



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 442/2013

In the matter between:

LIONIC INVESTMENTS (PTY) LIMITED t/a

E'PAP SWAZILAND

Plaintiff

And

MES MEDICAL & SURGICAL SUPPLIERS (PTY)

LIMITED

1st Defendant

VICTOR MINGANA

2nd Defendant

Neutral citation: Lionic Investments (Pty) Limited t/a E'Pap Swaziland v MES Medical & Surgical Suppliers (Pty) Limited & Another (442/2013) [2014] SZHC 187 (7th August 2014)

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

Heard : **23rd July 2014**

Delivered : **7th August 2014**

Summary

Summary judgment - prayerS in simple summons and declaration not the same - plaintiff amending declaration after summary judgment filed and opposed through an affidavit resisting summary judgment - declaration bad on variance - amount claimed not proven with clear particularity - summary judgment refused and cost to be costs in the cause - defendant granted leave to file a plea within 10 days.

JUDGMENT 7th AUGUST 2014

[1] On the **21st March 2013** the Plaintiff commenced the action by simple summons where it claimed payment of:

(a) E32 069.00 (Thirty two thousand and sixty nine Emalangeni) for the supply of E'pap nutritional supplements.

(b) Interest thereon at the rate of 9% per annum.

(c) Costs at attorney and own client scale.

[2] The Defendants duly, on the **8th April 2013**, filed a Notice to Defend and the Plaintiff filed a Declaration on **2nd May 2013**.

[3] Upon laying down the cause of action in the Declaration the Plaintiff then prayed for the following Orders:

(a) Payment of the sum of E32 069.00 (Thirty two thousand and sixty nine Emalangi).

*(b) Interest on the aforesaid sum at the rate of **24%** per annum together with **collection commission**.*

(c) Costs of suit at attorney and own client scale.

[4] On the **20th of May 2013** the Plaintiff applied for Summary Judgment based on the prayers that appear in the declaration.

[5] On the **21st of June 2014** the Defendant filed an Affidavit Resisting Summary Judgment wherein amongst its defence, it attacked the varied interest rate and collection commission which did not appear in the Simple Summons.

[6] The 2nd Defendant also denied that the signature that appeared in a suretyship form was his.

- [7] The signature belonged to a certain ZANELE who bound herself as surety but the Plaintiff had claimed that it was 2nd Defendant who had bound himself as a surety.
- [8] Faced with these facts the Plaintiff on the **26th NOVEMBER 2013** filed a Notice of Amendment with the court and subsequently amended its Particulars of Claim on the **15th January 2014** to state that it was ZANELE that bound herself as a surety on behalf of the 2nd defendant.
- [9] On the **24th FEBRUARY 2014** the Plaintiff filed its Replying Affidavit.
- [10] It must be noted that the Summary Judgment commenced on **20th MAY 2013** and was closed for arguments on the **24th February 2014** some **9 months** later which does not exhibit any urgency and the process was longer than the one anticipated in terms of **Rule 6 of the High Court Rules**.

MERITS

[11] It is the Plaintiff's case that it supplied E'pap nutritional supplements to the value of E72 629.00 (Seventy two thousand six hundred and twenty nine Emalangi) and that the Defendant has paid the sum of E40 560.00 (Forty thousand five hundred and sixty thousand Emalangi) leaving a balance of E32 069.00 (Thirty two thousand and sixty nine Emalangi). This appears in the Replying Affidavit.

[12] Further the Plaintiff claims that a certain ZANELE on behalf of 1st Defendant signed suretyship forms where she bound the 2nd Defendant to settle al outstanding debts and interest at the rate of 24% per annum and collection commission coupled with costs at attorney and own client in the event the matter went to court.

[13] Before proceeding further it must be noted as could be seen from the amendment that the person who signed the suretyship agreement is ZANELE then the 2nd Defendant cannot be bound by the said suretyship hence the issue of

24% interest and **punitive costs** and **collection commission** must fall away.

[14] Same do not apply to the 1st Defendant for it has not signed for such conditions. In fact a suretyship is a personal obligation hence I cannot fathom how ZANELE can bind the 2nd Defendant

[15] In any event you cannot claim both collection commission and costs through court process. **(Gigi A. Reid Attorneys v Swaziland Law Society Disciplinary Tribunal & 2 Others (2039/2012) [2014] SZHC21).**

[16] The Defendants defence is that:

(a) They do not know the said Zanele who signed the suretyship agreement and was not duly authorized by both Defendants to do so.

(b) It is not clear where the sum of E32 069.00 (Thirty two thousand and sixty nine Emalangeneni) comes from because the Plaintiff does not tabulate from the declaration as to how the sum of E32 069.00 (Thirty two thousand and sixty nine Emalangeneni) comes about.

(c)The prayers in the summary and declaration are not similar hence the introduction of a new cause of action embarrassing the Defendant.

[7] On the last point of defence regarding the two different prayers I do hold that to introduce a new or additional cause of action in the declaration is bad in law.

[18] It is a rule of practice that there must not be a material variance between the Summons and the Declaration introducing a new cause of action which is a material variance. The summons must contain an indication of what the Defendant is to expect in the Declaration. It would embarrass the Defendant to expect him to plead to a declaration which contains a totally new cause of action.

[19] The Plaintiff sought to refute all the defence of the Plaintiff by an email dated **28th February 2013** which is annexure "D" in the replying affidavit wherein the 2nd Defendant wrote as follows:

*“The Accountant
Lionic Investments
P. O. Box
Manzini*

Dear Sir

Balance due to Lionic Investments

Due to our discussions earlier today at our offices we wish to acknowledge receipt of your statement reflecting the amount due to your Company for the consignments delivered to our premises. We further wish to assure you that the balance payments will be done within 30 days from the date of this letter. We are sorry for the inconvenience caused

Yours Faithfully

*Victor Mangué Mingana
Sales and Marketing Director
+26867020732”*

[20] The learned authors Herbststein and Van Winsen in their work entitled **“The Civil Practice of the Supreme Court of South Africa** 4th ed Juta & Co. Ltd 1997 state as follows at page 356:

“In his replying affidavit the Applicant may adduce any testimony that is relevant to the issue and that serves to refute the case put up by the respondent in his answering affidavit.” (my emphasis).

[21] The problem with the letter introduced by the Plaintiff is that it refers to a statement which has not been annexed in the pleadings.

[22] The Defendant does not state how much money is owed. The plaintiff does not also state if there were monies received after the promised 30 days in the letter.

[23] It is my considered view that the Plaintiff has failed to meet the threshold of applying for summary judgment for the purpose of summary judgment procedure is to enable a Plaintiff with a clear case to obtain a swift enforcement of his claim against the Defendant who has no real defence to that claim **(Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric Civil appeal no. 22.2007.)**

[24] In the premise I order that:

(a) Summary judgment is refused.

(b) Costs to be costs in the cause.

(c) The Defendant is granted leave to file a Plea within the next 10 days.

MBUSO E. SIMELANE
ACTING JUDGE

For Plaintiff : **K. Simelane**

For Defendants : **L. Mzizi**