IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 38/2013

In the matter between:

TON – TESS INVESTMENTS **Plaintiff**

And

GCINA SANELE DLAMINI **Defendant**

Neutral citation: *Ton – Tess Investments v. Gcina Sanele Dlamini (38/2013) [2014] SZHC183 (7th August 2014)*

Coram : **M. E. SIMELANE, AJ**

Heard : **30th July 2014**

Delivered : **7th August 2014**

Summary:

Summary Judgement application – plaintiff claiming goods sold and delivered – defendant not denying delivery and receipt of goods – defendant alleging a lesser amount than one claimed – email correspondence reflecting that the claimed amount has always been known – no triable issue – summary judgment granted.

JUDGMENT
7th AUGUST 2014

---

[1] On the 30th July 2014 I delivered an *ex tempore* judgment granting summary judgment and here are my reasons thereof.

[2] The Applicant initiated an action for the recovery of E55 190.00 (Fifty five Thousand one hundred and ninety Emalangeni) which is made up of two claims of E53 550.00 (Fifty three Thousand five hundred and fifty Emalangeni) and E1 640.00 (one thousand six hundred and forty emalangeni) in terms of Claim A and B respectively.

[3] The cause of action centres around the sale and delivery of sugar beans to the Defendant at his special request.

[4] Upon service of the Combined Summons the Defendant filed a Notice to Defend and the Plaintiff applied for Summary Judgment. The Defendant opposed same and filed an affidavit resisting Summary Judgment and leave was granted to Plaintiff to file a Replying Affidavit.

[5] It is worthy to note that the Defendant at paragraph 6 admitted to owing the sum of E1 640.00 (one thousand six hundred and forty emalangeni) in terms of Claim B where he said

"I admit that the only sum I owe the Plaintiff is the sum of E1 640.00 (one thousand six hundred and forty emalangeni) which sum remained unpaid by me in the cash transaction that we had."

[6] There was no tender to pay the money and Miss Nkosingiphile Sambo for the Defendant failed to tender same as she did not have instructions to do so but to oppose the Summary Judgment in its entirety.

[7] In relation to Claim A the Plaintiff pleaded that duly represented by its Managing Director Tony Sibandze on the 22nd October 2012 at Manzini the parties entered into an oral agreement wherein it sold and delivered to the Defendant's agents AIM INVESTMENTS (PTY) LTD 63 x 50kg sugar beans bags totaling E53 550.00 (Fifty three Thousand five hundred and fifty Emalangeni) at E850.00 (Eight hundred and fifty Emalangeni) per bag to be payable within 30 days thereafter.

[8] It is common cause that the sugar beans were collected by the agent.

[9] The Defendant argues in his affidavit resisting Summary Judgment that the sum charged by Plaintiff of E850.00 (Eight hundred and fifty Emalangeni) per bag is incorrect as it was agreed that the Defendant would pay the cost price of E400.00 (Four hundred Emalangeni) per bag totaling E25 200.00 (Twenty five thousand two hundred Emalangeni) or return the equivalent number of bags upon receipt of his stock.

[10] It is common cause that since October 2012 to date the sum of E25 200.00 (Twenty five thousand two hundred Emalangeni) has not been paid nor the 63 bags replaced.

[11] Again from the affidavit there was no tender for either of the two.

[12] Miss Nkosingiphile Sambo argued that there is a dispute of fact on the difference between the sum of E25 200.00 (Twenty five thousand two hundred Emalangeni) and E53 550.00 (Fifty three thousand five hundred and fifty Emalangeni) such that the matter should be referred to oral evidence.

[13] Mr. Hlomi Mdladla on the other hand argued that the Defendant's defence has no merit at all because of email correspondence between the parties where it is clear that the amount in issue has been E53 550.00 (Fifty three thousand five hundred and fifty Emalangeni). He argued that the Defendant is just trying to delay settlement of the matter. He further argued that the emails in the Replying Affidavit were not introducing a new cause of action but was rebutting the untruths peddled by the Defendant.

[14] In the email dated 5th November 2012 the Defendant wrote:

"Following our discussion on the payment of goods (beans) collected by (AIM) from your shop in Manzini, I hereby confirm that we will either pay or submit the goods back to your shop by the week ending 9th November 2012." (underlining my emphasis).

[15] The Plaintiff replied on the 7th of November 2012 by saying:

"You have been extremely dishonest in this transaction. You informed my staff that they must release the 63 bags of 50kg @ E850.00 per bag of beans to your customer and you will pay in full at 12 noon on the same day after your meeting in Siteki. It is now 3 weeks and you have failed to pay and you are now deliberately ignoring calls from my staff and me.

As you know my trade is COD and as a result of your delay I am in trouble with my supplier who needs the payment.

You must pay as per your undertaking below (referring to the 5th November 2012 email) this week. If no payment by the 10th I will definitely seek legal recourse."

[16] The Defendant responded on the same day and wrote:

"Tony I feel very sad for all that has happened. I cannot reverse anything but am working around the clock to ensure that you are sorted by the end of the week.

It must also be clear with you that contacting the buyer not only delayed your payment but also you have damage a E 1 680 000.00 (one million six hundred and eighty thousand emalangeni) turnover business through your actions.

As I had indicated earlier on that the buyers were still to pay a balance on the total goods, which I would have used to clear the debt. Immediately when they had (heard) beans were owned (owed), a decision was taken not to accept any goods from my side and that I does not only affect your transaction but the whole deal."

[17] The Plaintiff responded on the 13th of November 2012 as follows:

"Please refer to your email dated 5th November 2012…"I hereby confirm that we will either pay or submit the goods back to your shop by the week ending 09th November 2012."

Today is the 13th nothing happened as per your confirmation. If no payment of E53 550.00 (Fifty three Thousand five hundred and fifty Emalangeni) by end of day tomorrow 14th November 2012, I will seek immediate legal intervention.

I have copied my email to my attorneys."

[18] These emails are part of the affidavits and they lay out the history of the matter.

[19] I am inclined to agree with Mr. Hlomi Mdladla that no triable issue arises from the matter and the principle found in the matter of ***Dulux Printings v Appollo Printer* (72/12) [2013] SZSC 19** stated below do apply in the matter:

> *"[10] From the aforegoing it is clear that the summons does disclose a cause of action. In addition the claim is for a liquidated amount of money as envisaged by Rule 32 (2) (b). A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment: superior court practice B1 – 210; Harms: Civil Procedure in the Supreme Court p. 315. Herbstein and Van Winsen; the Civil Practice of the Supreme Court of South Africa, 4th edition, Van Winsen et al, Juta Publishers, 1997 at pp 435-436 defines a liquidated amount as an amount based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation. There is no doubt that the calculation of the amount in Annexure "A" is capable of speedy and prompt ascertainment.*
>
> *[11] The purpose of the summary judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. See Herbstein and Winsen (supra) at pp 435-436. This is understandable because the remedy is final in nature and closes the door to the defendant without trial.*
>
> *[17]* ***Dunn AJ,*** *as the then was, in the case of the* ***Bank of Credit and Commerce International (Swaziland) Ltd v. Swaziland Consolidated Investment Corporation Ltd and Another*** *1982-1986 SLR 406 (HC) at p. 407 stated:*

"It is not enough for a defendant simply to allege that he has a bona fide defence to the plaintiff's action. He must allege the facts upon which he relies to establish his defence. When this has been done, it is for the court to decide whether such facts, it proved would in law constitute a defence to the plaintiff's claim and also whether they satisfy the court that the defendant is alleging such facts to acting bona fide."

[18] Similarly, ***Corbett JA in the case of Maharaj v. Barclays National Bank*** *1976 (1) SA 418 (A) at 426 A-E stated the following:*

"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 summary or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issue 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 requires 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 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 particulars and completeness to enable the court to decide whether the affidavit disclosed a bona fide defence".*

[20] A closer look at Rule 32 shows that the remedy for summary judgment is not a weapon for injustice because it does not close the doors to a defendant who can show that there is an issue or question in dispute which ought to be tried of that reason to be a trial of that claim. Courts should not be sceptical of this remedy when considering that its purpose is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim.

[21] ***Justice Navsa*** *in* ***Joob Joob Investments (PTY) Ltd v. Stocks Mavundla Zek Joint Venture*** *2009 (5) SA (1) SCA at para 32-33 does expostulate the view that this remedy does not close the doors to a defendant with a triable issue and who can show that he has a bona fide defence to the action. At para 32-33 His Lordship stated the following:*

> *"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his or her day in court. After almost a century or successful applications in our courts, summary judgement proceedings can hardly continue to be described as extraordinary. Out courts, both first instance and at appellate level, have during that time rightly been trusted*

to ensure that a defendant with a triable issue is not shut out....

Having regard to its purpose and its proper application, summary judgment proceedings only hold terror and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425-426 E."

[20] From the totaling of the aforegoing and upon reading paragraph 8 of the defendant's answering affidavit where he says:

> *"We entered into a verbal agreement with the Plaintiff director and the terms were that he gives me 63 bags (50kg) of beans. I was to then later, when I got my stock from my supplier from Mozambique return the exact 63 bags (50kg) of beans or alternatively pay for them at cash price which is the sum of E400.00 (four hundred emalangeni). I must mention that the cost price of a 50kg bag of beans from the supplier is E400.00 (four hundred emalangeni)."*

The Defendant has failed to state why he has not delivered the beans or paid the money he alleges to be owing which in any event flies in the face of the email communication between the parties.

[21] He never corrected or raised any issue about the price of E850.00 (Eight hundred and fifty Emalangeni) per bag in the email of the 7th November 2012 which he

authored. He agreed to the sum of E53 550.00 (Fifty three thousand five hundred and fifty Emalangeni) by direct implication.

[22] The cost price of E400.00 (Four hundred Emalangeni) is just an afterthought. It is more visible in that the purchase order attached onto the Defendant's affidavit belongs to a company called SADI CONSULTING (PTY) LTD, yet in the body of the opposing affidavit the Defendant refers to an agreement entered into between **himself** and the **Plaintiff**. As to how this company has to do with the agreement between the litigants is a mystery.

[23] The delivery invoice of the 63 bags attached to the Summons reflect E53 550.00 (Fifty three thousand five hundred and fifty Emalangeni).

[24] The Defendant has failed to show that it has a triable issue or a sustainable defence.

Accordingly Summary Judgment is granted with costs.

____

M E SIMELANE

ACTING JUDGE

For Plaintiff : Hlomi Mdladla

For Defendant : Nkosingiphile Sambo