IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **Case No.2048/10**

In the matter between:

Standard Bank Swaziland Ltd **Plaintiff**

And

Paul Ivan Groening **Defendant**

Coram

Ota, J

Mr. M.P. Simelane **For Plaintiff**

Ms. M. DaSilva **For Defendant**

JUDGMENT

[1] This is an application for Summary Judgment wherein the Plaintiff prays *inter alia* for the following reliefs against the Defendant: -

1. Payment of the sum of E379,744.88

2. Interest thereon at the rate of 9% per annum from date of service of summons to date of final payment

3. Costs of suit

4. Further and/or alternative relief.

[2] I find it convenient at this juncture before stating the facts upon which this application is founded, to interpolate and observe here, that when this matter served before me for argument on the 8th of March 2011, **Mr. M.P. Simelane** appeared for the Plaintiff. The Defendant was absent and unrepresented, in spite of the fact that learned counsel for the Defendant, **Ms. M. DaSilva,** attended court on the 2nd of March 2011, and specifically sought for a postponement of this matter to enable the Defendant file his heads of argument. Whereupon the matter was postponed to the 8th of March 2011, for argument at 9.30 a.m. in the presence of counsel. Since there was no representation for the Defendant on the 8th of March 2011 and since no reasons for the absence of counsel served before court, I proceeded with this matter. I find it also expedient to observe that the Defendant's heads of argument was only handed to court on the 8th of March 2011, after the court had postponed this case for judgment.

[3] I have decided irrespective of this fact, not to throw the said heads of argument in the waste bin like a piece of unwanted meal, but to countenance it. This is because that is what substantial justice demands. I will thus consider the said heads of argument together with all the other processes filed by the Defendant in determining this application.

[4] Be that as it may, what appears to be the Plaintiffs claim as demonstrated by its declaration, is that on or about the 23rd of December 2005, the Plaintiff granted an asset based financed facility to the Defendant, in respect of two hire purchase agreements, evidenced by annexures A1 and A2 respectively, exhibited to the declaration. That in terms of annexure A1, the Defendant hired from the Plaintiff a white 2004 paramount trailer, over a period of 60 months, in respect whereof the Plaintiff advanced to the Defendant a total amount of E527,425.20. That the Defendant agreed to repay the facility by monthly instalments of E8, 790.42, commencing on the 6th of February 2006, to the 22nd of December, 2010. The Defendant also

agreed to pay interest at the Plaintiffs prime rate at the time standing at 10.50% per annum, or at such other rate as the Plaintiff is entitled to determine from time to time, and to pay the loan free of exchange or bank commission and without any deduction whatsoever.

[5] In respect of agreement evidenced by annexure A2, the Defendant hired from the Plaintiff a Mercedes Truck Tractor, over a period of 60 months, in respect of which the Plaintiff lent and advanced to the Defendant a total amount of El, 018,214.40. The Defendant agreed to repay the facility by monthly instalments of El6, 972.34, commencing on the 6th of February, 2006, to the 22nd of December, 2010. The Defendant also agreed to pay interest at the Plaintiffs prime rate at the time standing at 10.50%, per annum or to such other rate as the Plaintiff is entitled to determine from time to time, and also to pay the loan free of exchange or bank commission, and without any deduction whatsoever. By the terms of annexures Al and A2, the Defendant was to pay any costs which may be awarded against him on an attorney and own client scale.

[6] That pursuant to the agreements, the Defendant took delivery of the truck trailer and trailer respectively. That the Defendant however defaulted in punctual payment of monthly instalments, which attracted rental arrears, and also invoked the rights of the Plaintiff to cancel the agreement and repossess the motor vehicles. That subsequently, the Plaintiff received an insurance payout from the Defendant's insurers to reduce the Defendant's indebtedness, which insurance payout in respect of annexure A1, was to the tune of E370, 000.00, and annexure A2, the amount of E628, 800.00. That the Defendant now owes the Plaintiff the sum of E80,527.07 on the transaction contained in annexure A2. That the defendant also owes the plaintiff the sum of E299,217.81 on the transaction contained in annexure A2. Totaling the sum of E379,744.88 in respect of which Summary Judgment is sought, plus interest and costs.

[7] Now, the Defendant is opposed to this Summary Judgment application. In furtherance of his opposition, he filed an affidavit resisting same, which can be found on pages 24 to 26 of the book of pleadings.

[8] I find it imperative at this juncture, before dabbling into the Defendant's affidavit, to restate the trite principles of law that a court seized with a Summary Judgment application must heed, in the process of determining same.

[9] I count it now judicially settled, that Summary Judgment is an extra-ordinary and stringent remedy, therefore, the court must approach it with trepidation, to avoid the ill consequence of shutting the door of justice in the face of a Defendant, who may otherwise have a bona fide defence to the Plaintiffs claim.

[10] **See National Motor Company Limited vs Moses Dlamini 1987-1995 SLR at 124** per Dunn J, **Metro Cash and Carry (Pty) Ltd t/a Manzini Liquor Warehouse vs Enyakatfo Investments (Pty) Ltd t/a Bemvelo Bottle Store Civil Case No.1038/04, Maharaj vs Barclays National Bank Ltd 1976 (1) SA 418A at 426, Erasmus-Supreme Court Practice Bl-206.**

[11] Now, it is in a bid to avoid the ill consequence enunciated ante, that **Rule 32(4)** enjoins the court to consider the affidavit resisting Summary Judgment to see if same discloses a bona fide defence or triable issues, entitling the Defendant to defend the claim. The bona fide defence or triable issues are to be gleaned from the material facts which the Defendant is required by **Rule 32(4),** to disclose in his affidavit. The duty placed upon both the court and the Defendant in this regard is best summarized by the pronouncement of Dunn J in **National Motor Company Ltd vs Moses Dlamini** **(*supra)*** **as follows:**

"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 these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is (a) whether the Defendant has fully disclosed the nature and ground 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. The word fully connotes in my view that while the Defendant

need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court decide, whether the affidavit discloses a bona fide defence".

[12] The question at this juncture is does the Defendant's affidavit ventilate a bona fide defence or triable issue to entitle him defend this claim?

[13] The defence that the defendant seeks to set up is as deposed to in paragraphs 5.2 to 5.6 of his Affidavit. It is convenient for me to reproduce these paragraphs of the Defendant's affidavit, for ease of reference in this judgment. They state as follows,

> "*5.2 In particular it is denied that I have no bona fide defence to the Plaintiffs claim and that the Notice of Intention to Defendant (sic) has been filed solely for the purpose of delay.*
>
> *5.3 It is denied that I am indebted to the Plaintiff in an amount of E379, 744.88 (three hundred and seventy nine thousand, seven hundred and forty four Emalangeni and eighty-eight cents) or any amount thereof.*

5.4 The subject matter for which the Plaintiff is suing me were hijacked in South Africa and my insurance paid out a total of E998, 800.00 (Nine hundred and ninety-eight thousand, eight hundred Emalangeni) in respect of the claim thereof

5.51 then made a total payment ofE551, 808.55 (five hundred and eleven thousand, eight hundred and eight Emalangeni and fifty five cents) via debit orders from my account and in favour of the Plaintiff.

5.6. I submit that I have over paid the Plaintiff and therefore, I reserve the right to claim against them for same."

[14] Learned counsel for the Plaintiff, **Mr. Simelane,** contends both in Plaintiffs heads of argument and oral submissions in court, that the insurance payment of E998, 800.00 is admitted by the Plaintiff and duly accounted for in the Plaintiffs declaration. He however further takes the position that the allegation of payment of E511, 808.55, as well as the allegation that the Defendant over paid the Plaintiff, have failed to descend upon particulars, and must thus be discountenanced by the court. He primarily took issue with the fact that the Defendant failed to annex the statement of the payment he allegedly made to the Plaintiff. It was contended replicando as follows by learned counsel for

the Defendant ,in paragraphs 5 and 6 of the Defendant's heads of argument, citing the case of **Mater Dolorosa High School vs M.J. Stationery Civil Appeal No.3/2005 (unreported) at page 2,**

[15] "*5. It is trite law that a Defendant is not required to deal exhaustively with the details of his defence, provided he discloses fully the nature and grounds of his defence and the material facts relied upon. In considering whether Defendant has shown a bona fide defence, the court does not judge the truthfulness of the allegations.*

> *6. Defendant is further not required to formulate his defence with the precision of a plea but has to show that a reasonable possibility exists that an injustice may be done if judgment is granted, summarily. Therefore, the Defendant is not required to annex the statements reflecting his payments to the Plaintiff.*"

[16] There is no doubt that the allegation by the Defendant in relation to the amount of E998, 800 raises no bona fide defence or triable issue. I say so because as rightly contended by Mr. Simelane, same is not in issue in this case. This is due to the fact that this amount is fully accounted for in paragraph 11 of the Plaintiffs declaration, on page 11

of the book of pleadings, wherein it is shown that an insurance payout on behalf of the Defendants was received by the Plaintiffs in the sum of E370, 000.00 and E628, 800.00 in respect of transactions contained in annexures AI and A2 respectively. By simple mathematical computation, a sum of these two amounts total the said insurance payout E998, 800.00. The Plaintiff further accounted for these sums in paragraphs 12 and 13 of the declaration, wherein it gave a breakdown of the sums received from the Defendant.

[17] The foregoing said and done, I however disagree with the Plaintiff on the stance adopted in relation to the Defendant's allegation that he has paid a sum of E511, 808.55 by debit order to the Plaintiff and has therefore over paid the Plaintiff. These allegations of fact are contained in paragraphs 5.5 and 5.6 of the Defendant's affidavit, which I have hereinbefore set forth.

[18] In casu, I hold the view that the Defendant has clearly disclosed a bona fide defence to the Plaintiffs claim to entitle him to proceed to trial.

[19] I say this because Defendant's allegation is that he is not owing the Plaintiff. In support of this allegation the Defendant avers that he has paid the Plaintiff the sum of E511, 808.55. He further alleges that the mode of payment of this amount to the Plaintiff was by debit order from his account. He also alleges that by this payment he has over paid the Plaintiff and reserved the right to counter claim.

[20] I agree entirely with learned counsel for the defendant, that it was not necessary for the Defendant to exhibit the statement of the payment he made to the Plaintiff in proof of the sum of E511, 808.55; he allegedly paid to the Plaintiff. This is because as rightly contended by learned counsel for the Defendant, the Defendant is not required to deal exhaustively with the details of his defence or set out the defence with the precision of a plea. All that he is required to do is to disclose that a reasonable possibility of a defence exists, via the facts he deposed to in his affidavit and I am satisfied that he has met this obligation.

[21] In the light of the totality of the foregoing, I hold that the Defendant has demonstrated a bona fide defence to the Plaintiffs claim, and the justice of this case demands, that defendant be granted leave to defend and that the parties be ordered to trial.

[22] On these premises, I make the following orders,

1 .The parties herein do and are hereby ordered to trial.

2.The Defendant do and is hereby ordered to deliver a plea and a counter claim if any within 14 days of the date hereof.

3.Costs to be in the cause.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 18TH DAY OF MARCH 2011

OTA J.
JUDGE OF THE HIGH COURT