IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 787/14

In the matter between:

SIBUSISO SYDNEY DLAMINI **Plaintiff**

And

JOZANA SUPPLIERS (PTY) LTD **1st Defendant**

VUSI MAZIYA **2nd Defendant**

Neutral citation: *Sibusiso Sydney Dlamini v Jozana Suppliers (Pty) Ltd & Another (787/2014) [2014] SZHC184 (7th August 2014)*

Coram : M. E. SIMELANE AJ

Heard : 15th July 2014

Delivered : 7th August 2014

Summary

Summary Judgment – points of law raised that particulars of claim do not comply with Rule 18(6) – affidavit resisting summary judgment disclosing a triable issue – summary judgment refused – defendant to file a plea within 10 days after delivery of judgment.

JUDGMENT
7th AUGUST 2014

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[1] The Plaintiff instituted Combined summons where he claimed a return of a Nissan truck failing which payment of E115 000.00 (one hundred and fifteen thousand Emalangeni) plus interest and costs.

[2] The Defendant filed a Notice to Defend and the Plaintiff applied for Summary Judgment.

[3] The Plaintiff pleaded that in April 2001 on an unmentioned day the parties entered into an oral agreement for the sale of the Nissan truck at the value of a sum of E250 000.00 (two hundred and fifty thousand Emalangeni) payable within a reasonable time.

[4] The Defendant on an unmentioned date in June 2011 paid a sum of E50 000.00 (fifty thousand Emalangeni).

[5] Due to a delay to settle the balance of E200 000.00 (two hundred thousand Emalangeni) the parties entered into a written agreement where it was provided that the Defendant would pay E100 000.00 (one hundred thousand Emalangeni) before 20th July 2011 and a further E90 000.00 (ninety thousand Emalangeni) plus E25 000.00 (twenty five thousand Emalangeni) as compensation for using the truck.

[6] No time limits were set for the two latter payments.

[7] The Defendant however paid E100 000.00 (one hundred thousand Emalangeni) but failed to pay the balance of E115 000.00 (one hundred and fifteen thousand Emalangeni) within a reasonable time hence the present action.

[8] The alleged written agreement was not annexed onto the Summons hence the Defendant raised a technical point of law that the Summons do not comply with Rule 18 (6) of the High Court Rules 20/1954 which reads as follows:

> *"A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleadings shall be annexed to the pleadings."*

[9] The Defendant also took issue that the Plaintiff had failed to state as to where, when and by whom was the written agreement concluded.

[10] Rule 32 provides the following:

> *"32. (1) Where in an action to which this rule applies and a combined summons has been served on a defendant or a declaration has been delivered to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to the court for summary judgment against that defendant.*

(2) This rule applies to such claims in the summons as is only-

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property;

or

(d) ejectment;

(3) (a) An application under sub-rule (1) shall be made on notice to the defendant accompanied by an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be and such affidavit may in addition set out any evidence material to the claim." (underlining my emphasis).

[11] Mr. Sabelo Bhembe argued that the Summary Judgment was incompetent because the particulars of claim were defective. He argued as follows per his Heads of Argument:

"7. The general rule is that an applicant must stand and fall by the founding affidavit and the facts alleged therein.

Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, 5th edition Juta at page 519.

8. An application for relief must make out his case and produce all the evidence he desires to use in support of it, in his founding or supporting affidavit and is not permitted to supplement or make a new case in his replying affidavit.

Juta Roderick's Motors Ltd v Viljoen 1958 (3) SA 575 (O) at page 579 Fairdeal Furnishers (Pty) Ltd v Dlamini SLR 1982-1986 at page 8.

9. The court will order any matter appearing in the replying affidavit that should have been in the supporting affidavits to be struck out.

Herbstein and Van Winsen, supra at page 441.

10. An affidavit verifying the facts on which the claim, or part of the claim, to which the summary judgment application is based may in addition set out any evidence material to the claim.

Rule 32 (3) of the High Court Rules.

11. A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleadings shall be annexed to the pleading.

Rule 18 (6) of the High Court Rules.

12. The Defendant can raise the defence that the summons issued at the instance of the plaintiff is defective or open to exception, or that the application for summary judgment is defective.

Herbstein and Van Winsen, supra at page 537.

13. A combined summons that does not comply with Rule 18 is defective and the defence that the combined summons was an irregular step or document was bona fide defence.

Western Bank Bpk v De Beer En'n Ander 1975 (3) SA 772 (T) at page 772."

[12] Miss Sukati argued to the contrary that the omission of the written agreement on the Summary Judgment was a mistake and the Defendant has not been prejudiced by referring or attaching it on its Replying Affidavit.

[13] Miss Sukati argued as follows in her heads of arguments:

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a) *It will be argued that the courts in this country have stated time and again that rules of court are made for the convenience of the court and litigants to ensure order and predictability and that dogmatic adherence to the rules can be in some cases be at the expense of justice and the courts can exercise its discretion. (See, Usutu Pulp Company v Swaziland Agricultural and Plantations Workers Union 2012).*

b) *Plaintiff will argue that such omission is not so fatal an irregularity so as to prejudice the Respondent in his defence as both the parties and the date of the contract has been disclosed.*

Since the Defendant has failed to state what prejudice he will suffer by the irregularity, the court should dismiss the point in law herein.

Where there is no prejudice that will be caused to Defendant by such irregularity the court would not allow such a point of law.

(See, Herbstein and Van Winsen: Civil Practice of the Supreme Court of South Africa, 1997 edition, 4th edition by De Villiers Van Winsen et al pages 558-562).

Further an argument will be advanced on behalf of the Plaintiff that the irregularity complained of is only technical. It shall be argued that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to

interfere with the expeditious and, if possible inexpensive decision of cases in their real merits.

Trans African Insurance Co. Ltd v Maluleka 1956 (2) SA 273 (A) at 278 f-g.

In cases where the court feels such omission by Plaintiff will prejudice and cause an injustice to the Defendant and which cannot be compensated by costs, it can always order for amendment of the summons. See, FishHoek Village Management Board v Romain 1932 CPD 304 at 307."

Failure to annex a copy of the Agreement; Plaintiff has in his Replying Affidavit annexed the written agreement being annexure SD1. It shall be submitted that failure to annex the agreement was a genuine omission and it is evidence relevant to the issue / matter and serves to refute the case put by the Respondent in his answering affidavit, thus the court should dismiss this point raised.

See, Herbstein and Van Winsen: Civil Practice of the Supreme Court of South Africa, 1997 edition 4th edition by De Villiers Van Winsen et al page 356."

[14] Apparently the Plaintiff sought to cure the deficiencies of his particulars of claim and affidavit in support of the summary judgment

application in the Replying Affidavit. Leave had been granted to file the third set of affidavit.

[15] The Particulars of Claim do not present a good model of drafting pleadings and I agree with Mr. Bhembe that they are defective and irregular.

[16] The Plaintiff failed to utilise the provision of Rule 32 (3) where the written agreement would have been attached to the affidavit in support of the Summary Judgment application.

[17] Clearly the Plaintiff is prejudiced in his defence as the agreement only appears in the Replying Affidavit. The truck mentioned in the Agreement is referred to a NISSAN UD whilst the one referred in the Particulars is a simple NISSAN truck.

[18] It must be noted that Miss Msibi in her Heads of Argument suggested that I should order an amendment of the Summons but no order is sought in the papers.

[19] It is an elementary principle of the law that a litigant cannot be granted that which it has not sought in the *lis*. ***(Commissioner of Correctional Services v Ntsetselelo Hlatshwako – Civil Case No. 67/09).***

[20] It is my considered view that the Plaintiff ought to have promptly amended the Particulars of Claim by withdrawing the Summary Judgment application upon receipt of the point of law.

[21] It must however be noted that lately the courts have relaxed adherence to the Rules. ***(Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors – Appeal Case 23/2006).***

[22] Before dismissing the application I must venture into the merits of the Summary Judgment application and in so doing adopt the dicta of *Her Lady Justice Mumcy Dlamini* in ***Lwazi Sibandze v Commissioner of Police & Another (2899/10) [2014] SZHC 107*** at paragraph 14 to 15:

> *"[14] It is my considered view that this protraction in hearing the point in limine turned it into a mere technicality and I*

was therefore persuaded by Shell Oil Swaziland (Pty) Ltd t/a Sir Motors:

> *"…the current trend in matters of this sort, which is now well recognized and firmly established, viz. not to allow technical objections to less than perfect procedural aspect to interfere in the expeditious and, if possible, inexpensive decision of cases on their real merits…"*

Their Lordships then cited from Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81(SE) at 95F-96A:

> *"The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."*

[15] At any rate, as it was the view of their Lordships in Shell Oil Swaziland supra, it would serve no purpose of justice to dismiss the case on this point as the applicant would have simply gone back to file the demand and come back to court as respondents were opposing the matter on its merits as well. Had respondents only come to court to oppose the matter on this procedural aspect of failure to comply with section 2 (1) of the Act, and conceded the merits, this would mitigate on costs of suit in favour of respondents."

MERITS

[23] The Defendant has argued that:

"5. On the merits the Defendants alleged inter alia as follows;

5.1 That they denied that they entered into a written agreement with Plaintiff in terms of paragraph 9 of the Particulars of Claim.

5.2 That they denied that they have no bona fide defence to the claim by Plaintiff and the Notice of Intention to Defend is filed solely to delay the final outcome of the action.

5.3 That the initial agreement was that Defendant used the motor vehicle for a period of time and thereafter pay Plaintiff a sum of E50 000.00 (Fifty Thousand Emalangeni).

5.4 That the reason for this was that the truck was unroadworthy and the Defendant would have to buy parts to put it on motion and inform Plaintiff of the amount Defendant had spent in repairing the truck.

5.5 That on or about June2011 at Tshaneni area Defendant and Plaintiff entered into another oral agreement after Defendant had informed Plaintiff that had spent E100 000.00 (One

hundred thousand Emalangeni) in repairing the motor vehicle, that he pays Plaintiff a sum of E100 000.00 (One hundred thousand Emalangeni) in full and final settlement of the purchase price of the motor vehicle, which amount he paid.

5.6 That he denied therefore that he owes Plaintiff the sum of E115 000.00 (One hundred and fifteen thousand Emalangeni) or any amount at all in respect of the said motor vehicle."

[24] I find that there is a triable issue in relation as to which agreement is operational between the parties for at one hand the Plaintiff claims that the agreement in issue is the one written down whilst the Defendant claims that there was an oral agreement to settle the deal by paying E100 000.00 (One hundred thousand Emalangeni) as full and final settlement.

[25] The Defendant further alleges that the truck had defects which when fixed amounted to E100 000.00 (One hundred thousand Emalangeni).

[26] 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. Ramodibedi JA, as he then was, in the case of ***Zanele Zwane v. Lewis Stores (PTY) Ltd t/a Best Electric Civil Appeal No. 22/2007*** stated the following:

> *"8. It is well-recognized that summary judgment is an extra-ordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the Courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence: see for example Maharaj v. Barclays National Bank Ltd 1976 (1) SA 418 (A), David Chester v. Central Bank of Swaziland CA 50/03. Each case must obviously be judged in the light of its own merits, bearing in mind always that the court has a judicial discretion whether or not to grant summary judgment. Such a discretion must*

be exercised upon a consideration of all the relevant factors. It is as such not an arbitration discretion."

[27] I therefore dismiss the application for Summary Judgment and costs to be costs in the cause and order the Defendant to file his Plea within the next 10 days.

[28] The Plaintiff is advised to amend his Particulars of Claim to be in line with Rule 18 (6) of the High Court Rules 20/1954 if he feels inclined.

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M. E. SIMELANE
ACTING JUDGE

For Plaintiff : N. Sukati
For Defendant : S. Bhembe