

IN THE HIGH COURT OF SWAZILAND
HELD AT MABANE

Case No. 3361/09

BETWEEN

SINKHWA SEMASWATI t/a MR. BREAD
BAKERY & CONFECTIONERY

Plaintiff

And

FIAGO ENTERPRISES (PTY) LTD

Defendant

Coram

OTA J.

For Plaintiff

Mr. M.Mabuza

JUDGMENT
23rd FEBRUARY 2011

This is an application for Summary Judgment, wherein, the Applicant prays for the following reliefs:

1. Payment of the sum of E55, 376.50 (Fifty Five Thousand Three Hundred and Seventy Six Emalangeneni Fifty Cents).
2. Interest on the aforesaid sum of E55, 376.50 (Fifty Five Thousand Three Hundred and Seventy Six Emalangeneni Fifty Cents) at the rate of 9% per annum *a tempore morae* to date of final payment.
3. Costs of suit.
4. Further and/ or alternative relief

Let me interpolate at this juncture and observe, that when this matter served before me for oral argument on Monday the 7th of February 2011, Mr. M. Mabuza appeared for the Plaintiff. The Defendant was absent and unrepresented. Mr. Mabuza informed the court that he received a notice of Withdrawal from the Defendant's Attorneys on the 1st of February 2011. That by the Rules of this Court, the Defendant is allowed ten (10) working days from the 1st of February 2011, when the Notice of Withdrawal was served, to appoint new Attorneys, which period will elapse on the 15th of February 2011. Mr Mabuza applied for a postponement of the matter to any date after the 15th of February 2011. Based on the foregoing, the court postponed this matter to the 17th February 2011 for hearing at 2pm.

On the 17th of February 2011 and at 2pm, Mr. Mabuza appeared for the Plaintiff. The Defendant was again absent and unrepresented. Mr. Mabuza intimated the court that he has not received any Notice from the Defendant indicating whether he is opposing the matter either personally or through any Attorney.

I proceeded with this matter on the premises that since the Notice of Withdrawal by the Defendant's Attorneys issued after the court's notice

sued out for roll call, that the Defendant should in these circumstances be aware of this matter.

The foregoing said and done, let us now consider the substance of this matter. The facts upon which the Applicant founded this application is as stated in its declaration as follows:

That on or about April 2009, the parties entered into an oral agreement, in terms of which it was agreed that the Plaintiff supplies and delivers white and brown **loaves** of bread to the Defendant, and the Defendant would pay cash upon each and every consignment made by the Plaintiff. That the Plaintiff duly delivered the said bread to the Defendant from 3rd of April 2009 to the 10th of July 2009, amounting to the sum of E73, 856.50. That the cheques delivered by the Defendant to the Plaintiff in payment of this transaction were dishonoured by the bank, as demonstrated by Annexures "MB1" to "MB9" respectively. That the Defendant is also indebted to the Plaintiff in the sum of E2, 695.00 which is for bread supplied and delivered to the Defendant which the Defendant never paid for. That the Defendant subsequently made two instalmental payments in the sums of E13,480.00 and E5,000.00 respectively, leaving the outstanding balance of E55,376.50 claimed.

In the circumstances the Defendant is unjustly enriched. That the Defendant has refused to pay the outstanding amount despite several demands.

Now in the case of **Supa Swift (Swaziland) (PTY) Ltd vs Guard Alert Security Services Ltd Case No.4328/09**, I had this to say about the purport of Summary Judgment:-

A Summary Judgment is one given in favour of a Plaintiff without a plenary trial of the action. The normal steps of filing all necessary pleadings, hearing evidence of witnesses and addresses by counsel, thereafter, before the court's judgment, are not followed. The procedure by way of Summary Judgment is resorted to by a Plaintiff, where obviously there can be no reasonable doubt that the Plaintiff is entitled to judgment and where it is inexpedient to allow the Defendant to defend for mere purposes of delay. It is for the plain and straight forward, not for the devious and crafty. Rather than suffer unnecessary delay and expense which attend a full trial, a Plaintiff may therefore apply to the court for instant judgment, if his claim is manifestly unanswerable both in fact and in law. Provided that the claim falls within the purview of classes of claims envisaged in **Rule 32(2)** i.e. is either upon a liquid document, for liquidated amount in money, for ejection or for delivery of specified movable property.

Summary Judgment therefore by its characteristic features, shuts the door of justice in the face of a Defendant who may otherwise have a triable defence.

Thus, the wise caution which has been sounded in the ears of the courts over

the decades, to approach this application with the greatest trepidation. This is to prevent foreclosing a Defendant who may otherwise have a triable defence from pleading to the Plaintiffs case"

See **Erasmus-Supreme Court Practice B1-206**

Now by **Rule 32 (4)** of the Rules of this court a Defendant who wishes to resist Summary Judgment is required to file an affidavit opposing same.

The affidavit in opposition must disclose a good and bona fide defence on the merits, by disclosing such facts as may be deemed sufficient to enable the Defendant defend generally. The affidavit should state whether the defence goes to the whole or part only of the Plaintiffs claim and in the case of the latter, which part of the claim. It should state the nature of the defence raised, the ground upon which the defence is predicated and the material facts relied upon by the Defendant to establish such defence. These requirements must be stated fully. The obligation to plead fully simply means that while the Defendant need not deal exhaustively with the facts and evidence relied upon to substantiate his claim, he must at least disclose the material facts upon which it is based with sufficient particularity and completeness, to enable the court to decide whether the affidavit discloses a bona fide defence.

See **Metro Cash and Carry (PTY) Ltd t/a Manzini Liquor Warehouse vs Envakatfo Investments (PTY) Ltd t/a Bemvelo Bottle Store Civil Case No. 1038/04, National Motor Company Limited vs Moses Dlamini 1987-1995 SLR at 124, Supa Swift (Swaziland) (PTY) Ltd vs Guard Alert Security Services Ltd (supra), Maharaj vs Barclays National Bank Ltd 1976 (1) SA 418A at 426 B-D, Gillinsky and Another vs Superb Launderers and Dry Cleaners (PTY) Ltd 1978 (3) SA 807 f C) at 809-810.**

Now, in compliance with the foregoing position of the law on this subject matter, the Defendant filed a five (5) paragraphs affidavit in opposition to this application. I find a need to reproduce said affidavit *in extenso*, for ease of clarity and to foster a better understanding of my reasoning in this judgment. In that affidavit sworn by one Fiaz Ahmed, described in that process as the Managing Director of the Defendant company, the deponent averred in paragraphs 4 and 5, thereof, as follows,

"4.AD PARAGRAPH 1

Contents hereof are not in issue.

5.AD PARAGRAPH 2 and 3

Contents hereof are in dispute and Applicant is put to strict proof.

I deny the amount charged by the Plaintiff as incorrect and not consistent with the total in the Annexures.

I aver that the amount owed and not that claimed, has been paid to the Defendant.

I aver that the Plaintiff has failed to disclose the amounts paid to her Attorneys".

This is the totality of the facts upon which the Defendant relies in opposing this application. I must say that the defence the Defendant touts before court leaves much to be desired. It violently and incurably offends **Rule 32(4)**. I say this because the entire defence lies in the realm of speculation and conjecture. This is due to the fact that the defence as it stands is a bare allegation in general terms. While the Defendant is not denying the fact of the agreement or the fact that the said loaves of bread were delivered to it, the Defendant however alleges that it has paid "the amount owed and not that claimed". The Defendant in seeking to set up this defence conveniently omitted to plead material facts in support of same.

As the court said in **National Motor Company Limited vs Moses Dlamini** (*supra*)

"The Defendant's affidavit must condescend upon particulars and should as far as possible deal specifically with the Plaintiffs claim and state clearly and what the defence is and facts relied upon to support it. It should also state whether the defence goes to the whole or should specify the part".

Similarly, the allegation that the amount charged is incorrect and inconsistent with the total of the Annexures, also does not afford the Defendant a bona fide defence. I say this because since the Defendant is disputing the correctness of the amount claimed, it was incumbent upon him to plead material particulars to substantiate his allegation. Since he is disputing the correctness of the amount, he was required to urge the amount he alleges is correct upon the court, with the material particulars to substantiate same. As it lies, the whole deposition constitutes bare allegations of fact in general terms and therefore does not raise any triable issues.

Furthermore, the allegation that the Plaintiff failed to disclose the amount paid to her Attorneys also falls into the same error. The Defendant was required to disclose the amount allegedly paid to Plaintiffs Attorneys with sufficient particularity to enable the court gauge the substantiality of the alleged defence. The allegation is equivocal in the way and manner it is presented before court and thus raises no triable issues.

As the case lies, the totality of the defence set up has failed to condescend upon particulars. It is for the Defendant to disclose a bona fide defence with triable issues and not for the court to embark on an inquiry into these matters.

In coming to this conclusion, I am guided by the dictum of **Megary VC in Lady Anne Tennant vs Associated Newspaper Group Ltd 1979 FSR 298,**

" A desire to investigate alleged obscurities and a hope that something will turn up in the investigation cannot separately or together amount to sufficient reasons refusing to enter judgment for the Plaintiff. You do not get leave to defend by putting forward a case that is all surmise and mucaw-berism".

I find the totality of the defence a bare denial of Applicant's material averment and cannot be regarded as sufficient to defeat Applicant's right to secure Summary Judgment. I am persuaded on this matter by the words of wisdom of the court in **Reed vs Wittrup SA 1962 (4)** at page 443 where the court declared thus:-

"...if by a mere denial in general terms a Respondent can defeat or delay an Applicant who comes to court on motion, then motion proceedings are worthless, for a Respondent can always defeat or delay a petition by such a

defence. It is necessary to make a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to dispute raised on affidavit".

Now, in *casu*, the claim is for a liquidated amount in money. I say so because the amount claimed which is for goods already delivered by the Plaintiff to the Defendant, is easily ascertainable in monetary terms. The fact that the Plaintiff supplied the goods to the Defendant is not disputed. The fact that the goods were supplied for the amount alleged in the founding affidavit is not disputed. Also not disputed is the fact that the cheques issued to the Plaintiff by the Defendant in an attempt to settle the outstanding balance on this transaction were dishonoured , as evidenced by Annexures MB1 to MB9 respectively. I have already discarded the defence set up by the Defendant for lacking in bona fides and triable issues. In the final analysis. I find that the Plaintiff has proved its claim against the Defendant in the circumstances.

On these premises, I enter judgment for the Plaintiff as follows:-

1. Payment of the sum of E55,376.50
2. Interest on the sum of E55,376.50 at the rate of 9% per annum a tempore morae until date of final payment.
3. Costs to follow the vent

OTA J

JUDGE OF THE HIGH COURT