THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1479/11

In the matter between:

R. V L INVESTMENTS (PTY) LTD **Plaintiff**

And

CROSS CONTINENTAL CARIERS **Defendant**

Neutral citation:	**R L V Investments *v* Cross Continental Carriers 1479/11 [2012] SZHC 67 (12th April 2012)**
CORAM:	**M. Dlamini**
Heard:	**20th March 2012**
Delivered:	**12th April 2012**
For the Plaintiff:	**W. Maseko**
For the Defendant:	**S. Zikalala**

Summary judgment – bona fide defence –lack of material facts establishing bona fide defence – claim in reconvention – insignificant amount incapable of set off.

[1] This is an application in terms of Rule 32. The plaintiff filed a simple summons and subsequently a declaration seeking for payment against defendant for the sum of E59 400-00 as due and owing following delivery services at the behest of defendant emanating from an oral contract.

[2] The terms of the contract as highlighted at paragraph 5 page 7 of the book of pleadings:

> "5. *The terms of the agreement were as follows:*
>
> *5.1 That the plaintiff would transport goods and deliver them at different intervals and at different destinations at the behest of the defendant at its usual price rate.*
>
> *5.2 That the defendant would pay plaintiff's usual rates for transportation and carrier services between various destinations within 30 days after receipt of the invoice from the plaintiff in respect of any carriage services rendered by the latter".*

[3] In its declaration, the plaintiff attached various invoices and a tabulated statement of account collectively marked annexure "RV1". Defendant served a notice to defend. Plaintiff subsequently lodged the application before court. It would appear from the book of pleadings that on the same day, defendant filed a plea, together with a counter-claim and later an affidavit resisting summary judgment.

[4] **Her Lordship Ota J. in Supa Swift (Swaziland) (Pty) Ltd v Guard Alert Security Services Ltd, Case No. 4328/09** well articulated the nature and characteristics of a summary judgment as:

> "*[10]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 pleading, hearing evidence o f 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 ejectment or for delivery of specified movable property.*
>
> *[11] Summary judgment therefore by its characteristic features, shuts the door of justice in the fact 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 of trepidation. This is to prevent foreclosing a defendant who may otherwise have a triable defence from pleading to the plaintiff's case.*

[5] The duty of this court is to adjudge on firstly, plaintiff's cause of action and secondly, defendant's defence. The rationale for the court to scrutinise plaintiff's cause of action is because no defendant is expected to answer on averments which in law do not disclose any cause of action. The defendant need not come to court to assert such. The court, *mero motu*, is duty bound to dismiss an action which does not disclose the nature of the claim.

[6] Has the plaintiff set out in his declaration sufficient averments with particularity and conciseness so as to call upon the opposite party to defend, if he is so inclined, the action. The answer lies in plaintiff's declaration. In *casu*, plaintiff avers at page 7 from paragraph 4-11:

> "*4. On or about 15th February 2010 at Matsapha, the plaintiff and the defendant entered into an oral contract of carriage wherein the plaintiff agreed to transport goods at the behest of the defendant to different destinations and at different times. The plaintiff was represented by its director, Sibusiso Ndzinisa and the defendant was represented by Claude Govender.*
>
> *5. The terms of the agreement were as follows:*
>
> *5.1 That the plaintiff would transport goods and deliver them at different intervals and at different destinations at the behest of the defendant at its usual price rate.*

5.2 That the defendant would pay plaintiff's usual rates for transportation and carrier services between various destinations within 30 days after receipt of the invoice from the plaintiff is in respect of any carriage services rendered by the latter.

6. Pursuant to the agreement, the plaintiff rendered carriage services on behalf of the defendant at different intervals from the 15th February 2010 to the 28th March 2011. Different invoices were issued to the defendant by the plaintiff in respect of the above mentioned services.

Annexed hereto and marked 'RV1' are copies of the different invoices that were issued by the plaintiff to the defendant in respect of the services rendered.

7. All the invoices that have been issued by the plaintiff for the services rendered accumulate to an amount of E59,400.00 (Fifty nine thousand four hundred Emalangeni). No payment had been forthcoming from the defendant after the issue of the invoices for the services rendered notwithstanding the lapse of the 30 days period agreed upon for the payment of same.

8. As a result, the defendant owes the plaintiff the amount of E59,400.00 being the amount due for transportation services rendered by the plaintiff at the instance of the defendant.

9. Demand was made by the plaintiff to the defendant on numerous occasions calling upon the defendant to settle the amount o wing but the

defendant either failed and /or neglected and / or refused to settle the said amount of E59,400.00.

10. The aforesaid amount of E59,400.00 is now due, owing and payable by the defendant.

11. Despite demand being made, the defendant either refuses and /or neglects and / or ignores to make payment of the sum of E59,400.00.

[7] To summarise plaintiff's cause of action, plaintiff and defendant entered into an oral agreement at Matsapha on 15th February 2010. The terms of the contract were that plaintiff would transport goods to various places on behalf of defendant for an agreed price set out to be plaintiff's usual rate. Payment would be due within 30 days after receipt of invoices by defendant. Plaintiff duly discharged the services on behalf of defendant and invoices delivered accordingly but defendant failed or neglected to pay even upon demand.

[8] It is my considered view that from the totality of the above assertion, plaintiff has established the cause of action.

[9] I now turn to consider the principles governing summary judgment application as propounded in the *locus classicus* case of **Maharaj v Barclays Bank Ltd 1976 (1) S.A. 418 at 426** where it was held:

"*Accordingly one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts in the sense that a 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 grounds 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.*

[10] In brief, there are two hurdles to be crossed by the defendant in summary judgment applications: defendant is to 'fully' disclose the nature and ground of his defence and (ii) *ex facie* set out facts pointing a bona fide and good defence.

[11] Corbett J. A. in **Maharaj** *supra* at page 426 defines the word '*fully*' as "*it connects, 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 to decide whether the affidavit discloses a bona fide defence. At the same time the*

defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine by the standards of pleadings".

[12] It is against the backdrop of the legal position as laid down in **Maharaj** *op. cit.* that I now examine the averments as set out in defendant's affidavit resisting summary judgment.

[13] I must mention from the onset that it is not clear on the face of the pleadings by defendant on the dates of their filing. However, one can deduce from the Commissioner's stamp that the affidavit resisting summary judgment was deposed to on 8th August 2011. The plea and counter claim were served on plaintiff on the 12th August 2011, the same day in which the application for summary judgment was filed.

[14] The affidavit resisting summary judgment reads at page 5 paragraph 3 - 5.4 of the book of pleadings:

> *3. I have read the plaintiff's application for summary judgment and the affidavit in support thereof and wish to respond thereto as hereunder set-out.*

4. Ad Paragraph 1-2

Save to deny that the contents of plaintiff's affidavit are true and correct, the aggregate of the contents of these paragraphs are not at issue.

5. Ad Paragraph 3-4

5.1 The contents of these paragraphs are denied as if specifically traversed and plaintiff is put to strict proof thereof;

5.2 I deny that defendant has no bona fide defence to plaintiff's claim and that defendant has entered appearance to defend merely for delay;

5.3 I submit that defendant is not indebted to plaintiff in the amount of E59,400.00 (Fifty nine thousand four hundred Emalangeni) and that this amount is due owing and payable by defendant to plaintiff by virtue of the fact that the amounts stated in the invoices issued by plaintiff do not correlate with the rates agreed upon by the parties for each transaction;

5.4 It was agreed upon by the parties that plaintiff would issue invoices showing the proper amounts based on the rates agreed upon".

[15] From paragraph 5.3 and 5.4 captured above, can this court safely conclude that the defendant has disclosed his defence "*with sufficient particularity*

and completeness to enable the court to decide" that he has disclosed a bona fide defence.

[16] Defendant does not dispute the existence of the oral agreement and when payment would fall due, nor does he deny that the agreed rate was at plaintiff's usual rate neither that plaintiff rendered the services agreed upon. All he states is that the rate reflected in the invoices does not "*correlate*" with the rate agreed upon. Whether this rate is the plaintiff's usual rate or any other rate is not clear. Nor does he state the rate agreed upon. He does not state how much then was due to plaintiff. The court is called upon to speculate that the sum claimed is higher than that envisaged by defendant.

[17] Paragraph 5.4 also does not assist the court in clarifying the basis and ground for defendant's defence. The defendant states that "*it was agreed upon the parties that plaintiff would issue invoices showing the proper amounts based on the rates agreed upon*". It is not clear whether this agreement was part of the initial oral agreement or a subsequent one following receipt of invoices that did not correlate with "*agreed upon"* rates. The court is called upon to fill in these gabs. Unfortunately it cannot do so as it would be tantamount to drawing up a contract on behalf of the parties which our law does not permit. In **Herb Dyers (Pty) Ltd. v Mahomed and Another 1965 (1) S.A.** page 31 at 32 the defendants had alleged that

plaintiff had not supplied them with details showing how the total sum claimed was arrived upon. The court held that such did not disclose sufficient material facts to constitute a bona *fide defence* to plaintiff's claim and upheld summary judgment.

[18] I raise the above queries but fully alive to the position of the law that the defendant in such proceedings need not outline in details his defence. However, the defendant is expected to allege material facts which will enable the court to say given a chance to prove his defence is a good one and he is honest in his attitude. With the *lacuna* demonstrated herein, it is difficult for this court to hold so.

[19] The defendant filed his plea and a claim in reconvention. However, in his affidavit resisting summary judgment, the counter claim is not alleged. I now consider the two pleadings in order to ascertain whether defendant has a *bona fide* defence in view of the position that this court would be slow in shutting the door against defendant based on the technical point that his affidavit falls far too short of a good and honest defence whereas a plea is at the disposal of the court.

[20] Without necessarily determining the merits and demerits of the counter-claim, one can say from the onset that the claim by plaintiff is for the sum of

E59,400.00 while defendant's counter-claim is for E11,560.17. It is difficult again to envisage how defendant views this as a defence in the light of the fact that the two figures are in far disparity. How it can be said such a figure as E11,560.17 could set off a claim of E59,400.00 thereby exonerating defendant of its liability entirely is not clear. On that point alone defendant basis for resisting the summary judgment should fail whereas a plea is at the disposal of the court.

[21] A case in analogy is **Trotman and Another v Edwick 1950 (1) S.A. 376** where the court was seized with the question as to:

> *"….whether or not a defendant who is in the position that he must admit the claim against him but who has a counter-claim which is not capable of set off is entitled to delay judgment on the claim and payment by pleading in the manner adopted in this case. If he is so entitled then his plea discloses a defence and if he is not so entitled then his plea does not disclose a defence".*

[22] In response to this question the court held at page 376:

> *"…..because he had alleged claims of smaller amount than plaintiffs' which were not capable of being set off against the claim, the defendant was not entitled to claim that the clearly admitted right of plaintiffs' to a judgment should be postponed until his counter-claim had been adjudicated upon".*

[23] I see no reason why this court should depart from the above position.

[24] I now turn to the defendant's plea which reads as follows from page 57 – 59 paragraphs 3-6.3:

"3. ***<u>Ad paragraph 5.1</u>***

The contents of this paragraph are admitted.

4. ***<u>Ad paragraph 5.2</u>***

4.1 *The contents of this paragraph are denied and plaintiff is put to proof thereof;*

4.2 *It was agreed between the parties that the transportation costs would be at a rate pre-determined between the parties for each transaction;*

4.3 *It was a further term of the agreement between the parties that plaintiff would perform all the duties that would be performed by defendant in the process of the transportation of the goods, more particularly, the completion of all documentation pertinent to customs and excise and in such manner as required by law.*

5. ***<u>Ad paragraph 6-8</u>***

5.1 *The contents of these paragraphs are denied as if traversed and plaintiff is put to proof thereof;*

5.2 Defendant denies that it is indebted to plaintiff in the amount of E59,400.00 (Fifty nine thousand four hundred Emalangeni only);

5.3 Defendant further denies that the invoices attached to plaintiff's summons represent all of the carriage services rendered by plaintiff to defendant;

5.4 Defendant further denies that it was agreed that payment was to be made to plaintiff after 30 (thirty) days of issuance of invoice.

6. <u>Ad paragraph 9-11</u>

6.1 The contents of these paragraphs are denied as if traversed and plaintiff is put to proof thereof.

6.2 Upon demand being made on it by plaintiff, defendant advised that the invoices sent to it do not reflect the rates agreed upon between the parties at specific intervals. It was then agreed between the parties that plaintiff would rectify the invoices it had issued to defendant after which defendant would make payment to plaintiff according to the corrected invoices. Plaintiff has not corrected the invoices to reflect the rates agreed upon by the parties.

6.3 Defendant denies that the amount of E59,400.00 (Fifty nine thousand four hundred Emalangeni only) is due, owing and payable to plaintiff.

[25] I note that at paragraph 3 where defendant addresses plaintiff's averments at paragraph 5.1 which reads:

5.1 That the plaintiff would transport goods and deliver them at different intervals and at different destinations at the behest of the defendant at its usual price rate".

[26] Defendant in response pleads:

"*The contents of this paragraph are* "*admitted*". In other words defendant does not dispute that services would be rendered at plaintiff's "*usual price rate*". It is amazing therefore that at paragraph 4 in response to plaintiff's paragraph 5.2 that defendant vehemently denies the usual rate and refers to a pre-determined rate: Even here, he does not state whether there was a pre-determined rate for each of the 18 transactions as reflected in the statement nor is the court informed of this pre-determined rate.

[27] Another interesting averment by defendant is one which appears at paragraph 5.3 which reads.

"5.3 Defendant further denies that the invoices attached to plaintiff's summons represent all of the carriage services rendered by plaintiff to defendant".

[28] The use of "a*ll*" connotes that plaintiff has filed for a claim less than what was due and owing.

[29] In drawing up an inference from the proceeding highlights this court is guided by what was stated by **Professor Ellison Kahn "Contract and**

Mercantile Law 2nd Edition, Juta & Co. Ltd., Cape Town 1988 at page 6:

> *"… it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one …."*.

[30] It is the court's considered view that in the totality of the above circumstances, the defendant has not alleged material facts pointing to a *bona fide* defence.

[31] I therefore enter the following orders in favour of the plaintiff:

1. Application for summary judgment is upheld;
2. Defendant is ordered to pay plaintiff the following:
   i) Sum of E59,400.00;
   ii) Interest thereon at the rate of 9% per annum;
   iii) Costs of suit.

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M. DLAMINI

JUDGE