



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Reportable

Case No: 1266/2011

In the matter between:

SWAZILAND REVENUE AUTHORITY

PLAINTIFF

and

WEBSTER PRINT (PTY) LTD

DEFENDANT

Neutral citation : Swaziland Revenue Authority v Webster Print (Pty) Ltd (1266/11)
[2013] SZHC165 (9 AUGUST 2013)

Coram : MABUZA J:

Delivered : 9/8/2013

Summary : **Practice – Application for summary judgment – Sales Tax – Whether amount on Commissioners certificate is liquidated amount for purposes of summary judgment – Amount thereon prima facie proof of the correctness of the amount stated therein therefore inconclusive – not liquidated amount – Summary judgment refused.**

JUDGMENT

MABUZA J

[1] This is an application for summary judgment wherein the Plaintiff claims the following:

1. Payment from the Defendants of the sum of E1,318,925.65 (One million three hundred and eighteen thousand nine hundred and twenty five hundred Emalangeneni, sixty five cents).
2. Interest thereon at 2% per month calculated from the 4th April 2011;
3. Costs of suit;
4. Further and alternative relief.

[2] In its particulars of claim as amplified by its amended particulars the Plaintiff alleges that:

The Defendant who carries on business of a printing wholesaler at Mbabane was at all material times liable as a merchandiser of goods and services to pay to the Plaintiff sales tax on all goods imported into the Kingdom of Swaziland. That in terms of the Sales Tax Act of 1983 the Defendant was registered for the purpose of payment of sales tax under certificate of registration number STR 122. That as at the

4th April, 2011 the Defendant owed sales tax in the sum of E1,318,925.65 (One million three hundred and eighteen thousand, nine hundred twenty five hundred Emalangeni sixty five cents).

- [3] That pursuant to section 19 of the Sales Tax Act 1938, the Defendant is liable to a levy of 2% (two percent) interest per month on the outstanding amounts owing as from the 4th April 2011 until payment has been made.
- [4] The Defendant duly filed its affidavit resisting summary judgment. In its affidavit the Defendant raised three points of law in addition to its defence. I shall return to both the points of law and defence later on in this judgment. I must first deal with some procedural aspects to the matter herein which were raised by the Defendant.
- [5] After the Defendant had filed its affidavit resisting summary judgment, the Plaintiff successfully applied for leave to file a replying affidavit on the 24th June 2011 but only filed the said affidavit some two months later on the 30th August 2011.

- [6] After receipt of the Plaintiff's replying affidavit the Defendant:
- (a) Filed a notice in terms of rule 30;
 - (b) Filed an application to strike out and set aside new matter raised in the Plaintiff's replying affidavit;
 - (c) Raised three points of law in respect of the Plaintiff's application;
 - (d) The merits of the application.

Notice in terms of rule 30

- [7] The notice in terms of rule 30 filed by the Defendant challenged the late filing of the Plaintiff's replying affidavit as being an irregular proceeding and called for it to be struck out or set aside. The Defendant contends that the Plaintiff failed to serve the replying affidavit within seven (7) days as provided for in the Rule 6 (13) which provide that:

“within seven (7) days of the service upon him of the answering affidavit, the applicant may deliver a replying affidavit ”.

The defendant's further contention is that the Plaintiff filed the replying affidavit out of time without seeking its consent and without an order of

court condoning the late filing thereof as provided for in rule 27 (1) & (3) which state:

“(1) In the absence of any agreement between the parties, the Court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit”.

“(3) The court may on good cause shown condone any non-compliance with these rules”.

[8] As stated above the Plaintiff’s replying affidavit was delivered some two months after the Court had granted leave to the Plaintiff to file same. There is no evidence on file that the Plaintiff sought condonation from this Court to condone its non-compliance with its order given on the 24th June 2011. There is no evidence on record that the Plaintiff sought the agreement of the Defendant in order to file its replying affidavit late. The Plaintiff simply served the said affidavit without any apologies.

[9] The Defendant contends that by filing its replying affidavit out of time, the Plaintiff's conduct was prejudicial to it because it was unaware that the Plaintiff had not waived its right to deliver the said affidavit and still intended to deliver it despite the lapse of time. The Defendant further contends that the Plaintiff's affidavit prejudices it in that it does not serve any purpose in coming to grips with the real issue without delay and expense and that it serves no purpose other than to increase costs and to make summary judgment proceedings a trial than a procedure for determining whether a Defendant has a bona fide defence to a claim instituted against it.

[10] The Defendant further contends that this Court should not allow the Plaintiff to act in total disregard of the rules of this Court as this would set a bad precedent and send a message that other parties to litigation ought to be disregarded. Accordingly the Defendant submits that the replying affidavit be set aside as an irregular step with costs and the application for summary judgment be determined on the basis of the summons, affidavit in support of the application for summary judgment and the Defendant's affidavit resisting summary judgment.

[11] When the Court granted leave to the Plaintiff to file a replying affidavit it set no time limits but it was expected that the Plaintiff would adhere to the rules and file the pleading within the stated time. The Defendant's submissions imply that the Defendant no longer believed that the Plaintiff's affidavit would be filed and that the matter would proceed without it. The Defendant did not file any notice in terms of rule 30 (5) in order to move the matter forward. Instead the Defendant only filed a Rule 30 complaint after the Plaintiff had filed its replying affidavit.

[12] In addition to my comments above the authorities state that in order for an application under the rule to succeed prejudice relating to the proceedings should be shown see **De Klerk v De Klerk** 1986 (4) SA 424; SA **Metropolitan v Louw NO** 1981 (4) SA 329.

[13] Sub-rule (3) makes provision that the Court

“may set it aside ... or make any order as to it seems meet ...”;

This sub-section gives a court wide powers. The court has a discretion and it is not intended that an irregular step should necessarily be set aside. The

discretion must be exercised judicially on a consideration of the circumstances and what is fair on both sides. The Court is entitled to overlook in proper cases any irregularity which does work any substantial prejudice to the other party per Erasmus: Superior Court Practice page B1 193 (See also authorities cited at footnote 6 and 7).

- [14] The Defendant has not shown any substantial prejudice except that it has been inconvenienced by the Plaintiff's delay in filing its replying affidavit late. The application fails; costs will be in the course.

Application to strike out

- [15] The Defendant makes application to strike out paragraphs 5.1, 5.2, 5.3 and 5.4 of the Plaintiff's replying affidavit alleging that new facts have been set out in these paragraphs; such facts should have been included in the particulars of claim or affidavit in support of summary judgment. The Defendant further contends that the Plaintiff must make his case and produce all the evidence he desires to use in support of it in his founding affidavit; that the Plaintiff was not permitted to supplement its relief in its replying affidavit or to make a new case therein. Thus Defendant concludes with a prayer to strike out the stated paragraphs with costs.

[16] The answer to the Defendant's concern is found in Herbstein and van Winsen: The Civil Practice of the High Court of South Africa 5 Ed, Vol. 1 p. 429 where it is stated:

“As far as the alleged new matter is concerned, an Applicant is entitled to include in his replying affidavit evidence which serves to refute the case made out by the respondent in the answering affidavit”.

The above text was quoted with approval in the case of **James Groening v Benita Paiva**; Swaziland Supreme Court of Appeal case No. 22/2011 (unreported). That effectively puts the Defendant's submission to rest and the application to strike out new matter from the Plaintiff's replying affidavit is hereby refused; costs to be in the course.

[17] In order to deal effectively with the points of law raised by the Defendant it is seemly that I should deal first with the merits of the application for summary judgment because the merits are inexorably inter-linked therewith.

[18] It has been stated many times over and over again in many judgments emanating from our courts that an application for summary judgment is an extra-ordinary, stringent and drastic remedy in that it closes the door in final fashion to the Defendant and permits a judgment to be given without trial ...” per Tebutt JA (as he then was) in **Economy Investments v First National Bank of Pretoria Ltd.** 1996 BLR 828 (CA) at p. 83.

[19] “Consequently the remedy of summary judgment should be resorted to and accorded only where the Plaintiff can establish his claim clearly and the Defendant fails to set up a *bona fide* defence. While on the one hand the Court wishes to assist a Plaintiff whose right to relief is being balked by the delaying tactics of a Defendant who has no defence; on the other hand it is reluctant to deprive the Defendant of his normal right to defend, except in a clear case”. Harns p. B1 – 206.

[20] It is well established procedure that an affidavit resisting summary judgment should disclose a bona fide defence and triable issues. In **Swaziland Development Finance Corporation v Vermaak Jacobus Stephanus**, High Court case 4021/2007, Masuku J cited with approval the case of **Busy Fire**

Enterprises (Pty) Ltd v Marsh & Another (2005) 1 BLR 51 (CA) AT 56

G that:

“In resisting an application for summary judgment the Defendant does not have to establish a cast iron defence. It is sufficient if what he alleges to be true may be capable of being proved at the trial and if so proved would constitute a defence to the Plaintiff’s claim”.

[21] Does the Defendant’s affidavit meet the above standards? Rule 32 (4) (a) states:

“Unless on the hearing of an application under sub-rule 1 ... the Defendant satisfies the Court with respect to the claim or the part of the claim to which the application relates 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 ...”.

[22] The first point of law is the Defendant’s contention that the Commissioner’s certificate issued in terms of section 20 (2) of the Sales Tax Act, 1983 (the Act) does not give conclusive proof of the correctness of the amount stated

therein. Section 20 of the Act makes provision for the recovery of sales tax namely:

- “20 (1) Any amount of tax or interest payable in terms of this Act shall constitute a debt to the Government and shall be recoverable by the Commissioner in the manner hereinafter provided.
- (2) If any person fails to pay any tax or interest payable in terms of this Act when it becomes due or is payable by him, the Commissioner may file with any competent Court a certificate signed by him stating the amount of tax or interest owing by that person, and such certificate shall be prima facie proof of the correctness of such amount.
- (3) The Commissioner may in consequence of the provisions of subsection (2) institute proceedings for the sequestration of the estate of any person, and shall for the purposes of such proceedings be deemed to be the creditor in respect of any tax or interest payable by such person under this Act.”

[23] Mr. Ndlovu’s counter-argument is that it is clear from the Sales Tax Act that the intention of the Legislature was to render the certificate of the

Commissioner final and conclusive of the amount owing by an individual in terms of sales tax. To fortify his argument he stated that subsection (3) of the Act further gives the Commissioner the option of even instituting sequestration proceeding of the amount he has determined in terms of section 20 (3).

[24] The meaning of the words “*prima facie*” has been defined by different sources as follows:

Black’s Law: At first sight, on the first appearance; on the face of it; so far as can be judged from the first disclosure; Legal Information Institute: Prima facie may be used as an adjective meaning “sufficient to establish a fact or raise a presumption unless disproved or reputed”.

Wikipedia, the free encyclopedia: *Prima facie* is a Latin expression meaning on its first encounter, first blush, or at first sight

Legal definition: A fact presumed to be true unless it is disproved Oxford.

[25] If the argument is taken further and the rules in respect of the law of evidence are applied the meaning of a “*prima facie* case” simply is that a case has been temporarily made out by the Plaintiff which calls for a

Defendant to answer; a *prima facie* case does not mean that a case has been concluded. The Defendant still has to place his defence before the case is finally concluded.

[26] At paragraph 5.6 of the Plaintiff's replying affidavit, the deponent states that the Defendant requested copies of CCA 1/SAD 500 forms. Even though the Defendant is obliged to have its own copies the Plaintiff made available to it their own copies to enable it to reconcile its own accounts.

[27] After the Defendant had submitted these forms after reconciling its accounts, the Plaintiff implemented the necessary adjustments on the Defendant's STR account and issued the requisite Commissioner's certificate. This further illustrates the point that the Commissioner's certificate can be wrong and inconclusive and cannot found a cause for summary judgment which is final. Were the Court to grant summary judgment solely based on this certificate and the figures after further conciliation turned out to be wrong or inaccurate an injustice would be occasioned; there is no remedy at law for a Defendant who finds itself in these circumstances. Rebates can never adequately compensate a Defendant caught in a final judgment emanating from the

grant of summary judgment. Mr. Bhembe has correctly submitted that the Commissioner's Certificate is as a result of the continuous interaction between the Revenue Authority and its customers.

[28] I must therefore agree with Mr. Bhembe that the Commissioner's certificate in terms of section 20 (2) is not meant to be conclusive.

[29] The second point of law is that in so far as the Commissioner's certificate is not based on an obligation to pay an agreed sum of money and is not expressed that the ascertainment of the amount is a mere matter of calculation it does not constitute a liquidated amount as envisaged in on the Rules of Court to entitle the Plaintiff to apply for summary judgment.

[30] I have stated above that the Commissioner's certificate provides prima facie proof of the indebtedness of the Defendant and that Defendant would have to advance a competent defence to avoid a final judgment against it, the question that arises is whether or not the amount reflected therein is a liquidated amount of money in terms of Rule 32 (2) (b) which states:

“This rule applies to such claims in the summons as is one –
(b) for a liquidated amount in money”

[31] Mr. Bhembe contends that in order for the amount stated in the Commissioner’s certificate to qualify as a liquidated amount of money in terms of rule 32 (2) (b), a long discussion to ascertain the liquidity of the amount would be necessary. He further argues that the amount is neither agreed upon nor capable of speedy and prompt ascertainment because if I understand him correctly, the certificate merely reflects sales tax up to year 2011, penalties and interest on sales tax due as at April, 2011. It fails to reflect the sum of sales tax up to year 2011 in a manner that the ascertainment of the amount allegedly owing as sales tax up to the year 2011 is a matter of mere calculation capable of speedy and prompt ascertainment.

[32] In **Lecter Investments (Pty) Ltd v Narshi** 1951 (2) SA 464 (C) an application for an order of ejectment for failure to pay rent within seven days of due date, the statutory tenant averred that, as the landlord owed him an amount expended on essential repairs which the landlord had despite demand failed to carry out, his indebtedness was extinguished by way of set-

off. It was held that the set off operated since the landlord's indebtedness was liquid in the sense of being readily ascertainable, namely, capable of easy and speedy proof.

[33] In **Botha v Swanson & Co. (Pty) Ltd** 1968 (2) P.H. F85 (CPD) Corbett J put the test as follows:

“That a claim cannot be regarded as one for a” a liquidated amount in money” unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation”.

[34] It was held in **Fattis Engineering Co. (Pty) Ltd v Vendick Spares (Pty)** 196 2 (1) SA 736 (T) that the expression “debt or liquidated demand” should be construed to include a liquidated claim as known in the common law despite the fact that a special meaning is given to the words “liquidated demand” in Rule of Court 42 (T) (now rule 31). It was further held, in a claim for a specific sum of money “in respect of work done and material supplied ...”, that it was a debt or liquidated demand within the meaning of the then Transvaal rule 42 (now rule 31). The decision of the Court rested on the view that the factors necessary for the ascertainment of the sum due

were actually in existence: the current reasonable remuneration for the work done and the current market price for the materials supplied were known and from this information the sum could be readily ascertained; and the decision as to whether the amount of a debt is a matter left to the discretion of the court in each particular case (at page 738)

[35] In **Neves Builders & Decorators v Dela Cour** 1985 (1) SA 540 (c) AT 543-4 it was stated that in the exercise of its discretion under the wider test, the court must not look only at the summons in order to decide whether a claim is for a liquidated amount, of money, the defence as disclosed in the Defendant's opposing affidavit must also be taken into account.

[36] In *casu* the summons sets out the cause of action but does not base same on a liquidated amount but an assessment. The Plaintiff does not therein supports its claim or found its claim on the Commissioner's certificate. The certificate is an afterthought as it is then used to support the application for summary judgment. And as stated earlier it is only prima facie (inconclusive) proof of the correctness of the amount stated therein. The second point of law succeeds.

[37] The third point of law states that the statement of sales tax account and the enquiry on the account balances annexed with the Commissioner's certificate are irrelevant having not been pleaded and adopted by the Plaintiff's deponent & without setting out their relevance.

[38] The Plaintiff's response to this point of law is that the annexures attached to the Plaintiff's affidavit are clearly items of evidence and in particulars of claim or declaration one does not plead facts this being a legal issue.

[39] The point that Mr. Bhembe has raised relates to the Plaintiff's affidavit and that the contents of the annexures should have been pleaded in the affidavit. The law of evidence requires that both parties must establish the *facta probanda* in their affidavits. This principle was re-affirmed in **Radebe v Eastern Transvaal Development Board** 1988 (2) SA 785. The *facta probanda* are of two types;

Primary facts and secondary facts. Secondary facts are drawn from primary facts. Whatever evidence a party wishes to place before a court it must do so in an affidavit and is not allowed to simply refer to a bundle of documents such as those annexed to the Plaintiff's replying affidavit nor is it allowed to simply attach the documents. The deponent would have to identify what he relies in and incorporate it in the affidavit. In **Die Bros. (Pty) Ltd and Another v Telefon Beverages CC and Others** 2003 (4) SA 207 it was held:

“It was trite law that affidavits in motion proceedings served not only to define the issues between parties but also to place the essential evidence before the court. They had to contain factual averments that were sufficient to support the cause of action on which the relief being sought was based. Facts could be either primary or secondary. Primary facts were those capable of being used for drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to the primary facts, were called secondary facts. Secondary facts in the absence of primary facts, were nothing more than a deponent's own conclusions and, accordingly did not constitute evidential material capable of supporting a cause of action (paragraph (28) at 217 A/B-E) see and **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa & Others** 1999 (2) SA 279 (T): a distinction was drawn between primary and secondary facts, where the former was used as basis for inference as to existence or non-existence of inferred or

secondary facts. In absence of primary fact alleged, secondary fact is merely conclusion of fact. The primary facts from these documents are not pleaded in any of the deponent's affidavits. It was an attempt by the Plaintiff to belate or amplify its case.”

[40] I must agree with Mr. Bhembe and this point of law succeeds and the application stands to be dismissed on these points of law alone.

[41] The core issue in resisting the application for judgment is that the Defendant must disclose in his affidavit a *bona fide* defence. In deciding whether the Defendant has set out *a bona fide* defence the court will enquire whether (a) the defendant has disclosed the nature and grounds of his defence, 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 *bona fide* and good in law.

In **National Motor Company Ltd v Moses Dlamini** 1987 – 1995 SLR at 124 it was held that:

“The Defendant's affidavit must condescend upon particulars and should as far as possible deal specifically with the Plaintiff's claim and state clearly what the defence is and facts relied upon to support

it. It should also state whether the defence goes to the whole or should specify the part”.

[42] The defence should if proved at the trial constitute a good defence to the Plaintiff’s claim and that there is a reasonable possibility that the defence he advances may succeed on trial see **Shepstone v Shepstone** 1974 (2) SA 462 (N).

[43] I am enjoined to consider whether the facts alleged by the Defendant on the merits constitute a good defence in law and whether that defence appears to be bona fide **Maharaj v Barclays National Bank Ltd** 1976 (1) 418 **District Bank Ltd v Hoosain** 1984 (4) SA 544 (c). In order for the court to do this it must be apprised of the facts upon which the Defendant relies with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given to the Defendant.

[44] A perusal of the Defendant’s affidavit reveals the following:

At paragraph 6, the Defendant states that it denies that it was liable to pay sales tax on all goods imported into the Kingdom. These goods

are identified as paper, printing ink, binders and folders because after these bond with other goods manufactured in Swaziland by registered manufactures, they remain as an element or essential thereof in their completely manufactured condition and are exempt from sales tax. The Defendant further says that the goods or materials it imports are exempt from sales tax and annexes “WP1” which gives a list of the materials or goods approved by the Commissioner as being exempt from taxation in respect of the printing industry to which the Defendant belongs.

[45] The Defendant then tells us that it does returns for rebates on a monthly basis and pays the difference due for imported taxable items. The Defendant further says that the sales tax office contacted the Defendant before instituting these proceedings regarding unpaid taxes but the Defendant after reviewing its accounts found that it was tax compliant. The Defendant then contacted the officers of the Plaintiff challenging their statements of sales tax and in addition the Defendant requested some CCA1 (SAD 500) forms. The Plaintiff refused with these forms saying that they belong to other companies despite the fact that they were reflected on the Defendant’s statement.

[46] The Defendant has annexed “WP2”, “WP3”, “WP4” and “WP5” as correspondence sent to the offices of the Plaintiff challenging their statements of sales tax account.

[47] At paragraph 6.5 the Defendant says that it discovered that it was wrongly charged and that some charges meant for other of its companies were charged to it under STR number 122. The court was referred to Annexures”WP6”, “WP7”, “WP8” and “WP9”. It is not clear what the sum total of these annexures amount to and how that figure impacts on the figure which appears in the Commissioner’s certificate for example if the figure were subtracted from the Commissioners certificate to what sum would it reduce the amount therein reflected. This obviously would lead to an uncertain amount that fortifies the argument that the the amount that appears on the Commissioner’s certificate is not conclusive.

[48] At paragraph 6.7 the Defendant states that it was preparing to serve the Plaintiff with a request for further particulars because the Plaintiff’s claim lacked details regarding the type of goods imported by the Defendants to make it liable to pay sales tax. In my respectful opinion the Defendant

should be allowed to do this for it to get clarity on precisely what amount it owes to the Plaintiff.

[49] Similarly at paragraph 6.8 and 8.3 the Defendant refers to certain officers of the Plaintiff who are aware of the problems that the Defendant has with its account with the Plaintiff.

[50] While it is not incumbent upon the Defendant to formulate his opposition to the summary judgment application with the precision that would be required in a plea, nonetheless when he advances his contentions in resistance to the Plaintiff's claim he must do so with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action (see B1-222; Harms: Superior Practice); and in this case the Defendant has done so.

[51] In the circumstances the application for summary judgment is refused and the application is dismissed. Costs to be in the course.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Plaintiff : Mr. T.M. Ndlovu

For the Defendant : Mr. S. Bhembe