

HIGH COURT OF SWAZILAND

Held at Mbabane

Civil Trial No. 84 / 2009

Long Distance Swaziland (Pty) Ltd Plaintiff

vs

Swazi Paper Mills (Pty) Ltd Defendant

Coram
For Plaintiff

Annandale J
Mr. Manyatsi (Rodrigues &
Associates)

For the Defendant

Ms Zwane (L.R. Mamba &
Associates)

SUMMARY JUDGMENT
(EX -TEMPORE) 18th
AUGUST 2009

[1] This is a summary judgment application which is before court today.

The Respondent or the Defendant opposes the application. The matter arises from a simple summons issued by Long Distance Swaziland (Pty) Ltd against Swazi Paper Mills (Pty) Ltd in which it filed a claim for an amount of E318, 000.00, interest of 9% per annum and costs. Payment of the sum of E318, 000.00 is claimed on account of various cheques drawn in favour of the Plaintiff by the Defendant which cheques, when presented for payment at Standard Bank Ltd at its Matsapha Branch, were referred to the drawer as unpaid on account of having no funds in the Defendant's bank account. The cheques are declared to have been paid in pursuance of a contractual agreement between the parties, whereby transportation and carriage services were rendered to the Defendant.

[2] There was allegedly no obligation on the bank to honour the cheques, and these cheques were in respect of payment of services rendered to the Defendant by the Plaintiff at its own special instance and request which amounts notwithstanding consequent demand, the Defendant refuses or neglects to pay. The amount is said to be due owing, and payable. Interest at 9% from date of issue of summons and costs is also claimed.

[3] The Plaintiff annexed quite a number of cheques to the summons. It is a point taken by the Defendant that they are not drawn for payment in favour of "Long Distance Swaziland (Pty) Ltd", but as it appears on the cheques, all of them are endorsed "Long Distance Transport". The Plaintiff's attorney handed up the

original cheques in Court and I endorsed those particulars on the court file. He may uplift them again against his signature.

[4] The common aspect is that all of these cheques are drawn in favour of "Long Distance Transport" by the Defendant's company being Swazi Paper Mills (Pty) Ltd. All of them were drawn on the Matsapha Branch of Standard Bank and each of them is individually endorsed "refer to drawer". Rubber stamps, affixed on the face of each evidences presentation to the bank. After issue of the summons, the Defendant Company filed a notice of its intention to defend the matter which eventually resulted in the current application before this court for summary judgment.

[5] In this application for summary judgment for the amount of E318 000.00 (Three Hundred and Eighteen Thousand Emalangeni), the Plaintiff sets out a more detailed version of it's claim in a declaration, otherwise than what it would have been if a combined summons was issued. It details how the claim came to arise. The Defendant company filed an opposing affidavit and took various points of law against it, which was argued very ably by Ms Zwane. She obviously researched well and she is to be commended for the fine manner in which she presented her client's case.

[6] However, cases are not judged on argument but on the facts and the law. Miss Zwane is faced with an issue which the Plaintiff through Mr. Manyatsi raises in respect of the points *in limine*. In ***HK Gokal (Pty) Ltd vs Muthambi 1967 (3) S.A. 89 (T)*** at 90 where Mr. Manyatsi quotes the De Wet JP with reference to the rules pertaining to summary judgment.

"It is clearly the contemplation of the Rule that a Defendant, if he wants to resist an application for summary judgment, must file an affidavit setting out his defence. It is not sufficient for him to take a chance of attempting to establish some irregularity or failure or defect in the application for summary judgment".

[7] The Plaintiff has its application for summary judgment supported by the affidavit of its Managing Director. The Defendant takes issue with his ability to say what he says. Issue is taken for instance, that a Managing Director would not know about these things unless he specifically says exactly how it came to his attention, and so forth. Other points are also taken, such as that the payee is endorsed differently on the cheques than the identity of the Plaintiff.

[8] Further issue is taken as to the amount of the claim. Various other points *in limine* have been argued such as the cause of action being unknown, whether it was based on contract or not, and that it does not suffice in that the pleadings do not comply with the requisite requirements pertaining to causes of action based on contracts. For instance, specifically where and when such contract was concluded. Therefore, the declaration is sought to be struck out and dismissed.

[9] Further, the Defendant says that it is unclear whether the cause of action is based on contract or dishonoured cheques and that if it is based on dishonoured cheques, that the Plaintiff is not the legal holder and therefore cannot sue on that basis. Various other issues are also relied upon to challenge the application for summary judgment. All of this is contained in the heads filed by Ms Zwane, comprehensively and very well prepared, as said before.

[10] But that is not the end of the matter. The view I take on this issue is that the Plaintiff issued summons against the Defendant and says to the Defendant, "I rendered transport services. It is due and payable. I have demanded the money and further, you have paid us with cheques which were returned by the bank". If the Plaintiff does not understand that, then there is a problem. Clearly the Defendant herein, Swazi Paper Mills, at least their chief accountant, understands exactly what is meant under the claim, what are they being sued for, because he sets out details in the resisting affidavit as to how this whole issue currently before the court are arose.

[11] It is not denied that the two companies have a relationship with each other, where one provides transport services to the other. It is not

denied that the Plaintiff rendered services to the Defendant, it is not denied that the Defendant issued cheques in respect of the amounts it owed, but the Defendant now seeks to say that the Plaintiff can not be the legal holder of the cheques because we, the Defendant, did not endorse the cheques in favour of "Long Distance Swaziland (Pty) Ltd", but instead we just wrote "Long Distance Transport".

[12] Each and every of the other points *in limine*, taken one by one, does not put this matter to rest. In particular, I cannot simply ignore evidence on affidavit, under oath, which is before the court. That evidence comes from the mouth of no one else than the Defendant's deponent to the resisting affidavit. He holds himself to be the financial controller of the Defendant. But what goes for the goose goes for the gander. The financial controller also does not file any company resolution to authorize him to oppose this matter at all. But that is an issue taken against the Plaintiff's Managing Director who belatedly filed a company resolution. But still that does not carry the day.

[13] When the affidavit resisting summary judgment is looked at properly, there are two specific paragraphs at page 6 thereof on page 31 of the record on the paragraph 5.3 where issue is taken with the amount as claimed. Therein the Defendant says how the amount of E341,000.00 comes into play. The total amount claimed as appears *ex facie* the invoice, the source of the invoice being unclear, was E247,000.00, for August 2008, and E94.000 for September 2008, which totals to the sum of E341,000.00. I have tried repeatedly to obtain from Counsel the correct sum, as my own addition of the cheques do not amount to these figures.

[14] But then the Defendant goes on to say that this discrepancy apparently comes through duplication of one of the cheques. And he then says "and thus leaving a balance owing of E301, 000.00". On page 8 of the affidavit, page 33 of the record, and again in paragraph 5.8 "Defendant avers that it is indebted to the Plaintiff in the sum of E301, 000.00". In my view, if the Defendant avers and explains how it arrives at the different figure from the claimed amount and then says that we, the Defendant are indebted to the Plaintiff in the sum of E341, 000.00, it is the end of the matter.

[15] I find it difficult for a litigant to both approbate and reprobate. On the one hand, to say we do not know what the cause of action is but on the other hand, to minutely disclose how it came about. On one hand to say you cannot sue as you are not the legal holder of the bounced cheques but on the other hand to say that we owe you only E301, 000.00. All sorts of preliminary legal points are taken which have the effect of delaying the matter, to avoid payment of an acknowledged debt. It is not a *bona fide* defence which requires the matter to go on trial.

[16] It will be folly to refer this whole matter to trial, where the pleadings at this stage clearly acknowledge that the Defendant is indebted to the Plaintiff in a specifically stated and acknowledged amount of E301,000.00. It would make no sense the waste time and resources and money of both litigants incurring big legal costs to run the gauntlet a trial where there is no real dispute. There is no dispute over the amount of E301, 000.00. What remains, and that is where the Defendant does have a triable defence, namely the difference

between the acknowledged amount of E301, 000.00 and the claimed amount of E318, 000.00, an amount of E17, 000.00. That is what needs to be explored and be ventilated at a trial and decided by the court.

[16] It is for these reasons that I do not deem it proper to uphold the preliminary legal points on which the defendant seeks to rely, especially in view of its formal and unequivocal admission that indeed the Defendant owes the Plaintiff, what is due and owing, a liquidated amount of E301, 000.00.

[17] I therefore order that summary judgment be entered against the Defendant in the amount of E301, 000.00 with costs and *mora* interest of 9% per annum from the date of service, not the date of issue of the summons, plus costs. The Plaintiff is granted leave to pursue the remainder of its claim in the ordinary course.

JACOBUS P. ANNANDALE JUDGE OF
THE HIGH COURT