



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 381/12

In the matter between

**SWAZILAND TYRE SERVICES (PTY) LTD
t/a MAX T. SOLUTIONS**

Applicant

and

SHARP FREIGHT (SWAZILAND) (PTY) LTD

Respondent

Neutral citation: *Swaziland Tyre Services (Pty) Ltd v Sharp Freight (Swaziland) (Pty) Ltd* (381/2012) [2014] SZHC 74 (1st April 2014)

Coram: MAMBA J

Heard: 06 December, 2013

Delivered: 01 April, 2014

- [1] Civil Law – application for summary judgment – extra-ordinary nature of such application discussed.
- [2] Civil Practice and Procedure – summary judgment application in terms of rule 32(4) (a) of the Rules of Court – what defendant needs to show in order to resist such application, ie, an issue or question in dispute which ought to be tried or that for some other reason a trial is necessary.

- [3] Civil Law and Procedure -respondent denying terms of written agreement - credit sale agreement clearly stipulating that in the event of default by the defendant all trade discounts on goods sold to be reversed and interest thereon charged on retail price at the rate of 2% per month. Respondent has no bona fide defence and there is no triable issue. Summary judgment granted.
- [1] On 2 January 2003, the respondent applied to the applicant to open and be granted a credit account facility. This application, which was in writing was duly accepted by the applicant on 27 January 2008. This acceptance was also in writing.
- [2] The applicant states that the material terms of the Agreement were that:
- 2.1 The applicant would sell and supply goods on credit to the respondent.
 - 2.2 The applicant would offer trade discounts to the respondents on all the goods sold and delivered.
 - 2.3 The full (discounted) purchase price of the goods sold would be paid by the respondent within 30 days' of delivery of the relevant goods.
 - 2.4 In the event of the respondent failing to pay the purchase price within the said period, the applicant would be entitled to reverse the trade discounts on those goods and charge interest at the rate of 2% per centum per month on the amounts owing.

- [3] The applicant states further that between June and July 2011, all dates inclusive, it sold and delivered goods to the respondent for the sum of E95 574.18, inclusive of any trade discount. This is reflected in annexures MTS2 to MTS8 herein. The price of the goods after discount is a sum of E49 192.91 which the respondent has failed to pay within the stipulated period in contravention or breach of the terms of the Credit Account Agreement. The applicant further states that because of this breach, it reversed the trade discount granted on those purchases.
- [4] As at the end of February 2012, the interest on the undiscounted purchase price of the goods sold and unpaid for was a sum of E6 395.99 and therefore the total amount due was a sum of E101 970.17. The interest is of course calculated with effect from the end of August 2011; being 30 days after the supply or delivery of the goods by the applicant to the respondent. This is the amount that the applicant claims in this Summary judgment application. The applicant makes the point or allegation that its claim is unassailable or unanswerable and the respondent has filed notice of intention to defend the action simply or solely for purposes of delaying its claim.

[5] In opposition, the respondent admits and has tendered the sum of E49 192.91 which is the undiscounted price for the goods in question. The respondent ‘denies that the actual retail price for the goods ... before the trade discount was the sum of E95 574.18 ...as alleged or at all ...[or] that the plaintiff did ... advise it of the actual price and or any trade discount for the goods, ... and as such no discounted value was agreed between the parties ...’ Based on these allegations, the respondent argues that this matter should go for trial as it is not suitable for summary judgment. The respondent argues further that its allegations either constitute a *bona fide* defence or a triable issue and thus the need for a trial.

[6] In *Swaziland Livestock Technical Services v Swaziland Government and Another*, judgment delivered on 19 April 2012 Ota J said:

“...in the case of **Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007.**

“It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial ... it is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far...”

See **Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3830/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.**

The rules have therefore laid down certain requirements to act as checks and balances to the summary judgment procedure, in an effort to prevent it from working a miscarriage of justice. Thus, 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 obligated 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**”.

It is now the judicial accord, that the existence of a triable issue or issues 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 RJM 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 exists 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.”

Case law is also agreed, that for the Defendant to be said to have raised triable issues, he must have set out material facts of his defence in his affidavit, though not in an exhaustive fashion. The defence must be clear, unequivocal and valid.”

Again in **SINKHWA SEMASWATI t/a MISTER BREAD BAKERY AND CONFECTIONARY v PSB ENTERPRISES (PTY) LTD** judgment delivered in February 2011 (unreported) I had occasion to say:

“[3] In terms of Rule 32 (5) (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgment “... may show cause against an application

under sub rule 1 by affidavit or otherwise to the satisfaction of the court and, with the leave of the court the plaintiff may deliver an affidavit in reply.” In the present case the defendant has filed an affidavit. In showing cause rules 32 (4)(a) requires the defendant to satisfy the court “...that 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.” I observe here that before these rules were amended by Legal Notice Number 38 of 1990, rule 32 (3)(b) required the defendant’s affidavit or evidence to “disclose fully the nature and grounds of the defence and the material facts relied upon therefor.” This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the former or old rule, a defendant was specifically required to show or “disclose fully the nature and grounds of his defence and the material facts relied upon therefor”, whereas under the present rule, he is required to satisfy the court that “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 on the whole claim or part thereof. The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.

[4] A close examination or reading of the case law on both the old and present rule, shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under the present rule, the primary obligation for the defendant is to satisfy the court that there is a triable issue or question, or that for some other reason there ought to be a trial. This, I think, is wider than merely satisfying the court that the defendant has a bona fide defence to the action as provided in the former rule. See **VARIETY INVESTMENTS (PTY) LTD v MOTSA, 1982-1986 SLR 77 at 80-81** and **BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER, 1982-1986 SLR 406 at page 406H-407E** which all refer to a defendant satisfying the court that he has a bona fide defence to the action and fully disclosing its nature and the material facts relied upon therefor. I would also add that where there is a dispute of fact a court would be entitled to refuse an application for summary judgment. Under the present rule, the defendant is not confined or restricted to satisfying the court that he has a bona fide defence to the action or to complain of procedural irregularities.

[5] In **MILES v BULL** [1969] 1QB258; [1968]3 ALL ER 632, the court pointed out that the words “that there ought for some other reason to be a trial” of the claim or part thereof, are wider in their scope than those used in the former rule referred to above. “It sometimes happens that the defendant may not be able to pin-point any precise “issue or question in dispute which ought to be tried,” nevertheless it is apparent that for some other reason there ought to be a trial. ...

Circumstances which might afford “some other reason for trial” might be, where, eg the defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff’s case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in full light of publicity.””

See also *First National Bank of Swaziland Limited t/a Wesbank v Rodgers Mabhooyane du Pont*, case 4356/09 delivered on 08 June 2012 where I pointed out that:

“[7] In **Sinkhwa Semaswati** (*supra*) I referred to the differences between our current rule and the old rule on this topic and I do not find it necessary to repeat that here, suffice to say that the old rule required the defendant to disclose fully the nature and grounds of his or her defence and the material facts relied upon therefor. Emphasis was placed on a defence to the action. The current rule entitles a defendant to satisfy the court “...that there is an issue or question in dispute which ought to be tried” or that for some other reason the matter should be referred to trial.”

[7] In the present case one of the terms of the Credit Agreement (MTS 1) clearly states in broad capital letters that ‘payment strictly 30 days from date of statement. In the event of late payment all trade discounts allowed on

invoice will be reversed and interest at the rate of 2% per month will be charged on overdue amounts'. All the relevant invoices herein that were dispatched by the applicant to the respondent reflect both the retail price and discount on all the goods in question. This information fully answers the defence raised by the respondent. The issues raised by the respondent are plainly false and do not amount to a bona fide defence. They do not constitute a triable issue in the circumstances as they are contrary to the available facts herein.

[8] For the foregoing reasons, summary judgment herein is granted as prayed with costs.

MAMBA J

For the Applicant : Rodrigues and Associates

For the Respondent : No appearance