IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE No.1545/2011**

In the matter between:-

SWAZILAND DEVELOPMENT AND SAVINGS BANK t/a SWAZI BANK **PLANTIFF**

AND

NEVILLE RENE HOUAREAU **DEFENDANT**

CORAM : OTA J

FOR PLANTIFF : MR. BHEMBE

FOR DEFENDANT : MS. BOXSHALL - SMITH

JUDGMENT

OTA J.

[1] The plaintiff sued out combined summons against the Defendant. Thereafter the Defendant filed a notice of intention to defend. The plaintiff then delivered a declaration, which he followed up with a summary judgment application pursuant to Rule 32 of the Rules of this court, contending for the following reliefs against the Defendant:- viz:-

1.1 That summary judgment be entered against the Defendant for payment of the sum of E55,862.64 (fifty five thousand eight hundred and sixty two Emalangeni sixty four cents).

1.2 Interest at the rate of 9% per annum.

1.3 Costs of suit.

1.4 Further and/ or alternative relief.

[2] In the affidavit in support of the summary judgment application, the deponent one Babhekile Dlamini, deposed to the belief that there is no *bona fide* defence to the claim and the notice of intention to defend has been filed purely for the purpose of delaying the action.

[3] The facts upon which the plaintiff contends for the reliefs can be deciphered from it's Declaration and are as follows:- that on the 9th of August and at Mbabane, the Plaintiff and the Defendant entered into a written contract of an application to open a VIP account and / or overdraft facility as per annexure "SDSBI" exhibited in these proceedings. That in terms of the contract the Defendant requested the amount of E 50 000.00 for said overdraft facilities. The period of payment of the overdraft was 12 months, at the prime interest rate of 1% per annum. The sum of E50, 000.00 plus interest was to be paid on or before the 9th August, 2006.

[4] The Plaintiff afforded the overdraft facilities to the Defendant as agreed up to the 9th August 2006, and

thereafter from time to time at the Defendant's special instance request on the terms of the application to open the VIP account and / or overdraft facility, in order to advance the Defendant's affairs as it appears from the statement of account marked *"SDSB2"*. That the Defendant from time to time deposited various amounts which were credited to his VIP account to reduce the overdraft as is clearly shown in annexure *"SDSB2".*

[5] That by the 14th April, 2011, the balance owing by the Defendant in terms of the VIP account overdraft facility, amounted to E 55, 862.64 as is evidenced by annexure "SDSB3". That the Plaintiff had written a letter to the Defendant demanding payment, when the balance owing was E 52, 191.46 as is shown in annexure "SDSB4".

[6] That the Defendant is therefore indebted to the plaintiff in the sum of E 55, 862.64, which amount is now due

and owing and which the Defendant refuses to pay despite several demands.

[7] The parties filed their respective heads of argument. When this matter served before me for argument on the 18th of January 2012, Mr. Bhembe learned counsel for the Plaintiff, promptly abandoned the point he raised in *limine, i*n paragraph 3 of the Plaintiff's heads of argument in relation to the non-stamping of the Defendant's answering affidavit in contravention of Section 7 (1) of the Stamp Duties Act, as this issue had been sufficiently explained and laid to rest by Ms Boxshall – Smith, counsel for the Defendant, in the Defendant's heads of argument. This point in *limine* is thus struck out.

[8] In the same vein I find that I must also dismiss the point in *limine* raise by Ms. Boxshall – Smith in paragraph 22 of the Defendants heads of argument. This point of law questioned the status of the deponent of the Plaintiff's founding Affidavit and Replying

affidavit, one Babhekile Dlamini. Ms Boxshall - Smith questioned the designation of the deponent in these two processes, contending that in the Founding Affidavit the deponent was designated the legal adviser of the Plaintiff, whilst in the Replying Affidavit, the deponent was designated senior manager, legal services of the Plaintiff. Ms Boxshall – Smith thus wondered whether the said Babhekile Dlamini was one and the same person.

[9] Mr. Bhembe has offered an explanation which I consider plausible in these respects, which explanation is that as at the time of swearing of the founding Affidavit, the deponent held the position of legal adviser, but had been promoted to the position of senior manager legal services, at the time of the Replying Affidavit. I accept this explanation. More so as I have taken the liberty of scrutinizing and comparing the signature of the deponent, as it appears on both processes and they are in substance the same. This point taken in *limine* is thus dismissed accordingly

[10] The foregoing said and done, it is apposite for me to pause at this juncture to recount the cardinal principles that guide the court in a summary judgment application, as is demonstrated by case law. The cases are legion. It will suffice to my mind, however, to visit one or two of them in these circumstances.

[11] In the Supreme Court of Swaziland case of **Zanele Zwane v Lewis Store (PTY) Ltd t/a Best Electric, Civil Appeal no. 22/07, Ramodibedi JA** (as he then was) speaking the mind of the court, enunciated these guiding principles in the following words:-

> *"It is well recognized that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the appearance to defend has been made*

solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence..."

[12] Similarly, in the case of ***Mater Dorolosa High School v R. J. M. Stationery (PTY) Ltd, Appeal case no. 3/2005***, the court declared as follows:-

"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."

[13] See also ***Musa Magongo v First National Bank (Swaziland) Appeal case no. 38/1999, Busaf (PTY) Ltd v Vusi Emmanuel Khumalo t/a Zimeleni***

Transport, Civil case no. 2839/08, ***Supa Swift (Swaziland) (PTY) Ltd v Guard Alert Security Services Ltd, Civil case no. 432/09***, ***MTN Swaziland v ZBK Services and another, case no 3279/2011***.

[14] In honour of the Rules, it is on record that the Defendant filed an 11 paragraph affidavit resisting this summary judgment application. The court is required by the Rules to scrutinize the Defendant's affidavit resisting summary judgment, to see if same raises any triable issues that would entitle the court to decline summary judgment.

[15] The only question arising at this juncture therefore, is:- whether there are any triable issues raised in the Defendant's affidavit disabling this summary judgment application?

[16] Now, a close reading of the Defendant's affidavit, reveals that the Defendant admits part, not the whole

of the plaintiff's claim. This fact is clearly evident from the Defendant's averments in paragraph 9.1 of his affidavit, where he declared thus:-

> *"9.1 The contents of this paragraph are denied in so far as it relates to the debt amount been (sic) E 55,862.64 (Fifty five thousand eight hundred sixty two Emalangeni and sixty four cents) and the plaintiff is put to the strictest proof thereof except to state that the Defendant does acknowledge to be indebted to the plaintiff in the amount of E 51, 415.21 (fifty one thousand four hundred fifteen Emalangeni twenty one cents)…"*

[17] It is the Defendant's contention that the amount of E 51, 415.21, admitted, was provided to it by the plaintiff's branch manager, one Mbuso Mavuso, upon a verbal request for a statement. This fact is disputed by the plaintiff. Suffice it to say that the fact remains that Defendant admits liability for the sum of E51, 415.21 out of the amount claimed. The natural progression of events in the face of this admission, would be that the

court should proceed to judgment for the amount admitted, which the Defendant is liable to pay to the Plaintiff. Ms. Boxshall- Smith concedes as much in oral submissions before the court. The only snag I find in these admissions and concessions by both Defendant and his counsel, is that the Defendant in an apparent effort to offset part- of the amounts owed, laboured to set up a counterclaim to same.

[18] The gravamen of the Defendant's counterclaim is that the plaintiff loaned one Airfix Aviation (PTY) Ltd, an amount of E 308,000.00. That Airfix Aviation (PTY) Ltd settled the debt owing to the plaintiff with an over payment of the sum of E 12, 190.00.(Twelve thousand one hundred ninety Emalangeni). It is this amount of E12. 190.00 which said Airfix Aviation (PTY)Ltd allegedly over paid the Plaintiff in the transaction between them, that the Defendant urges as a counterclaim in these proceedings.

[19] There is no doubt, and as rightly contended by the Defendant, that generally, a counterclaim would

operate as a defence to a summary judgment, more especially where the amount of the counterclaim is more than the amount of the claim in convention. This is the position of the law in this jurisdiction, as has been ably demonstrated by case law over the decades.

[20] A case of reference is my decision in the case of ***MTN Swaziland v ZBK Ltd and another Supra***, at paragraph 10, where I adumbrated upon this principle of law with reference to the work of **Van Niekerk et al, in the text Summary Judgment, A Practical Guide, Butterworths, 1998 at pages 9-35 and 9-36,** where it is stated as follows:-

> *"An unliquidented counterclaim does constitute a bona fide defence to the plaintiff's liquidated claim. A defendant may, accordingly rely on an unliquidated counterclaim to avoid summary judgment even when he admits owing a liquidated amount in money to the plaintiff.*

There is no requirement that the counterclaim should depend upon the same facts as those upon which the plaintiff's claim is based. Any unliquidated counter claim, even when it depends upon facts and circumstances differing entirely from those forming the basis of the plaintiff's claim, may be advanced by a defendant and in law constitutes a bona fide defence in summary judgment proceedings."

[21] Furthermore, in the case of **Busaf (PTY) Limited v Vusi Emmanuel Khumalo t/a Zimeleni Transport (Supra)** at paragraph 22, the court declared as follows:-

"(27) In this regard, the learned authors Van Niekerk et al, summary judgment – A Practical Guide Butterworths, 2004 say the following at 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 plaintiff's 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 plaintiff's claim, only then is the counterclaim a bona fide defence to the plaintiff's claim. Should the defendant have a liquidated counterclaim with a quantum less than that of the plaintiff's claim, or if the quantum of the defendant's unliquidated counterclaim is less than that of the plaintiff's claim, the defendant should in order to advance a bona fide defence, pay in the balance".

[22] Similarly, in the text. **The Civil Practice of the Supreme Court of South Africa, 4th edition, page 444, the learned authors Herbstein and Van Winsen, state thus:-**

"It is open to the defendant to raise a counterclaim to the plaintiff's claim. In this case also, sufficient detail must be given of the claim to enable the court to decide whether it is well founded... it must be of such a nature as to afford a defence to the claim".

[23] The natural question in the face of the authorities detailed ante is: Does the Defendant's counterclaim

exhibit the requisite characteristic to afford a defence to the claim instant? My answer to this poser must be in the negative. I say this because in the first instance, the amount of E 12, 190.00 urged in reconvention, is an amount owing to Airfix Aviation (PTY) Ltd which is not a Defendant in these proceedings. I hold the view that the position of the law that a counterclaim arising from facts and circumstances differing entirely from the plaintiff's claim can constitute a defence to a summary judgment application, presupposes, that such a counterclaim must relate to a debt owing to the Defendant or, in respect of which the Defendant has the authority to recover.

[24] In casu, the counterclaim relates to a debt owing to Airfix Aviation (PTY) Ltd, a corporate legal entity, with a personality distinct from that of its members, shareholders and Directors and having the capacity to sue or be sued *eo nomine* . I am thus firmly convinced, that the mere fact that the Defendant who has been sued in his personal capacity, is a Director of Airfix

Aviation (PTY) Ltd, confers him with absolutely no standing to urge the alleged debt of E 12, 190.00 owing by the plaintiff to Airfix Aviation (PTY) Ltd, in these proceedings. This is more so as there is no resolution of the board of Directors of AirFix Aviation (Pty) Ltd authorizing the Defendant to recover the said amount of E12,190.00 from the Plaintiff, and none is urged in these proceeding. Rather the course that Ms Boxshall – Smith proposes, is that the court should grant summary judgment based on the alleged counterclaim premised on the debt owing to Airfix Aviation (Pty) Ltd, thereafter, the board of Airfix Aviation would pass the necessary resolutions to regularise the action. This proposition is clearly putting the carte before the horse and cannot be sustained. I have come across no precedent that gives me the legs to proceed upon this proposition and none is urged in these proceedings. To travel this route will mean this court travelling in the realm of conjecture. This is not allowed in law.

[25] More to the foregoing, is as already demonstrated ante, that for the liquidated counterclaim of E 12, 190.00, which is less than the claim in convention, (if I were minded to countenance same) to constitute a defence in these proceedings, the Defendant must have paid in the balance. It cannot be gainsaid that the Defendant failed to satisfy this position of our law, as no balance of the amount of the alleged counterclaim has been paid. The letter of the 24th January 2012, written by Ms Boxshall-Smith, to this court, exhibiting the photocopy of a cheque in the amount of E39,225.21 which she says is payable to the Plaintiff, in the event the court gives judgment in that amount, does not constitute such payment. It is beyond controversy from the totality of the foregoing, that the alleged counterclaim has no legs to stand upon and it is discountenanced in its entirety.

[26] Since the Defendant admits owing the sum of E 51, 415.21, the only question that remains to be answered, is, whether there is any triable issue raised by the

Defendant in his affidavit to defeat summary judgment for the balance of 4, 447.43 (four thousand, four hundred and forty seven Emalangeni, forty three cents) from the original claim.

[27] The defence which the Defendant struggled to raise to the balance of the claim is as depicted in paragraphs 9.2 and 9.3 of his affidavit as follows:-

> *"9.2 On the 15th September 2010, I wrote a letter to Mrs. T. Shabangu the credit administrator and informed her that I was not happy with the way the plaintiff was administering my accounts, no response was ever received from the plaintiff. (A copy of the letter is annexed hereto marked "A").*
>
> *9.3 On the 20th September 2010, I wrote another letter to the Manager of Swazi Bank and requested a settlement figure, yet again I received no response (a copy of the letter is annexed hereto marked "B")".*

[28] I have taken the liberty of scrutinizing annexures “A” and “B” and I find that they are letters written by the Defendant in his capacity as a Director of Airfix Aviation (PTY) Ltd, to the Plaintiff, complaining about the handling of the accounts of Airfix Aviation (PTY) Ltd. There is absolutely no queries or complaints regarding the Defendant’s personal account with the plaintiff. Ms Boxshall – Smith conceded as much in oral argument, albeit, arguing that annexures A and B were urged to demonstrate a pattern of the Plaintiff’s attitude towards the accounts of the Defendant which it holds. I hold the view contrary to Ms. Boxshall- Smiths stance in oral argument, that the mere fact that in exhibit B, the plaintiff was requested to close the Defendant’s personal account with the plaintiff, amongst others, does not detract from the fact that there are no particulars of complaints relating to Defendant’s personal account, in annexure B.

[29] The mere fact that in annexure B, the Defendant requested the Plaintiff to close his personal account and

to communicate to him a statement of any amount owed to or owing by the said account, does not constitute a defence, without more, especially in the face of the fact that the particulars of the complaints in annexure B, relate to the account of Airfix Avation (Pty) Ltd, and not to the Defendants personal account. What constitutes the defence which the Defendant sought to urge is thus not evident to me on the papers.

[30] In the face of the absence of any material facts urged in relation to the Defendant's personal account with the Plaintiff, the defence remains in the realm of conjective and surmise, thereby adding no sustenance to the Defendant's alleged defence.

[31] The Defendant has thus failed to urge upon the court the material particulars of his defence, to enable the court envisage a triable issue. This state of affairs gives me no legs at all, to exercise my discretion in favour of the Defendant, by allowing him to proceed to the realm of trial, for this part of the claim.

[32] In conclusion, a restatement of the words of **Zulman J,** in the case of **Nedperm Bank Ltd v Verbin Projects cc 1993 (3) SA 214 at 224 D- E**, as captured by the court in **Busaf Pty Ltd v Vusi Emmanuel Khumalo t/a Zimeleni Transport (Supra) at paragraph (29),** are germaine in these circumstances. **Zulman J** declared thus:-

> *"...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".*

[33] This is not such a case. No such triable issue emerges from the Defendant's affidavit to defeat the full claim of E55,862.64 which is based on the Defendant's statement of balance dated 14th April, 2011, annexure SDSB3. In the light of the totality of the foregoing, this summary judgment application succeeds and I accordingly make the following orders:-

1. That the Defendant be and is hereby ordered to pay the sum of E55, 862.64 owed to the plaintiff.

2. That the Defendant be and is hereby ordered to pay interest on the judgment sum at the rate of 9% per annum.

3. Costs to follow the event on the ordinary scale.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE ……. DAY OF ……2011

OTA J.

JUDGE OF THE HIGH COURT