



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 983/2012

In the matter between:

DAVID MSAKENI KUNENE

Plaintiff

And

**REALHOLD PROPERTIES (PROPRIETARY
LIMITED**

Defendant

Neutral Citation: *David Masakeni Kunene v Realhold Properties (Proprietary) Limited 983/2012) [2013] SZHC 99 (3rd May, 2013)*

Coram: **Dlamini J.**

Heard: **15th November 2012**

Delivered: **3rd May, 2013**

Summary judgment application – defendant raising counter-claim defence – requirement thereof.

Summary: The plaintiff initially instituted action proceedings by way of combined summons against defendant. He claims the sum of E90,000 as balance of purchase price of an immovable by defendant from him. The defendant having filed a notice to defend, plaintiff moved an application for summary judgment. Defendant resists this application by plaintiff.

[1] The chronicles which are common cause are as follows:

The plaintiff and defendant entered into a sale agreement in respect of an immovable property. The purchase price was the sum of E300,000.00. The terms of the agreement were that defendant would pay to the plaintiff the sum of E100,000.00. This deposit would be paid upon signature of the agreement and transfer to the name of plaintiff would also take place. The defendant would secure a bank loan within ten days from date of signature.

[2] Plaintiff discharged all his obligations under the contract. Defendant however failed to secure a bank loan.

[3] In the affidavit resisting summary judgment defendant avers as follows

“4. Defendant admits that the Deed of Sale, **Annexure “CJ1”**, was executed between the parties. However, Plaintiff has conveniently omitted to mention that having executed the said Deed of Sale Plaintiff then refused and / or was unable to facilitate the registration and transfer of ownership of the Farm onto Defendant.

5. The Plaintiff was unable to do so because at the time of the execution of the Deed of Sale between the parties, Plaintiff himself was not the registered owner of the Farm.

6. *This fact emerged after Defendant was forced to embark on a process of investigation which investigations disclosed that the sold piece of land actually formed a constitutive part of Farm 382, District Shiselweni.*
7. *At the time when this portion of land was sold, the said Farm 382, Shiselweni which it actually formed a part, belonged not to the Plaintiff but to the Estate of the Late Richard Clarence Henwood.*
8. *This Estate had an Executor and Beneficiaries who were now resisting the same and alienation of the said Farm onto third parties. In fact, the aforesaid resistance on the part of the Estate left Defendant with no choice but to institute legal action.*
9. *The said action Defendant launched before the above Honourable Court under **Civil Case No. 3417/2004**, being the matter of **Amos Velem Kunene and David Masakeni Kunene v. Monica Matthews N. O. and 4 Others.***
10. *In the above cited case, Defendant had to find and enlist for the support and assistance of Amos Velem Kunene, the joint purchaser of the Farm with Plaintiff. Again, Plaintiff had deliberately omitted to mention his co-ownership of the Farm with the said Amos Velem Kunene to the Defendant, at the time when the Deed of Sale was concluded.*
11. *The Court process went as far as the Supreme Court wherein the Estate was appealing against the judgment of the High Court which directed the Executors to facilitate compliance with all requirements that were necessary to pass transfer onto Plaintiff and his co-purchasing partner Amos Velem Kunene.*

12. *This ordious process was done and overseen by the Defendant who had to bear all the costs associated with the exercise such as attorney's fees, the payment of transfer costs including the penalties that were occasioned to the process by the delays.*
13. *During the whole process, Plaintiff refused to co-operate with Defendant to the extent of even refusing to execute the Affidavits necessary to establish and support the reliefs that were sought under **Civil Case No. 3417/2004.***
14. *It is therefore quiet preposterous of the Plaintiff to rush to this Honourable Court, claiming his supposed balance, without even disclosing the above background facts. These background facts disclose, ex-facie, that Defendant's indebtedness to the Plaintiff was considerably reduced, if not extinguished, by the protracted litigation which Defendant had to sponsor against the Estate.*
15. *It is for these reasons that the application for summary judgment is opposed. In fact, Defendant is intends to file against the Plaintiff, together with its Plea, a comprehensive counter-claim for the damages that was made to suffer as a result of the plaintiff's lack of candidness when the contract was concluded.*
16. *In a nutshell, Defendant therefore contends its liability to the Plaintiff for the sum of E90,000.00 (Ninety Thousand Emalangeni) since it was thereafter forced to expend monies in order to ensure the delivery of the res sold, firstly from the Estate onto the joint purchasers and thereafter from the joint purchasers onto itself. these monies exceeds Plaintiff's E90,000.00 (Ninety Thousand Emalangeni).”*

[4] From the assertion of defendant as highlighted above, it is clear that defendant does not dispute the debt owing. Defendant however raises a counter-claim as a defence.

[5] **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa** page 44 writes:

“It is open to the defendant to raise a counter-claim to the plaintiff’s claim.”

[6] The learned authors proceed to highlight:

“In this case also, sufficient detail must be given of the claim to enable the court to decide whether it is well founded.”

[7] Holding the same view **Eksteen J. in Traut v Du Toit 1966 (1) S.A. 69** stated:

“Where the total failure of the defendant to set out his counter-claim fully makes it impossible for the court to say that the counter-claim can disclose a bona fide defence, the court will grant summary judgment against the defendant.”

[8] The question for determination in *casu* therefore is whether defendant has set out fully its counter-claim thereby disclosing a *bona fide* defence to the plaintiff’s claim.

[9] Defendant state at its paragraph 12:

“12. This odious process was done and overseen by the Defendant who had to bear all the costs associated with the exercise such as attorney’s fees, the payment of transfer costs including the penalties that were occasioned to the process by the delays.”

[10] This averment is as gleaned the basis for the counter-claim. This assertion is ambiguous in that it is not clear whether defendant paid for the attorneys’ fees, transfer costs and penalties or whether it merely supervised the payments of such fees.

[11] The defendant on its own showing must have appreciated that it did not disclose fully the counter-claim as it avers at paragraph 15 as follows:

“15. It is for these reasons that the application for summary judgment is opposed. In fact, Defendant is intends to file against the Plaintiff, together with its Plea, a comprehensive counter-claim for the damages that was made to suffer as a result of the plaintiff’s lack of candidness when the contract was concluded.”

[12] There is also another aspect of defendant’s affidavit that needs attention.

[13] **Stassen v Stofberg 1973 (3) S.A. 725** is a case partly analogous to the present one. The parties had entered into an agreement of sale. Purchase price was payable upon registration for transfer. The plaintiff transferred the property but defendant failed to pay the purchase price. The court held *inter alia*, that:

“.... as the purchaser had only raised an unliquidated counter-claim without in any way stating the amount thereof, that the purchaser’s

‘counter-claim’ disclosed no bona fide defence for purposes of summary judgment.”

[14] In *casu*, on the amount for the counter-claim defendant avers:

“14. These background facts disclose, ex-facie, that Defendant’s indebtedness to the Plaintiff was considerably reduced, if not extinguished, by the protracted litigation which Defendant had to sponsor against the Estate.”

[15] Defendant concludes at paragraph 16:

“16. In a nutshell, Defendant therefore contends its liability to the Plaintiff for the sum of E90,000.00 (Ninety Thousand Emalangeni) since it was thereafter forced to expend monies in order to ensure the delivery of the res sold, firstly from the Estate onto the joint purchasers and thereafter from the joint purchasers onto itself. these monies exceeds Plaintiff’s E90,000.00 (Ninety Thousand Emalangeni).”

[16] The *quantum* claimed by defendant is not specific. The court is left on conjecture as to whether the amount in the counter-claim is the sum of E90,000 equivalent to plaintiff’s claim as it seems to be suggested by defendant as paragraph 14 when it states *“Defendant’s indebtedness to the plaintiff was considerably reduced, if not extinguished.”*

[17] At paragraph 16 defendant suggests that plaintiff owes it the sum of E90,000.00. However, this is clouded by the last sentence that *“These monies exceeds plaintiff’s E90,000.00.”*

[18] This wavering contention by defendant is according to **Corbbet J.** in **Stassen supra**, failure to disclose an amount in a counter-claim is tantamount to failure to disclose a *bona fide* defence.

[19] In the circumstances of the above it cannot be held that defendant has raised a *bona fide* defence to plaintiff's application for summary judgment.

[20] Before I enter the appropriate orders herein, it is worth noting *en passant* that *ex-facie* after the payment of E100,000.00 by defendant on date of signature, defendant did attempt to dissolve the balance debt as it is not owing E200,000.00 but E90,000 only. One wonders as to when these protracted delays in registration commenced affecting defendant.

[21] I therefore make the following orders:

1. Plaintiff's application for summary judgment is allowed;
2. Defendant is ordered to pay plaintiff:
 - 2.1 The sum of E90,000.00
 - 2.2 Interest at the rate of 9% per annum tempore more
 - 2.3 Costs of suit.

M. DLAMINI
JUDGE

For Plaintiff : **Mr. S. C. Simelane**

For Defendant : **Mr. M Thwala**

