IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2839/Q8

In the matter between:

BUSAF (PTY) LIMITED **Plaintiff**

And

VUSI EMMANUEL KHUMALO t/a ZIMELENI TRANSPORT **Defendant**

Mr Attorney K. Motsa for the Applicant Mr Attorney S. Dlamini for the Defendant

Date of hearing: 27 January, 2009.
Date of judgment: 6 February, 2009.

J U D G M E N T

MASUKU J.

[1] This is an application for summary judgment brought in terms of the provisions of Rule 32 of the Rules of this Court. This application comes as a sequel to an action launched by the Plaintiff in which it sued out a simple summons from the office of the Registrar of this Court, claiming

from the Defendant payment of the sum of El09, 795. 33, interest thereon and costs on the punitive scale.

In its declaration, the Plaintiff alleged that on or about 9 December, 2005, it of the one part, and the Defendant, of the other, entered into a written agreement in terms of which it sold two MAN buses to the Defendant for the sum of E400, 000. 00. In terms of the said agreement, the Defendant was required to and did pay a deposit in the amount of E140, 000. 00. The Defendant further agreed to pay the balance of the purchase price in twelve equal monthly instalments. The Plaintiff further averred that the Defendant is in arrears and has failed or neglected to pay the balance claimed, contrary to the written agreement referred to above.

Upon the Defendant filing an intention to defend, the Plaintiff filed its declaration, followed by an application for summary judgment, which I must point out is in full compliance with the provisions of Rule 32 (3) (a). In opposition thereto, the Defendant filed an affidavit of his own, in which he resists the granting of summary judgment. I shall presently outline the bases upon which the Defendant resists the summary judgment application.

Shorn of all the frills, the Defendant's opposition to the grant of the summary judgment can be summarised as follows:

(a) The Plaintiff overpriced the *merx,* regard had to the poor mechanical condition and serious mechanical faults of the same;

(b) The Plaintiff made certain misrepresentations regarding the value of the buses in question at the time of signing the agreement;

(c)The Plaintiff fraudulently misrepresented to the Defendant that the buses would generate sufficient income to repay the balance of the *pretium;* and

(d) The Defendant has a counterclaim against the Plaintiff for the sum of E80, 000. 00 in respect of damages for loss of business arising from the defective buses sold to him by the Plaintiff.

I must hasten to point out that from a reading of the affidavit resisting summary judgment, it is plain that the Defendant does not deny that it entered into the agreement referred to and on the terms alleged in the Plaintiffs declaration. It is also common cause that the Defendant does not deny that he owes the Plaintiff and further does not deny owing the amount claimed in the declaration.

The central issue to be determined by this Court is whether the Defendant has set out issues in his affidavit that would render the granting of the judgment improper. Before adverting to the question of the propriety or otherwise of granting summary judgment in the instant case, it would be apposite at this juncture, to briefly outline the principles that govern the procedure called summary judgment, as adumbrated in case law.

In *Musa Magongo v First National Bank (Swaziland)* Appeal Case No. 38 of 1999, the Court of Appeal described summary judgment in the following terms:

> "It has been held time and again in the courts of this country that in view of the extra-ordinary and stringent nature of summary judgment proceedings, the court will be slow to close the door to the defendant if a reasonable possibility exists that an injustice may be done if judgment is granted."

In yet another case of *Mater Dorolosa High School u R.J.M. Stationery (Pty) Limited* Appeal Case No. 3 of 2005, the Court, amplifying its statement of

the law in the *Musa Magongo* case *(supra),* expressed its self on the correct test to apply in summary judgment as follows:

> "That it would more accurate to say that a court will not merely "be slow' to close the door to a defendant, but will in fact refuse to do so if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiffs claim, the court cannot deny him the opportunity of having such an issue tried."

The *locus classicus* judgment on summary judgment was delivered by Corbett C.J. (as he then was) in *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 (AD) at 236, where the learned Judge set out the duty thrust upon a defendant in order to successfully oppose the said application and thus have his or her full day in Court to defend the claim. The learned Judge said:

> "*Where the defence is based upon facts, in the sense that material facts are alleged by the plaintiff in the summons, or combined summons, are disputed, or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one or the other. All that the Court enquires into is: (a) whether he 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* ***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. . .*"

It now behoves me to consider the allegations contained in the Defendant's affidavit and to decide whether they do meet the test set out in the judgments cited above. There is, however an incorrect statement of the law made by the Defendant in its affidavit resisting summary judgment that needs to be corrected and the requirements for the grant of summary

judgment put in a proper perspective. In paragraph 6.3 of the same, the deponent states:

> "I have been advised and verily believe that in order for summary judgment to be granted to any plaintiff, the plaintiff must have a clear right which is undisputed and there must not be a triable issue."

[10] In the first place, it must be stated that affidavits serve the purpose of stating facts and the allegations relied upon by the deponent in support of the relief he or she seeks. According to the learned author Peter van Blerk, Legal Drafting Civil Proceedings, Juta, 2007, at p 49, affidavits take the place of both pleadings and evidence in an action and should, for that reason, provide sufficient detail having regard to the nature of the proceedings and circumstances to enable the court to make an assessment of the case. In my view, they are not and should not be used to argue the law or state submissions on the law or the facts. What a plaintiff has to show in order to qualify for the grant of summary judgment is a matter of law and which should be the subject of legal argument and is not a matter ordinarily to be found in an affidavit. The use of the affidavit should therefore be confined to stating the facts or the legal principles relied on for the relief sought, legal argument expressly excepted.

[11] Reverting to the passage quoted above, it appears plain that the Defendant's advice was wrong and his avowed belief was totally misplaced. I say so for the reason that there is no requirement for a plaintiff in a summary judgment application, to show that he has a clear right. The concept of a 'clear right' is to be found in final interdicts and has no place or application to summary judgment. Grammatical

exactitude is called for in such matters and no room must be left for misstatement of the law or the principles applicable. The latter portion of the passage quoted regarding a triable issue is, however accurate, though need not have been included in an affidavit as I have sought to demonstrate above.

[12] The 'triable' issues that have been raised by the Defendant in his affidavit in the above matter deserve some comment. It would appear to me that save the defence allegedly relating to the counter-claim, the balance of the contentions by which the Defendant seeks to resist summary judgment should be dealt with at once. The Defendant claims that the *merx* was overpriced and that same was in a bad mechanical condition and had serious faults. One needs not look further than the agreement to answer these purported defences.

[13] Paragraphs 4.1 and 4.4 of the agreement records the following:

> 4.1 "The parties record that the Purchaser has inspected the vehicles, and has selected the vehicles and Busaf has no knowledge of the purpose for which the vehicles are required by the purchaser.
>
> 4.4 On the effective date, the Purchaser shall inspect the vehicles before taking delivery of the vehicles and the Purchaser acknowledges that the vehicles are sold on a voetstoots basis and that Busaf gives no warranties to the Purchaser pertaining to the fitness for the purpose of the vehicles. The purchaser agrees that no warranties or representations have been made to it, as to the

> condition or fitness of the vehicles and the Purchaser takes the goods as is, with all faults and accepts all risk of whatever nature pertaining to the vehicles."

It will be apparent from reading the papers filed by the Defendant that he now seeks to question the validity of certain terms of the agreement signed by both parties. Should he be allowed to do so? In particular, the Defendant now seeks to say that the vehicles he purchased were in a faulty mechanical condition and further contends that the Plaintiff made certain representations about the fitness of the vehicles and how they would raise good money, so to speak. These contentions by the Defendant must be observed and considered from the backdrop of the clauses cited in full above.

In their work entitled The South African Law of Evidence, (formerly Hoffman & Zeffert), Lexis Nexis, 2003, the learned authors Zeffert *et al* say the following at page 322, regarding the proper position relating to agreements reduced to writing:

> "If, however, the parties, decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the parties' previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible."
>
> This principle enunciated above is referred to by the learned authors as the integration rule.

[16] Speaking about it in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) S.A. 16 (A) at 26, Botha J.A., quoting from the learned author Wigmore stated as follows:

> "This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: *When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of hat are the determining what are the terms of their act.*"

[17] The import of the foregoing on the case is that because the parties to the agreement, namely, the Plaintiff and the Defendant decided to embody all the terms of the agreement in a single memorial, the Defendant may not seek to lead evidence tending to prove anything contrary to the express terms of the agreement. To the extent that he seeks to do so, he is totally out of order. The net result is that the purported defences raised by the Defendant serve to undermine the memorial of their agreement, which it is common cause, was reduced to writing and signed by both parties, signifying that they bound themselves to the terms thereof.

That being the legal position, I am of the view that the Defendant cannot be heard to claim that the *merx* was overpriced because in terms of the agreement which he signed, and there is no indication or insinuation that he signed the same under duress or that any undue pressure that could affect the reality of consent was brought to bear on him, it becomes abundantly clear that the Defendant cannot be allowed to put up the defence of overpricing, in the face of a clear and unambiguous term in terms of which he accepted that he inspected the vehicles and that he selected them. Nor can the allegation that the vehicles had any mechanical or other faults stand as he accepted in the agreement that he would receive those vehicles having inspected them and more particularly, subject to the operation of the *voetstoots* clause, which was also embodied

in the agreement. In regard to the latter issue of the *voetstoots* clause, see Gardiner J.P.'s remarks in *Bosman Brothers v Van Nierkerk* 1927 67.

For the same reasons, the allegation that the Plaintiff made certain representations to the Defendant regarding the fitness of the vehicles for the purpose to which the Defendant sought to put them also flies in the face of the terms of the agreement, in terms of which the Defendant stated that the Plaintiff did not make any representations regarding the vehicles which were sold as is. Furthermore, the Defendant agreed that the Plaintiff did not, in any event know the purpose to which the vehicles would be put by the Defendant. Either way, it is clear that regard had to the terms of the agreement, the Plaintiff could not have made the warranties alleged.

Another allegation made by the Defendant, which is raised as a possible defence to the summary judgment is contained in paragraph 6.6 of his affidavit, where he states that the Plaintiff fraudulently misrepresented that the vehicles would generate sufficient income to enable him to repay the outstanding balance due to the Plaintiff. As earlier indicated, according to the agreement, the Plaintiff did not know the use to which the vehicles would be put by the Defendant, per clause 4.1. Even if that was indeed the case, which is not, regard had to the terms of the agreement, it would have been folly, if not presumptuous for the Plaintiff to make such a puff, considering that it is clear on the papers that the Plaintiff is a company that is registered and operates in the Republic of South Africa. In view of that notorious fact, the Plaintiff would on all accounts, be ill-placed to predict how the buses would fare in a foreign economy. The force of the contention would in any event be doubtful.

A more fundamental reason for finding that the defence raised by the Defendant would not carry a prospect of success at the trial is that the Defendant alleges fraud on the part of the Plaintiff. This is a most serious allegation which should not be lightly made. The position regarding this issue was succinctly stated by Zulman J. (as he then was) in *Nedperm Bank Ltd v Verbri Projects C.C.* 1993 (3) S.A. 214 at 220 B-F, where His Lordship said:

> "At the outset one has to observe that it is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up speculative propositions or to raise submissions or to advance arguments on probabilities which might indicate a fraud. What is essential is that there should be hard facts as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment. Rule 32 (3) (b) makes it plain that the affidavit seeking to resist summary judgment successfully must satisfy the Court, by evidence, of the fact that the defendant has 'a *bona fide* defence to the action and furthermore 'such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore. The emphasis therefore is plainly on 'material facts'. The proposition is a trite one and has been dealt with in a number of cases where the Rule has been considered by our Courts". (Emphasis added) See also *R v Myers* 1948 (1) S.A. 375 (A).

A reading of the Defendant's affidavit resisting summary judgment shows that the said affidavit is as bare as can be regarding the facts allegedly constituting the allegation of fraud. Unlike in the *Nedperm* case *(op cit),* where the Court found that the facts alleged were speculative, in the instant case there are no facts or allegations which suggest or point in the direction of fraud. All that has been done by the Defendant is to allege that the Plaintiff 'fraudulently misrepresented' certain facts. There are, however,

no factual allegations made from which this Court can possibly be satisfied that the defence of fraud carries a prospect of success at the trial.

In the circumstances, I am of the considered view that in so far as the allegation of a fraudulent misrepresentation is concerned, the Defendant has failed to place 'hard facts' upon which this Court may conceivably exercise its discretion in his favour. The issue is in any event exacerbated by the provisions of clause 4.4 of the agreement which the Defendant signed, acknowledging that the Plaintiff did not make any representations to him. The conclusion to which I came earlier in respect of the purported defences predicated on allegations inconsistent with the written terms of the agreement equally holds in relation to the defence of fraudulent misrepresentation.

I now turn to consider the last defence, namely that the Defendant has a counterclaim against the Plaintiff for damages. From the affidavit resisting summary judgment, it is clear that this defence is premised on the allegation with which I have already dealt with that the Plaintiff sold defective buses which resulted in the Defendant losing business as a result. The question is whether this defence should hold at this stage, considering that I have found that the Defendant cannot rely on the allegation of defective buses in the light of the *voetstoots* clause to which

I have already alluded in the judgement. To allow the Defendant to do so would licence him to violate the agreement and the very underpinnings of the parole evidence rule, a situation that would be untenable.

According to the learned authors Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, Juta, 4th ed. At p444, the

defendant must give sufficient detail as to how the said counter-claim arises in order to enable the Court to decide whether it is well founded. See also *Traut v Du toit* 1966 (1) S.A. 69 (O) and *Groenewald v Plattebosch Farms (Pty) Ltd* 1976 (1) S.A. 548 (C). In view of the basis for the Defendant's claim in reconvention, as stated in the immediately preceding paragraph, I am of the view that the said counter-claim is not well-founded for the reason that it would seek to abrogate the agreement and do serious violence to the parole evidence rule. The contents of the agreement, particularly clause 4.4 quoted above, stipulate clearly that the Plaintiff did not make any representations to the Defendant. The Defendant also accepted that he had inspected the vehicles and purchased them on an as is basis. This position therefore renders the counter-claim bad in law and facts in the affidavit resisting summary judgment therefore not sufficient to defeat the summary judgment application.

There is yet another insuperable difficulty in the defendant's way regarding the defence of a counter-claim. It is this - in order for credence to be given to the unliquidated counter-claim, it must either be equal to or more than the claim in convention, but certainly not less. If that requirement is not met, then the counter-claim is not regarded as *bona fide.*

In this regard, the learned authors Van Niekerk *et al.* Summary Judgment - A Practical Guide Butterworths, 2004 say the following at page 9 - 35, 9 - 36;

> "It is generally required that, for an unliquidated counterclaim to constitute a *bona fide* defence, the quantum of the counterclaim should exceed (or be at least of similar magnitude, but not less) the quantum of the plaintiffs claim. The implication hereof is that the defendant ought to quantify his counterclaim in order to

> demonstrate that the quantum thereof is at least as much, as or in any event, not smaller than that of the plaintiffs claim. Only then is the counterclaim a *bona fide* defence to the plaintiffs claim. Should the defendant have a liquidated counterclaim with a quantum less than that of the plaintiffs claim, or if the quantum of the defendant's unliquidated counterclaim is less than that of the plaintiffs claim, the defendant should, in order to advance a *bona fide* defence, pay in the balance."

From the affidavit resisting summary judgment, it emerges that the Defendant alleges that its counter-claim is unliquidated, the quantum whereof is E80,000. It is clear that the quantum of the alleged counterclaim is in the first place unliquidated. Second, it is less than the Plaintiffs claim in convention. Last it is an ineluctable fact that the Defendant has not made good the balance between his claim, in reconvention and the Plaintiffs claim in convention. For that reason, I come to the conclusion that the counter-claim cannot be regarded as *bona fide,* regard had to the quotation immediately above and which states the correct legal position.

The entire conspectus of the evidence before me leads me to what I consider the inexorable conclusion that on the whole, the Defendant has not shown that he has a *bona fide* defence, capable of raising a triable issue during the trial, which is the only gate through which he can be able to enter the field in which the main trial can take place. In closing, I will again refer to some trenchant remarks by Zulman J. in the *Nedperm* case *(op cit)* at p 224 D-E, regarding the Court's exercise of a discretion in these matters. The learned Judge said:

> ". . . but a discretion exercised in appropriate cases where there is some factual basis, or belief, set out in the affidavit resisting summary judgment which would enable a Court to say that something may emerge at a trial, and there was a reasonable probability of it so emerging, that the defendant would indeed be able to establish the defences which it puts up in the affidavit and which at the particular time it might have difficulty in precisely formulating or in precisely quantifying because of lack of detailed information."

Having considered the contents of the affidavit resisting summary judgment, I have come to the conclusion that this is not a proper case in which to exercise the discretion in favour of the Defendant by allowing him an opportunity to enter the trial proper. I am not and cannot be satisfied from the contents of the affidavit resisting summary judgment that there is a reasonable possibility of the Defendant establishing a defence that carries a prospect of success at trial.

[31] In the premises, I issue the following Order:

1.1 The application for summary judgment in the amount of El09, 795-33 be and is hereby granted in favour of the Plaintiff herein.

1.2 The Defendant be and is hereby ordered to pay interest on the aforesaid sum of E109, 795-33 at the rate of 14.5% from June 2008, to the date of final payment.

1.3 The Defendant be and is hereby ordered to pay the costs of the suit on the scale between attorney and own client as recorded in clause 19.2 of the agreement *inter partes.*

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 6™ DAY OF FENRUARY, 2009.

T.S. Masuku, Judge
Messrs. Robinson Bertram for the Plaintiff
Messrs. Mabila Attorneys for the Defendant