



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2268/2011

In the matter between:

THE SPAR GROUP LIMITED

Plaintiff

And

PLAZA SUPERMARKET (PTY) LIMITED

1st Defendant

THE HUB SUPERMARKET (PTY) LIMITED

2nd Defendant

MTS SUPERMARKET (PTY) LIMITED

3rd Defendant

ROBERT COLIN FOSTER

4th Defendant

LETICIA FOSTER

5th Defendant

Neutral citation: The Spar Group Limited v Plaza Supermarket (Pty) Limited and 4 Others (2268/2011) [2012] 05 SZHC (23rd January 2013)

Coram: M. Dlamini J.

Heard: 3rd August 2012

Delivered: 23rd January 2013

Summary judgment application – counter-claim raised – plaintiff raising a defence on counter-claim.

Summary: The plaintiff instituted actions proceedings by way of summons for a debt due and owing. The defendant does not dispute the claim by plaintiff but raises a counter-claim. Plaintiff raises a defence of mis-joinder to defendants' claim in reconvention.

[1] The issue before court is in *simpliciter* whether this court can safely grant plaintiff application in the light of the defence raised by defendant.

[2] In **Caxton Ltd v Barrigo 1960 4 S.A. 1 (T) 3 (H)** the court wisely propounded on Rule 32 which provides for summary judgment application in our jurisdiction:

“The rule provides a simple method of exposing of suitable cases without the high costs and long delays of trial action.”

[3] Citing the above case, **S. J. Van Kiekerk et al** in **“Summary Judgment a Practical Guide”**, 1998 at 1-5 eloquently describe summary judgment as:

“.that remedy in civil procedure which may be utilized as an independent, distinctive, unique and speedy debt collecting mechanism by creditors who wish to claim liquidated amounts in money, whether or not the claim is contained in a liquid document , and in circumstances in which the enforcement of the claim is delayed by a meritless appearance to defend. The remedy is also available to creditors who have claims for the delivery of specific movable goods and ejectment.”

[4] The circumstances of plaintiff's claim is briefly as follows:

- [5] The plaintiff, a company duly registered in terms of the company laws of South Africa and having its principal place of business in that country, duly purchased Nelspruit Wholesalers (Pty) Ltd, a business, as a going concern, thereby acquiring all its rights and assumed all its liabilities and obligations in 2006. 1st, 2nd and 3rd defendants had concluded a contract of sale in respect of supermarket commodities with Nelspruit Wholesalers (Pty) Ltd in 1991. 4th and 5th defendants stood as sureties.
- [6] In the course of their trade, 1st, 2nd and 3rd defendants acquired a retailer membership of the Spar Guild of Southern Africa (the Guild). This entitled the defendants to specific benefits in the event defendants satisfy certain conditions such as discounts and credit facilities purchases above certain limits.
- [7] It would appear that the defendants would, in settling their respective accounts with plaintiff set-off any amounts due to them by virtue of their membership to the Guild.
- [8] In February 2010 1st, 2nd and 3rd defendants terminated their membership with the Guild and ceased to conduct any business with plaintiff.
- [9] In March 2010 the parties reconciled their accounts. Plaintiff found that as 1st, 2nd and 3rd defendants were not members of the Guild on the “last day of the over-rider year as per paragraph 22 of summons, they were not entitled to set off the accounts claimed in the summons.
- [10] Defendants do not dispute plaintiff’s claim. They have, however raised a counter-claim in that during the course of their membership they paid over to the plaintiff franchise fees. Those fees included VAT and Sales Tax.

They have since discovered that franchise fees are exclusive of VAT and Sales Tax. As a result the plaintiff is indebted to the defendant of the overpayment amounts consisting of VAT and Sales Tax. Defendants point out further that as 20% of the sales was profit, sales tax was 9.7% of the retailer price. In the result plaintiff is indebted to defendants for 9.7% of the franchise fees.

[11] Defendants also raises a second claim under franchise fees paid to plaintiff which is that defendant ought to have deducted 15% as withholding tax due to Revenue Authority, an entity established to collect taxes in the Kingdom.

[12] In reply to defendants' defence, plaintiff informs the court that the Guild being a non-profit organization is not bound to pay taxes, fees paid were for the general welfare and maintenance of the Guild; the plaintiff was a member of the Guild and not the Guild and therefore fees merely passed the hands of the plaintiff and not necessarily paid to the plaintiff. In collecting the fees, plaintiff did so by virtue of clause 5.2 of the "Spar Franchise Agreement" which permitted distributors to act as collecting agents, it was misnomer for defendants to refer to franchise fees as all fees collected were Guild fees;

[13] Members of the Guild were entitled to use Spar brand name and to acquire stock from plaintiff as an independent business entity from the Guild; should there be any overpayment by defendant, their claim lies not against plaintiff but the Guild.

[14] The plaintiff concludes at its paragraph 7.12 page 71 of the book of pleadings:

“Accordingly, the defendants do not have any counter-claim against the plaintiff.”

[15] The question ceased by this court therefore is whether there is a counter-claim against the plaintiff or not.

[16] Their Lordships in **Fathoos Investment (Pty) Ltd and 2 Others v Misi Adam Ali (43/12) [2012] SZSC 70** at page 16, citing **Maharaj v Barclays National Bank 1976 (1) S.A. 418 (A) at 426 A-E**:

“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 material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new-facts are alleged consisting 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 ground of his defence and the material facts upon which it is founded, and (b) whether the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters, the court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”connotes 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.”

[17] The question before court is therefore whether the defendant have set out a bona fide defence satisfactory.

[18] **Erasmus** in **Superior Court Practice 1999** at **B1 – 221** correctly states:

“satisfy” does not mean “prove”. What the rule requires is that the defendant set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff’s claim.”

[19] In *casu*, I have already alluded that defendants have not raised any qualms with the plaintiff’s claim. They, however raise a claim in convention.

[20] The list of defences available to a defendant in summary judgment application is in-exhaustive.

[21] **Erasmus** *supra* at B1 – 224 in support hereof writes:

“To list all the defences available to a defendant in summary judgment proceedings is impossible.”

[22] At **B1 – 225 – 226**, he outlines guidelines to the defence raised as follows:

“(i) The defence must go to the merits of the application and not consist merely of an attack on the language of the summons and the plaintiff’s affidavit, nor is it sufficient for a defendant merely to state that he has no knowledge of the allegations in

the plaintiff's summons or that he cannot comment on the plaintiff's claim.

- (ii) *The defence raised must be valid in law, not merely an unenforceable moral right or inability to pay. However, the procedure for summary judgment is not intended to replace the exception as a test of one or other of the parties' legal contentions. When a real difficulty as to a matter of law arises, the court should grant summary judgment only if it is satisfied that the point is really unarguable, and also that it is not depriving the defendant of the right he would have had, in an appropriate case, had the point of law been decided against him on exception, of amending his pleadings.*

- (iii) *The defendant is not required to disclose the whole of his defence; it is sufficient if he discloses the 'nature and grounds' of a bona fide defence and the 'material facts relied upon therefore'*

- (iv) *Purely technical defences are not permitted."*

[23] **Watermeyer A. J. in Weinkove v Botha 1952 (3) S.A. 178** faced with a question as to whether a counter-claim was a defence within the meaning of the rule referred to **Abolt and Another v Nolte, 1951 (3) S.A. 419 C** at page 426 where **De Villiers J.P.** stated:

"In light of the authorities cited, I am of the opinion that this form of pleading is permissible. A defendant who admits a claim in convention (as in casu) is, I think, entitled to plead that on balance

upon final adjudication, he owes the plaintiff nothing, and this is precisely the issue he raises when he alleges that upon proof of his greater counterclaim, he is excused from liability to pay anything to the plaintiff.”

[24] **Watermeyer J. in Spilhaus & Co. Ltd v Coreejees 1966 (1) S.A. 525 AT 529** highlights the rationale of considering counter-claim as defence under the rule as:

“...the basis is again stated to be that the giving of judgment on the counterclaim would extinguish the claim, either in whole or in part. If it would not be wholly extinguished the court would have a discretion, if no other defence were raised, to give judgment in favour of the plaintiff for such part of the claim as would not be extinguished.”

[25] In *casu* plaintiff correctly therefore does not dispute defendant’s right to raise a counter-claim but avers that there is no counter-claim as against him on the basis that the fees paid over to him were so duly collected by plaintiff in its capacity as a collection agent for the Guild, a non profit making legal *persona* and not to plaintiff. The counter-claim, if any, should therefore be directed to the Guild.

[26] **Maphalala P. J. in Francis Siboniso Dlamini v Tokyo Cars (Pty) Ltd 2880/2009 [2012] SZHC 37** at page 12:

“When an agent contracts on behalf of his principal with a third person, no contractual liability or right in respect of the agreement can attach to the agent if he had acted within his authority.”

[27] The honourable judge proceeds at 167 on the same question:

“The effect of representation is, ...that the agent is the one who enters into juristic act but the resulting obligations exist, directly between the other contracting party and the principal, the agent is in no way a party to the contract An exception to this rule is the so-called doctrine of the undisclosed principal. According to this doctrine, where the agent acts for a principal but without disclosing this fact to the other contracting party, the principal may afterwards reveal himself and claim under the contract. Where the other party gets to know of the existence of the undisclosed principal, he may choose whether to hold the agent or the principal liable under the contract.”

[28] It would appear that the plaintiff relied on the above principle when submitting that there was therefore no counter-claim as defendants were barking at the wrong tree as it were.

[29] That as it may, the present application by plaintiff is however confounded by the following:

- The principle relating to agents is subject to exception.

[30] With this defence by plaintiff to the counter-claim raised under reply, the court is not in a position at this stage of the proceeding to decide fully on plaintiff's defence by virtue of the pleadings having closed. Indeed during submissions, Counsel on behalf of defendants vigorously disputed the

plaintiff's defence. This therefore was tantamount to raising an issue by defendant.

[31] **Mamba J.** deciding upon **First National Bank of Swaziland Limited t/a Wesbank v Rodgers Mabhoyane Du Pont (4356/2009) [2012] SZHC 119** stated at page 6:

“This, 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 obliged 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.”

[32] The learned judge emphasizes on this position:

“It is now the judicial accord, that the existence of a triable issue or issue 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 R. J. M. 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 exist 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.”

[33] Further plaintiff's replying affidavit shows that there is an issue in relation to the fees received from defendants. Defendants have alleged in their affidavit resisting summary judgment that the counter-claims flows from "franchise fees" while plaintiff in reply informs court that defendants paid to it "Guild fees" and not franchise fees. This on its own presents a trial issue. A further issue revealed by the pleadings is whether the fees paid were paid to plaintiff as an agent of the Guild or as plaintiff who extended the Guild as a benefit to its customers.

[34] In the totality of the principle as enunciated in **First National Bank of Swaziland** (*supra*) this court is not inclined to grant summary judgment.

[35] In determining the question of costs, I consider the averment by defendants at paragraph 9 and 16

"9. *It has recently been drawn to my attention that in terms of the plaintiff's practice the franchise fee payable is the gross sales less VAT or Sales Tax and that the payment that the defendants were liable in respect of franchise fee were supposed to be less the amount collected for sales tax.*

16. *Withholding Tax*

It has been brought to the defendant's attention by the Revenue Authority that all payments to the plaintiff in respect of franchise fees are liable for withholding tax of 15%."

[36] From the above contention inference can safely be drawn that the defendants discovered the overpayments to plaintiff recently or after the plaintiff lodged the present proceedings.

[37] There is further no averment by defendants to the effect that despite demand plaintiff has refused or failed to pay the sum owed.

[38] In the totality of the above consideration together with the evidence that defendants do not dispute plaintiff's claim, costs should be deferred to the final determination of the counter-claim.

[39] In the foregoing the following orders are entered.

1. Summary Judgment application is dismissed;
2. Costs shall be cost in the course;
3. Defendants are ordered to file their counter-claim within a month from date of this judgment.

M. DLAMINI
JUDGE

For Plaintiff : Advocate Van der Walt instructed by Rodrigues & Association

For Defendants: Advocate P. Flynn instructed by L. R. Mamba & Associates

