IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1914/2011

In the matter between

MUSA ELIAS DLAMINI **Plaintiff**

And

SANDILE DLAMINI **Defendant**

Neutral Citation: Musa Elias Dlamini v Sandile Dlamini (1914/2011) [2012] SZHC 128 (18th June 2012)

Coram: Dlamini J;

Heard: 8th June 2012

Delivered: 18th June 2012

Summary judgment application – oral agreement – sole proprietary – respondent alleging to be acting as agent of company where he is a director.

Summary: The applicant and the respondent entered into a sale agreement. The agreement was oral. Respondent sold a tractor to applicant. Applicant was to pay the sum of E50,000 and respondent to deliver the merx within seven days. Applicant, by bank transfer, paid into the account of Respondent the sum of E50,000. Respondent - issued a cash receipt for the sum of E50,000. However, there was no delivery of the merx.

The sum of E50,000 was paid on the 4th March 2011 on the same day of the oral agreement. On the 8th July 2011 applicant moved by way of urgency an application for orders canceling the contract and attaching movable goods against the respondent upon respondent's failure to deliver the merx pending action proceedings. I am now seized with the action proceedings.

[1] The applicant served respondent with a combined summons claiming E50 000 and the respondent entered a Notice to Defend. Applicant filed an application for summary judgment in terms of Rule 32.

[2] This rule is intended to provide parties in business with expedient redress in instances where the other party has no *bona fide* defence to a claim. It was introduced in England by Order XIV under the Judicature Acts. It was according to their **Lordships** in **Meek v Kruger 1958 (3) S.A. 154 at 156** a procedure by which:

> *"a plaintiff was able by means of summary proceedings to obtain a final judgment when there was no real bona fide defence to an action".*

[3] At the same time it was never "*intended to shut* (a defendant) out in the action. It was "*intended to prevent sham defences from defeating the rights of parties by delay and at the same time causing great loss to the plaintiffs who were endeavoring to enforce their rights*", as propounded by **Lord Hatherely** in **John Wallingford v The Director of the Mutual Society and Another (1880) 5 A..C. 685 at 700.**

[4] In matters such as this, it is prudent once the court has satisfied itself that the applicant has alleged sufficient facts to establish a cause of action to turn to the affidavit resisting the summary judgment and enquire as to the:

> *"a) nature*
> *b) the grounds of defence*
> *c) the material facts relied upon to establish such a defence"*

as highlighted in **Gilinsky and Another v Superb Landerers and Dry Cleaners (Pty) Ltd 1978 (3) S.A. 807 at 810**.

[5] I have perused the applicant's combined summons together with the affidavit in support of the summary judgment application and conclude that the applicant has established a cause of action.

[6] The respondent contest applicant's claim as follows:

> *"**AD PARAGRAPH 2.1 AND 2.2***
>
> *4.1 The contents herein are denied and the plaintiff is put to strict proof thereof. In particular I deny that I have no bona fide defence to plaintiff's claim and that I have entered an appearance to defend solely for purposes of delaying the action.*
>
> *4.2 I do have a defence to the plaintiff's claim as pleaded in the Defendant Plea served on the Plaintiff's attorneys on the 14th February 2012.*
>
> *4.3 I point out that I do not trade as Indelebuli Tractor Service but that is the trading name of Brothers-In-Arms Investment (Pty)*

Ltd a company duly incorporated and registered in terms of the laws of Swaziland. I am advised and verily believe, therefore, that the plaintiff should have instituted his action against Brothers-In-Arms Investment (Pty) Ltd trading as Indelebuli Tractors and not me i n my individual capacity.

4.4 In particular I point out that in terms of the agreement sued on the plaintiff, after paying the full purchase price, had to come to Indelebuli Tractor Services' premises at Siteki to take delivery of the tractor. The tractor is still at the premises of Indelebuli Tractor Service and the plaintiff is still at liberty to come to Siteki to take delivery of the tractor.

4.5 I deny, therefore that I have breached the agreement by failing to deliver the tractor to the plaintiff or at all. In terms of the agreement it was the plaintiff who had come to the premises of Indelebuli Tractor Services to take delivery of the tractor.

4.6 I deny further that I am not indebted to the plaintiff in the sum of E50,000.00 or at all and Plaintiff is put to strict proof thereof. I deny that the plaintiff ever demanded payment of the sum ofE50,000-00 from me".

[7] In **Tribute Investment (Pty) Ltd v H and E Company (Pty) Ltd 1033/11 Ota J.** wisely states:

"*I am of the firm view notwithstanding the fact that the defendant is not required at this stage to set out its defence with precision or exactitude required of a plea, that for the allegation contained in the defendant's affidavit to satisfy the requirements of Rule 32*

*(4)(a), they must be made **bona fide**, must be equivocal, and must contain sufficient material facts upon which the allegations are based to enable the court to reach the conclusion that a triable issue is raised or that there ought for some other reason to be a trial of the claim or part of it".*

[8] Defendant informs the court that when the agreement was entered to, it was between the plaintiff and Brothers-in-Arms Investment (Pty) Ltd trading as Indelebuli Tractor Services. It was pointed out during viva voce submissions that the payment was made into defendant's account and the receipt subsequently issued by defendant did not reflect Brothers-in-Arms Investments (Pty) Ltd. Defendant's counsel responded that at the time of the agreement Brothers-in-Arms Investments (Pty) Ltd had no account. This of course is not in defendants' affidavit and it is therefore inadmissible. Even if it were in defendants' affidavit it meant that Brothers-in-Arms Investments (Pty) Ltd was not ripe for operating any business, and in that ground alone, plaintiff cited the correct defendant.

[9] Defendant further avers that plaintiff ought to have come and collected the merx.

[10] It is common cause as reflected in the courts file that the plaintiff obtained a *rule nisi* for cancellation and attachment of respondent's movable in respect of the agreement between the two parties. This rule was confirmed on 3rd February 2012. The summary judgment application was lodged on 28th February 2012 and in its affidavit resisting summary judgment, defendant does not aver that the tractor was attached. It is untenable that a deputy sheriff armed with a court order to attach defendant's movable would leave out the

tractor. This accords with the averment by plaintiff that as appears at paragraph 5.2 that:

> *"I went to Siteki on various occasions and the defendant failed to give me the possession of the tractor as undertaken*".

[11] In the circumstances it is my considered view that the defendant has no *bona fide* defence but merely raises a sham defence which must fail.

[12] The following orders are entered in favour of plaintiff:

1. Plaintiff's application is upheld.
2. Defendant is ordered to pay plaintiff the sum of E50,000.00.
3. Interest at the rate of 9% per annum a *temporae morae*
4. Costs of suit.

DLAMINI J.
JUDGE

For Plaintiff: **W. Maseko**
For Defendant: **X. Mthethwa**