IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4356/09

In the matter between

FIRST NATIONAL BANK OF SWAZILAND LIMITED t/a WESBANK **Plaintiff**

and

RODGERS MABHOYANE DU PONT **Defendant**

Neutral citation: *First National Bank of Swaziland Limited t/a Wesbank v Rodgers Mabhoyane Du Pont* (4356/09) [2012] SZHC 119 (8 JUNE, 2012)

CORAM **Mamba J**

Heard: **30 April, 2012**

Delivered: **8 June, 2012**

[1] Civil law – Application for summary judgment – extra ordinary nature of such application discussed.

[2] Civil practice and procedure – summary judgment application per Rule 32 (4) (a) of Rules of Court – what defendant needs to show in order to oppose or resist such application – an issue or question in dispute which ought to be tried or that for some other

reason a trial is necessary. Allegation of fraud or other unconscionable conduct may qualify as such other reason.

[1] This is an application for summary judgment filed by the plaintiff herein. As is always the case, it follows a notice of intention to defend filed by the defendant; the plaintiff having sued the defendant for payment of a sum of E65,990.36 and other ancillary relief. The application, which is opposed, is based on the following allegations:

1.1 On 8th December, 2006 the parties duly entered into a written agreement whereby the defendant leased certain movables; a 2006 Tata Telcoline 2.0 TDI motor vehicle from the plaintiff. The monthly rentals in respect of the said lease was a sum of E3577.29. Again, as is normal with such agreements, the defendant was to become the owner of the motor vehicle once he had paid all such monthly instalments equivalent to the purchase price of the motor vehicle plus the agreed interest thereon and the lease agreement, would come to an end. Until this eventuality came to pass, the plaintiff retained ownership of the motor vehicle in question.

1.2 In or about 2009, the motor vehicle developed some mechanical

defects or broke down; as a result of which the defendant was unable to generate the necessary funds to honour his monthly lease obligations to the plaintiff.

1.3 The Plaintiff alleges that after the motor vehicle broke down and the

defendant failed to pay the monthly rentals, he then surrendered it to the plaintiff. This was in February, 2009 and the arrear rentals then stood at E4, 957.98.

1.4 The plaintiff then disposed of the motor vehicle by private treaty for

a sum of E23,935-26, without recourse or notification to the defendant. The aforesaid amount was then credited to the defendant's debit account. After this credit (transaction) a debit balance of E65,990.36 remained on the said account and this is the amount plus interest, that the plaintiff now seeks to recover from the defendant. Plaintiff says its case is unassailable, indefensible or unanswerable and the defendant has filed his notice to defend solely to delay payment, thus this application.

[2] The defendant states that he has a legitimate and *bona fide* defence and that the matter should go to trial. The grounds for this contention by the defendant may be summarised as follows:

2.1 After the Motor vehicle broke down, the defendant informed or notified the plaintiff about this and requested that pending repairs of the motor vehicle, he be excused from paying the monthly instalments. His request was turned down by plaintiff who instead offered to repair the motor vehicle and debit the defendant's account with such costs. This was unacceptable to the defendant.

2.2 Meanwhile, the plaintiff advised the defendant to park the motor vehicle at its warehouse "... to make sure [the defendant] was not using it whilst not paying for it." Defendant says he agreed to this on the understanding that he would be granted an indulgence of not paying his monthly instalments for the next two months. He retained the keys and blue book card for the motor vehicle. These were later to be demanded by the plaintiff through a deputy sheriff and after consultation between the parties, the defendant handed these to the Deputy Sheriff together with some spare parts he had already purchased to fix the motor vehicle.

2.3 The said Deputy Sheriff did not have a court order for his or her actions.

2.4 Defendant states that he did not surrender the motor vehicle to the plaintiff nor did he consent to the disposal thereof.

> "19. ...Moreover the amount at which same was sold is a far cry as to the actual value of the motor vehicle hence Plaintiff's conduct cannot at the end prejudice myself for I could have easily found a purchaser who would purchase the motor vehicle for more than the balance that remained when I took the vehicle to Plaintiff.
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> 20. I do not even know how the figure was arrived at which figure the motor vehicle was sold at.
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> 24. ...The motor vehicle could have fetched a decent price in the market hence I humbly state that I do not owe the Plaintiff any monies for the proceeds of the sale of the motor vehicle should have been enough to satisfy any monies due to it from me."

[3] Perhaps one needs to clarify the agreement between the parties herein. I have referred to it as a lease agreement. The plaintiff refers to it as such and so does the document embodying it. However, this agreement is essentially in the nature of a loan-cum-sale agreement whereby the plaintiff sold and delivered the

motor vehicle in question to the defendant and simultaneously loaned him the purchase price thereof. The purchase price and other charges had to be paid in monthly instalments; the plaintiff retaining ownership of the motor vehicle until these charges were paid in full.

[4] Recently this court stated that :

> "…in the case of **Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007.**
> *"It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial … it is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far…"*
> **See Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3830/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater**

Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.

The rules have therefore laid down certain requirements to act as checks and balances to the summary judgment procedure, in an effort to prevent it from working a miscarriage of justice. Thus, Rule 32 (5) requires a Defendant who is opposed to summary judgment, to file an affidavit resisting same, and by rule 32 (4) (a) the court is obligated to scrutinize such an opposing affidavit to ascertain for itself whether "…**there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof".**

It is now the judicial accord, that the existence of a triable issue or issues or the disclosure of a *bona fide* defence in the opposing affidavit, emasculates summary judgment, and entitles the Defendant to proceed to trial. As the court stated in **Mater Dolorosa High School v RJM Stationery (Pty) Ltd (supra)**

"It would be 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 Plaintiff's claim, the Court cannot deny him the opportunity of having such an issue tried."

Case law is also agreed, that for the Defendant to be said to have raised triable issues, he must have set out material facts of his defence in his affidavit, though not in an

> exhaustive fashion. The defence must be clear, unequivocal and valid."

(Per Ota J in **SWAZILAND LIVESTOCK TECHNICAL SERVICES v SWAZILAND GOVERNMENT & ANO.** judgment delivered on 19th April 2012 (unreported)

And in **SINKHWA SEMASWATI t/a MISTER BREAD BAKERY AND CONFECTIONARY v PSB ENTERPRISES (PTY) LTD** judgment delivered in February 2011 (unreported) I had occasion to say:

> "[3] In terms of Rule 32 (5) (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgment "... may show cause against an application under sub rule 1 by affidavit or otherwise to the satisfaction of the court and, with the leave of the court the plaintiff may deliver an affidavit in reply." In the present case the defendant has filed an affidavit. In showing cause rules 32 (4)(a) requires the defendant to satisfy the court "...that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof." I observe here that before these rules were amended by Legal Notice Number 38 of 1990, rule 32 (3)(b) required the defendant's affidavit or evidence to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the former or old rule, a defendant was specifically required to show or "disclose fully the nature and grounds of his defence and the

material facts relied upon therefor", whereas under the present rule, he is required to satisfy the court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial on the whole claim or part thereof. The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.

[4] A close examination or reading of the case law on both the old and present rule, shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under the present rule, the primary obligation for the defendant is to satisfy the court that there is a triable issue or question, or that for some other reason there ought to be a trial. This, I think, is wider than merely satisfying the court that the defendant has a bona fide defence to the action as provided in the former rule. See **VARIETY INVESTMENTS (PTY) LTD v MOTSA, 1982-1986 SLR 77 at 80-81** and **BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER**, 1982-1986 SLR 406 at page 406H-407E which all refer to a defendant satisfying the court that he has a bona fide defence to the action and fully disclosing its nature and the material facts relied upon therefor. I would also add that where there is a dispute of fact a court would be entitled to refuse an application for summary judgment. Under the present rule, the defendant is not confined or restricted to

satisfying the court that he has a bona fide defence to the action or to complain of procedural irregularities.

[5] In **MILES v BULL [1969] 1QB258; [1968]3 ALL ER 632**, the court pointed out that the words "that there ought for some other reason to be a trial" of the claim or part thereof, are wider in their scope than those used in the former rule referred to above. "It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial. …

Circumstances which might afford "some other reason for trial" might be, where, eg the defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in full light of publicity.""

[5] In the present case, the defendant complains that he was tricked into surrendering the motor vehicle to the plaintiff. His consent was obtained by fraud inasmuch as he thought he was leaving the motor vehicle with the plaintiff purely for safekeeping, yet the plaintiff had other ulterior motives as he intended to dispose

of it by private treaty. That, to my mind is unconscionable and I do not think any court would countenance it.

[6] The defendant complains further that the plaintiff surreptitiously gave away the motor vehicle cheaply to his prejudice and financial detriment. Even accepting for the moment that the plaintiff was, per the agreement between the parties, entitled to dispose of the motor vehicle by private treaty, a certain measure of transparency or openness was required. The fundamentals of the notion of the rule of law is that the governors and the governed must act and be seen to be acting in accordance with the law. I find nothing in rhyme or reason why this should not apply with equal measure in respect of a lender and a borrower. Justice is, after all, rooted in fairness.

[7] In **Sinkhwa Semaswati** *(supra)* I referred to the differences between our current rule and the old rule on this topic and I do not find it necessary to repeat that here, suffice to say that the old rule required the defendant to disclose fully the nature and grounds of his or her defence and the material facts relied upon therefor. Emphasis was placed on a defence to the action. The current rule entitles a defendant to satisfy the court "…that there is an issue or question in dispute which ought to be tried" or that

for some other reason the matter should be referred to trial. I have no doubt in my mind that the issues raised by the defendant in this case are legitimate and serious enough for the court to refuse summary judgment. The issues raised by the defendant shall be ventilated and determined in a trial rather than in this application.

[8] For the above reasons, summary judgment is refused. The costs of this application shall be the costs in the action.

MAMBA J

For Plaintiff: **Mr T. Mlangeni**

For Defendant: **No Appearance**