CASE NO. 429/08

BETWEEN

FEEDMASTER SWAZILAND NGWANE MILLS

(PTY) LIMITED. **PLAINTIFF**

AND

ESTELLE DLAMINL. **DEFENDANT**

CORAM: **AGYEMANG J**

FOR THE PLAINTIFF: FOR THE **B. MAGAGULA ESQ.**

DEFENDANTS: **T. NDLOVU ESQ.**

IATED THE 7™ DAY OF OCTOBER 2009

JUDGMENT

The suit sought the following reliefs: payment of the sum of E176,412.30; interest on the said sum at 9% tempora morae and costs. On 25th February 2008. the respondent filed a Notice to Defend. The applicant followed it up with a Declaration which was duly served on the respondent on 17th March 2008. The respondent served her plea on the plaintiff on 25th of March 2008. Thereafter, the respondent who filed a discovery affidavit, called upon the applicant to deliver one. The applicant however did not, but filed the present application for summary judgment.

The case of the applicant is that under an oral contract of sale between the parties under which goods sold by the applicant to the respondent had to be paid for within thirty days of delivery, it supplied chicken feed to the respondent on a number of occasions during the period 11th April 2007 to 4 December 2007. The applicant alleged that the consignments of chicken feed supplied by it to the respondent were duly evidenced by delivery notes setting out the quantity of feed purchased and the price thereof but that the respondent failed to settle the amount due and owing, being an alleged sum of E176, 412.30. In the verifying affidavit filed in support of the present application, the applicant stated that the respondent had no defence to the claim and had in fact filed a Notice of Intention to Defend solely to delay the final outcome of the action. The respondent in her affidavit resisting summary judgment raised points in limine, first that the applicant's affidavit was not deposed to by one who had personal knowledge of the matters therein contained, nor had the said deponent revealed the sources of his information regarding the matters he deposed to.

The second point was that the applicant had not referred to the plea which had been filed and which had put forward a valid and bona fide defence. On the merits, the respondent repeated the two-fold defence put forward in her plea which are: that the amount owing was not as claimed by the plaintiff nor was it due at the time of the issuance of the summons. Elaborating, the respondent alleged that the grace period for payment after delivery of the feed to her, was five months and not the thirty days alleged by the plaintiff for which reason the amount outstanding on the defendant's account with the plaintiff was

not due at the time of the issuance of the summons. Regarding the amount outstanding, the respondent alleged that the sum claimed was not correct in so far as it contained duplication in accounting. The respondent averred that what was owed (but not yet due) was the sum of E43,345.00 and not the sum claimed. This she said was what was outstanding from the total sum of E161,290.00 covered by invoices after the defendant paid the sum of E117,945.00. Learned counsel for the respondent in arguing the points raised in limine copiously reproduced portions of the judgment of Ebersohn J ***in Motor Vehicle Accident Fund v. Mandla Case No. 3946/05*** (in which the learned judge postulated that the deponent to an affidavit on behalf of a legal persona ought to state that he had personal knowledge of the matters deposed to and provide particulars as to how that knowledge was acquired, to the satisfaction of the court. Relying on this, he attacked the affidavit of the plaintiff regarding the lack of qualification of the deponent who the defendant said was unknown to her and had never dealt with her in of the transactions and had not indicated the sources

of the information he had deposed to, argue that the affidavit filed in support of the application was incompetent. Learned counsel also argued, relying on the dicta of Gihwala AJ in ***Gulf Steel (Pty) Ltd v. Rack Rite BOP (Pty) Ltd and Anor. 1998*** *(1)* ***SA 679 at 683*** and Marais AJ in ***Dowson v. Dobson Industrial Ltd v. Van Der Wer and Ors. 1981 (4) SA 425,*** on the requirement of technical regularity of the plaintiff's pleadings for a successful application for summary judgement, that the plaintiff/applicant's pleading which failed to set out where the contract was entered into, or that this court has jurisdiction was not in technical order. For this reason, he urged the court to dismiss the present application on these points. On the merits, he contended that the respondent had set out her defence in her plea and also in affidavit, showing clearly that here was a triable issue regarding the amount owing and when same became due. He added that certain documents of account that had been filed by the applicant were done in the Reply which gave the respondent no opportunity to reply this he said, was improper and was to be disregarded. He thus prayed

that the application be dismissed and the defendant be allowed to defend the action. In argument, learned counsel for the applicant contended that the contractual obligations assumed by the defendant under the agreement of sale demanded that once she had been supplied with specified goods, she would pay the price stipulated within thirty days of receipt. This condition, counsel contended was contained on the reverse side of the plaintiff's invoices and governed the contract and that the defendant had the onus to prove the five months' moratorium alleged was in fact term agreed upon especially in the light of the fact that a term of the contract was indicted on the invoice that the plaintiff was entitled to amend, cancel, or withhold existing or future facilities to the defendant. Affirming that the computation by the plaintiff was a true reflection of the account between the parties, he contended that the defendant had no real defence which would bring about a triable issue and thus could not avoid summary judgement. Learned counsel contended that the affidavit of the respondent fell short of the test enunciated in ***National Motor Company Ltd v. Moses Dlamini 1987-1995 (4) SLR at 124*** which provides a guideline for such affidavits including that it must"... as far as possible deal specifically with the plaintiffs claim and...state clearly and concisely what the defence is and what are facts relied upon to support it...whether the defence goes to the whole or part of the claim, in the latter case it should specify the part". With regard to the points raised in limine, learned counsel contended that the plaintiff a legal persona could be represented by any person it so authorised and that in an affidavit regarding dealings with it, the deponent need not be the person dealt with directly it being sufficient that the facts deposed to are within the knowledge of the plaintiff. He thus affirmed that the deponent to the plaintiff's affidavit was qualified to depose to the matters in the affidavit. In considering the application, I will first begin with the merits thereof and state that the application is unmeritorious and must be dismissed. I say this firstly because in this case in which the application was made after the filing of the defendant's plea, an assertion by the applicant that, the terms of the contract it alleged included certain terms appearing on the receipt, that the said terms may be varied by the applicant at will, and that it was up to the respondent to prove the five-month moratorium for payment of goods delivered it alleged, instead of the thirty days the

applicant pleaded as a specific term of the contract, was by itself an admission that there was a triable issue. This issue was with regard to the agreed term of the contract regarding time for payment under the contract; it in turn raised another issue regarding whether the sums owing to the applicant were due at all at the time of the issuance of the summons. The respondent's defence did not deny the contract between the parties or that there was money outstanding under the contract of sale of goods, she however challenged the computation of the sums owing alleging that same had been duplicated in the applicant's account. This challenge raised another issue regarding the sums owing and in respect of which the applicant as plaintiff may have judgment against the defendant.

Even if the applicant were held entitled to introduce the documents it did in its Reply to refute the said allegation of duplicated accounting by the respondent, the said matter still raised a triable issue.

This is because it was not sufficient (and certainly did not aid in the court's purpose for due determination of the matter raised by the respondent), for the applicant to simply bring its own accounting documents and insist that this was proof that the respondent's defence was not tenable. The defence of the respondent was contained in her plea and was repeated in the affidavit she filed to resist summary judgement. The said defence is made up of the following: that the transaction between the parties was covered by invoices amounting to a total of E161,290.00 out of which she had paid El 17,945.00 leaving a balance of E43.345 outstanding. This was contrary to what the plaintiff asserted: that what was owing was the sum of E176,412.00, Furthermore, she alleged that what she said was owing had not become due at the time of the issuance of the summons as the term of the contract relating to payment allowed her five months to pay for deliveries. This was contrary to the thirty days asserted by the applicant.

It seems to me that although the said defence may be found to have no merit when the matter finally comes to trial, as it stands, is not frivolous but. gives rise to triable issues. In resisting an application for summary trial, all the defendant needs to demonstrate is a case that raises a reasonable possibility that an injustice may be done of the judgment is summarily granted, see: the Court of Appeal cases of ***Musa Magongo v. First National***

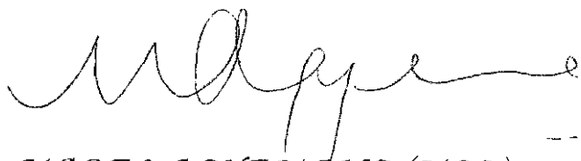
Bank (Swaziland) Appeal Case No. 38/1999 and ***Mater Dolorosa High School v. RJM Stationery (Pty) Ltd App. Case No. 3/2005.*** The demonstration of this includes the full disclosure by the respondent of the nature and grounds of the defence and the material facts upon which it is founded and also, that he has a bona fide defence in law., see: per Corbett CJ in ***Maharaj v. Barclays Bank Ltd 1976 (1) SA 418*** *AD.* It seems to me that the respondent herein has by the defence raised in her plea, which she repeated in the affidavit filed to resist the present application, succeeded in doing this. The court will thus not shut the door on her case. The defendant will be heard on the defence raised and the application for summary judgment must fail.

But it will be remiss of me (even though I have found the application to have no merit), not to comment on the matters raised in limine and I proceed to do so. Regarding the charge that the applicant's affidavit was not properly deposed to, it seems to me that same is not tenable for the reason that the applicant is a legal persona which can only sue and be sued by persons duly authorised by it. In that adventure, persons who are so authorised by it may prosecute or defend its claims or defences as the case may be. Where a person in the employment of the applicant deposes that by virtue of his position in that establishment, he is cognisant with facts and matters within the knowledge of the applicant, unless that person's position is demonstrated to be so unrelated to the matter in question that he may not under any circumstance purport to give evidence in relation to it, he may depose to an affidavit on its behalf. In the present instance, the deponent Manqoba Fakudze has averred that he is the Sales Manager of the applicant. That designation (in the absence of contrary evidence contained in the respondent's affidavit) to my mind, informs that he oversees sales and related matters in the applicant's business. It seems to me that in that position, where he deposes that he has the requisite knowledge in a case involving sales as the instant one, he may depose to the applicant's affidavit regarding the said matters. I daresay that by reason of his position and responsibilities as Sales Manager, he need not have dealt with the respondent personally during the sales transactions, nor must he be required to depose to the sources of his information, seeing that such is assumed from his position as one responsible for sales.

in this I must depart from the position of Ebersohn J in the *Motor Vehicle Accident Fund v. Mahlalela (supra)* cited for my persuasion and distinguish same, citing with approval, the dictum of Zulman J in ***Nedperm Bank Ltd v. Verbri Projects CC 1993 (3) SA 214 (W) at 217*** in the instant case. Regarding the alleged technical irregularity of the plaintiff's case in his failure to state where the contract was entered into, I must say that where the defendant failed to raise an exception to the plaintiff's case, but took the next step to file her defence, admitting the existence of the contract, the said defect ceases to be fatal. This is because in the normal course of an application for summary judgement (although a time limit is not provided in the Court's Rules), the application is filed before the plea is received. It is for this reason that the plaintiffs pleading must not leave anyone (certainly not the defendant) in doubt regarding the claim he is required to answer to. Any defect in the claim, including if the plaintiffs Declaration does not disclose a cause of action, may not be cured by depositions in an affidavit in support of an application for summary judgment. Thus is the requirement of technical regularity the correct position of the law as stated by Giwhala and Marais AJJ in the *Gulf Steel's* case (supra) and the *Dowson and Dobson's* case (supra) respectively. In the present instance however, a plea was filed admitting the existence of the oral contract alleged and even the transactions under it, thus validating the cause of action. An unsuccessful answer to the application would thus not have been defeated by technical irregularity in the instant claim. The said point in limine, must thus be discountenanced although in the normal circumstance, technical irregularity of the plaintiffs claim would by itself have rendered the application a non-starter.

Regarding the last point raised, there is no gainsaying that a cardinal rule in pleading is that a plaintiff may not introduce a new case in his Reply. This is because the other party may not have the opportunity to rebut same. It seems to me that in the present instance, what the documents pleaded in the Reply sought to do, was to buttress a case already made by the plaintiff, that its computations had taken all matters into consideration and were therefore correct. The applicant as plaintiff did not thereby set up a new case. But I have said that the said documents by themselves may not settle the question of the

respondent's liability and close the door on her defence as they are open to challenge by the respondent who alleged inaccuracy in the computation. I reiterate that the instant application for summary judgment must fail on its merits in the light of triable issues raised by the respondent regarding the amount owed to the applicant, and the time when such became due. The application for summary judgment thus cannot succeed and is accordingly dismissed with costs.



MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE