 3 July, 2007, a copy of which was annexed to the aforesaid simple summons.

Having filed - his notice to defend, the Plaintiff filed his declaration, which was followed by the Defendant's plea and counter-claim dated 8 October, 2007. In regard to the claim in convention, the Defendant stated categorically in his plea that he did not deny liability for the amount claimed. In his claim in reconvention, however, the Defendant alleged

that there was an agreement in terms of which the Plaintiff was given by the Defendant charge over the harvesting of the latter's sugar cane crop, the proceeds of which were to be applied to settling outstanding amounts due to the Plaintiff by the Defendant.

It was the Defendant's averral that the Plaintiff never accounted to him regarding the proceeds of the said harvest whose estimated value, per a valuation report filed of record, was E122, 209.08. The Defendant further averred that he purchased certain items worth E349, 640.00, which were installed by him on the Plaintiffs property and which served to improve the Plaintiffs farm which he occupied by agreement *inter partes.* These improvements, he further alleged, were left on the Plaintiffs property when his possession of the farm came to an end. In consequence, the Defendant made a counter-claim against the Plaintiff in the amount of E471, 849.08, interest thereon and costs.

[5] The plea and counter-claim were followed by an application for summary judgment launched by the Plaintiff. In his affidavit, resisting the same, the Defendant raised the same issues as canvassed above in the counter-claim and stated that he has a *bona fide* defence to the Plaintiffs claim. Regarding the improvements referred to earlier, the Defendant disclosed that in October, 2006, he caused, at his own expense, electrical improvements to be made on the Plaintiffs farm and which included the installation of a three phase electrical line transformer.

[6] In his replying affidavit, the Plaintiff denied that he did not account for the harvest as alleged. He stated that he never harvested the crop in question for the reason that the sugar cane was in a very poor state and was not of good quality. It was the Plaintiffs further allegation that the improvements referred to by the Defendant were removed by him when he vacated the farm in question.

It is trite learning that summary judgment is a swift, stringent and extra-ordinary remedy for the reason that it closes the door to a defendant in a final and comprehensive fashion but before a full ventilation of the issues before Court. For that reason, the Court must, in granting the said remedy, be astute so as to ensure that a defendant who raises a triable issue or a defence that *prima facie* carries a prospect of success at trial, does not have the portals of the Court closed in his face, so to speak. Nor should the Court, on the other hand, allow a defendant who is cantankerous but has in essence no or a spurious or a meritless defence, be allowed to delay a plaintiff who has an unanswerable case in the early enjoyment of the fruits of the judgment. See *Musa Magongo v First National*

Bank (Swaziland) Ltd App. Case No. 38/99 and *Mater Dolorosa High School v R.M.J. Stationery* App. Case No. 3/05 and C S *Group of Companies v Construction Associates (Pty) Ltd* App. Case No. 41/08.

[8] What then, can a defendant, faced with the prospect of a summary judgment being granted against him, do to deflect or thwart the possible grant of the said judgment? His responsibilities in that regard were spelt out in clear terms by Corbett J.A. (as he then was), in the high watermark case of *Maharaj v Barclays National Bank Ltd* 1976 (1) S.A. 418 (A.D.) at 426, where the learned Judge of Appeal trenchantly remarked as follows at A-C:

> "Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide the issues or to determine whether or not there is a balance of , probabilities in favour of one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be."

Both parties are *ad idem* that the above statement of the law is good and as a result, both of them made reference to the above-mentioned case in their heads of argument. For his part, Mr. Magagula, contended that the Defendant is not entitled to be granted leave to defend in this matter for the reason that in his plea, he

acknowledged that he owes the money in question and cannot for that reason, be properly held by the Court to have advanced a valid, good and *bona fide* defence to the claim. This, it was argued, is so, regardless of the fact that the Defendant may have raised triable issues, which it was in any event contended by Mr. Magagula, apply
not to the Plaintiffs claim as recorded in the declaration, but
to other issues specifically unrelated to the claim in question.

[10] For that reason, Mr. Magagula argued and strenuously too that the Court should grant the Plaintiffs claim as recorded in the declaration and that at some later stage, the Court may then consider the merits or otherwise of the Defendant's counterclaim, and totally independently of the Plaintiffs claim in convention. Is there any merit to the Plaintiffs submission in the circumstances? Obviously, I must mention that Mr. Simelane, learned Counsel for the Defendant argued contrariwise.

[11] His major contention was that the Defendant's claim in reconvention constitutes a valid defence to the claim in convention, regardless of the fact that the facts on which it is predicated may differ from those on which the claim in convention is based. He relied in this regard, on the works of the celebrated learned authors Herbstein van

Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, Juta, 1997, at 444, where the following appears:

> "It is open to the defendant to raise a counterclaim to the plaintiffs claim. In this case also, sufficient detail must be given of the claim to enable the court to decide whether it is well-founded. The counterclaim may be unliquidated and need not necessarily arise out of the same set of facts as the claim in convention, though it must be of such a nature as to afford a defence to the claim."

[12] Much store appears to have been laid in argument by Mr. Magagula, learned Counsel for the Plaintiff, on the last sentence quoted from the learned authors above, namely that the nature of the defence must afford a defence to the claim. In support of the said proposition, the learned authors relied on the case of *Spilhaus & Co. Ltd v Coreejees* 1966 (1) S.A. 525 (C).

[13] That case does not, however, on a close reading, support Mr. Magagula's contention on the facts of the instant case because what it actually says is that the counterclaim must constitute

a defence to the claim in convention in the sense that the counterclaim should be able to meet the claim in convention pound for pound, as it were; i.e. the claim and the counterclaim must, generally speaking, be of the same genus and one must be capable of cancelling out the other e.g.

monetary claims, whether liquidated or not. Where the counterclaim is of a different genus, it may, in some circumstances not constitute a defence to the claim in convention.

The above-cited case may provide a good illustration of what I was trying to express above. In that case, the counterclaim was held not to constitute a defence for the reason that the plaintiff had in it, claimed for the return of certain property and other relief. In its counter-claim, the defendant claimed damages. In its finding, the Court held that the defendant's claim in reconvention could not serve to extinguish the plaintiffs claim for the return of the equipment in question. The Court held that it would be unfair in the circumstances, to order the defendant to return the equipment only after the determination of its counter-claim.

[15] It is in that context that the statement by the learned author must be understood. The statement by the learned authors must not be construed to mean that if the defendant does not deny the claim in convention, any counter-claim he raises must specifically constitute a defence to the claim in convention and that anything less or different will not do. It suffices, for instance, in a liquid claim or in one for a liquidated amount, for the defendant to raise a counter-claim which is unliquidated.

[16] In closing, and in a bid to put the legal position as succinctly as possible, I will quote with approval from works of the learned authors van Niekerk *et al,* Summary Judgment - A Practical Guide, Butterworths, 1998, where they say the following at para 9.5.7 on counter-claims:

> "An unliquidated counterclaim does constitute a *bona fide* defence to a plaintiffs liquidated claim. A defendant may, accordingly, rely on an unliquidated counterclaim to avoid summary judgment - even when he admits owing a liquidated amount of money to the plaintiff
>
> There is no requirement that the counterclaim should depend upon the same facts as those upon which the plaintiffs claim is based. Any unliquidated counterclaim, even when it depends upon facts and circumstances differing entirely from those forming the basis of the plaintiffs claim, may be advanced by a defendant and in law constitutes a *bona, fide* defence in summary judgment proceedings." (Emphasis added).

I should add, however, that there is, in my view, no reason in law, logic or principle why the above proposition cannot be held to apply with equal force to an action such as the present, which is based on a liquid document. The rationale for the application of the principle to liquidated amounts applies with equal force, in my considered opinion, to claims based on liquid documents such as the present one.

The reason why the Plaintiffs position as encapsulated in paragraph 10 above, is untenable and should therefor not be allowed to stand, is to be found in what the learned authors van Niekerk *et al (ibid),* continue to say at para 9.5.7, namely that:

> "The principle that an unliquidated counterclaim may be advanced against a liquidated claim is, in turn, based on the underlying principle attendant upon reconventional claims, namely that a defendant having a claim against a plaintiff is entitled to request that judgment in favour of the plaintiff be suspended until such time as the court has adjudicated upon the counter-claim. This procedural remedy enables the claim in convention and the claim in reconvention to be set off against each other."

The policy reason for the contemporaneous hearing of both the claims in convention and in reconvention is laudable and should not be defeated or thwarted easily by a plaintiff who claims that because the defendant does not have a direct defence to his claim, that his claim should therefore be granted priority and that he be accorded instant justice, so to speak, whereas the counter-claim should await adjudication at some later stage. It is always convenient and cost-effective to deal with both matters, which in any event involve the same parties, as far as is possible, at the same time.

[18] On the question of costs, Mr. Simelane argued that this is a proper case in which the Court should dismiss the application for summary judgment with costs. The basis for this submission was that the Defendant had amply shown both in his plea and his affidavit resisting summary judgment that he indeed has a valid defence to the Plaintiffs claim and that notwithstanding the alarm bells ringing

loudly for his benefit from the aforesaid Court process, the Plaintiff persisted undeterred in his claim for summary judgment.

[19] In my view, this argument is not only meritorious, but it is also compelling. The learned authors van Niekerk *et al (ibid)* at para 12.3, page 12-5, state that where the defendant delivers an opposing affidavit which clearly discloses a *bona fide* defence, the defendant will be awarded costs if the plaintiff persists in arguing the summary judgment application.

[20] It is clear from what I have said that in the instant case, the Defendant raised triable issues and deposed to facts on oath, from which it was clear that summary judgment may not be properly granted and this was done at two different levels, i.e. at the plea and counter-claim stage and at the summary judgment stage in the opposing affidavit. Both these Court documents flagged clearly to the Plaintiff that there was a defence disclosed therein but that notwithstanding, the Plaintiff persisted in arguing the summary judgment application. The inevitable conclusion in the circumstances, in my view, is to order the Plaintiff to bear the costs of the summary judgment hearing.

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[21] In the premises, I issue the following order:

21.1 The Plaintiffs application for summary judgment be and is hereby dismissed.

21.2 The Defendant be and is hereby granted leave to defend the proceedings.

21.3 The Plaintiff be and is hereby ordered to pay the costs of the summary judgment on the scale between party and party.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 19™ DAY OF JUNE, 2009.

TS MASUKU

JUDGE

Messrs. Cloete/Henwood/Dlamini/Magagula Associated for the Plaintiff

Messrs. B.J. Simelane & Associates for the Defendant