IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD IN MBABANE Case No. 129/15

In the matter between:

SWAZILAND DEVELOPMENT & SAVINGS BANK Applicant

And

PHINEAS BUTTER NKAMBULE Respondent

Neutral Citation: *Swaziland Development and Savings Bank*

Phineas Butter Nkambule (129/2015) [2018] SZHC 123 [12th June 2018]

Coram: MAPHANGA J

Date Heard: 18/08/2017

Date Delivered: 12/06/2018

Summary: ***Civil Law- In an application for summary judgment premised on alleged breach by the defendant defaulting on its obligation to a credit loan facility defendant opposing application; Defendant's cause for resisting summary judgment premised on a plea of non-joinder of a guarantor which bound itself to the defendant as a borrower in a demand guarantee, and an alleged counterclaim for certain alleged damages arising out of unauthorized deductions in the defendant's business account held with the plaintiff; Plaintiff a financial institution and nominated guarantor, the Central Bank as administrator of a small and medium enterprises loan guarantee scheme or fund;***

Civil Practice and Procedure- summary judgment requirements in terms of Rule 32 (4) (a) of the Rules of Court explained in context of application- what applicant needs to show and what constitutes cause to be set out by defendant to obtain leave to defend;

Civil Law and Procedure- defendant putting up a plea or exception of non-joinder of a third party- in principle non-joinder availing defendant in a summary judgment provided he can show third party is a necessary party having a legal interest in the subject matter of the action; a guarantor in a similar position to that of a co-principal debtor or surety and has no legal interest in the subject matter of a claim for recovery of a loan and thus not a necessary party in the proceedings; Test whether necessary party that the third party be shown to stand to be prejudiced by the outcome or grant of the claim;

Civil Law and Procedure – On proper construction and application of Rule 32 (4) (b) a counterclaim in reconvention founded on a separate cause of action may not serve as a valid defence to summary judgment on proper construction of the wording of r.

32(3) (b) as read with r. 32 (3) (c) of the Rules of Court; Defendant constrained under the rule to set out circumstances in respect of which there ought to be a trial or investigation 'with respect to the claim, or the part of the claim, to which the application relates'. A counterclaim based on a separate cause of action not a question, issue, or circumstance 'in respect to the claim or part of the claim to which application relates' and as such not proper cause for the court to grant leave to defend and dismiss summary judgment.

JUDGMENT

[1] In this action the plaintiff seeks summary judgment against the defendant for a principal of E356,255.00 together with a *temporae morae* interest thereon and costs of suits at a scale as between Attorney and client.

[2] The above claims are founded on a loan agreement termed Finance Facility Agreement entered into between the parties on the 10th June 2013 in terms whereof the plaintiff extended a certain capital financial loan facility to fund the defendant's poultry farming business undertaking. In terms of the agreement the defendant bound himself to pay the loan in monthly remittances at a rate of E29, 688.00 per month which repayment included a component of interest at an agreed rate of 12.5% per annum.

[3] It is also common ground that the defendant's business undertaking floundered and as a result he defaulted and failed to honour the repayment

terms of the agreement and in that regard the amount accumulated arrears to the order of E262, 506.65.

[4] Consequently the plaintiff, invoking a default and acceleration clause in the agreement and citing the default as a material breach of the contract, gave written notice to the defendant demanding payment of the arrears forthwith failing which it would accordingly cancel the agreement and foreclosure on the securities tendered by the defendant.

[5] It is pursuant to the defendant's failure to abide by the notice delivered upon it, that the plaintiff subsequently issued summons against the defendant for the claim and having received notice of defendant's Notice of Intention to defend it brought the present application for the summary judgment in terms of Rule 32 of the rules of this Court in the standard form.

[6] The judgment application is opposed by the defendant who has deposed to an affidavit setting out his cause.

[7] The essence of the content of the defendant's affidavit resisting summary judgment stems from the following background facts and circumstances leading to the conclusion of the loan transaction with the plaintiff.

7.1. During the negotiation phases of the loan facility the defendant took advantage of and sought to secure the financial support for his enterprise through a small and medium enterprise (SME) funding scheme called the Central Bank of Swaziland Small Enterprise Guarantee Scheme (the "scheme" or "fund")

7.2. As its moniker suggests, the scheme was an agri-business initiative established to benefit nascent small enterprise projects by providing security to candidates via a dedicated public fund. Thus the scheme was administered and guaranteed by the Fund under the aegis of the Central Bank of Swaziland. The defendant was one of the beneficiaries of the scheme in that his loan application having been approved and having qualified as a participating project under the scheme, was secured *inter alia* by the Central Bank as guarantor for the loan.

7.3. It is important to note however that although providing a guarantee the Central Bank was not privy to the loan agreement in the sense of being a party thereto or standing as either surety or co-principal deter; nor is this alleged by the defendant.

[8] The defendant contends that plaintiff ought to have cited and joined Central Bank in the proceedings on account of its status as guarantor to the loan; which, as the defendant account contends rendered the Central Bank a

necessary party to the proceedings. I cannot comprehend the basis for this assertion. I shall however elaborate further on this aspect in the course of the judgment.

[9] Finally the defendant avers that the plaintiff Particulars of Claim lack sufficient particularity to sustain a cause of action.

The legal Principles

[10] The rules and principles as to the essential elements of an application for a summary judgment application and the relative case a defendant must make to successfully repel summary judgment being granted against him in an action, are so well established in this jurisdiction and have been so oft-repeated that they may well be trite at this time. Yet often clarification becomes necessary. This is one such instance.

[11] In ***Sinkhwa Semaswati t/d Mister Bread Bakery*** **v** ***PSB Enterprises (Pty) Ltd*** the learned Mamba J has given a lucid exposition of our law on the summary judgment procedure and signposted the common pitfalls.

I need only respectfully reproduce his Lordship remarks here as follows:

> ***"[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, e.g. 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 Swaziland Tyre Services (Pty) Ltd v Sharp Freight (Swaziland) (Pty) Ltd (381/2012) [2014] SZHC 74 (01April 2014); FNB Swaziland Ltd t/a Wesbank v Rodgers Mabhoyane du Pont, (4356/2009) 4556/09).

[12] I discern that the central essential issue per determination in this application seems to turn on an exception or plea of non-joinder that the defendant

appears to be advancing – that the plaintiff ought to have joined the Central Bank of Swaziland. It touches on the first two grounds that I have alluded to earlier. I propose to deal with the last cause of complaint as relates to the alleged unauthorized deductions in turn.

Non-Joinder

[13] Its an established principle in our civil law that if a party has a direct and substantial interest in any order or judgment the Court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party such a party should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined.

(See Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD))

[14] It has been suggested that where the plea of non-joinder has been raised and demanded by a defendant and the question whether such a 3rd party is a necessary in the sense that he or she has a direct and substantial interest, will depend on the nature of the subject matter of the suit.

(See Amalgamated Engineering Union v Minister of Labour in the judgment of Fagan AJ) at 652).

[15] In ***Morgan and Another v Salisbury Municipality 1935 A (6), De*** **Villers JA** had this to say with reference to the approach the courts has tended towards in non-joinder pleas by Defendants:

> ***"The only cases in which a Defendant has been allowed in the past to demand a joinder of a party as of right are the cases of joint owners and joint contractors and partners in all of which cases there exists a joint financial or proprietary interest. In other cases a Defendant, as a general rule has not been allowed to demand such joinder"***

[16] In sum it maybe concluded from these principles that it is only in instances where the defendant can firstly show that a third party has a direct and substantial interest in the subject matter in the sense of either a joined financial or proprietary interest or such other interest that would be adversely affected or prejudiced by the carrying into effect or execution of an order or judgment of court. In those cases the third party ought be joined as a necessary party. Secondly if a defendant could ordinarily raise and sustain a plea of non-joinder in an action surely he should be able to put such up such as a reason as basis for the court not to grant summary judgment against him.

[17] Commenting on these principles and the applicable test the court in a ***South African (Pty) Ltd and ANO v ABSA Bank Limited [2017] ZASCA 78 (30 May 2016)*** the court had this to say:

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter is the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, Kwazulu – Natal [2008] ZASCA 99; 2008 (6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without prejudicing the interest of third parties that had not been joined then those third parties have a legal interest in the matter and must be joined"

[18] In a recent decision the South African Supreme Court of Appeal summarised the principles applicable to joinder in *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA). These principles are equally applicable in this jurisdiction. With reference to the prevailing judicial consensus on the subject, the court narrated the law as follows:

"[7] The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make. ... See also United Watch & Diamond Co. (Pty) Limited and Others v Disa Hotels Ltd and Another1972 (4) SA 409 (C) at 415E-F."

26] In the United Watch & Diamond Company case (supra), Corbett J (as he then was) defined "a direct and substantial interest" (p415FH) as follows:

"In Henri Viljoen (Pty) Ltd v Awerbuch Brothers, 1953 (2) SA 151 (O), HORWITZ A.J.P.... analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p169) –

'... an interest in the right which is the subject matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation.'

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ... and it is generally accepted that what is required is a legal interest in the subjectmatter of the action which could be prejudicially affected by the judgment of the Court."

[emphasis added]

[19] Where these principles further lead us is the conclusion that a position comparable to that of a guarantor vis-à-vis a creditor in an action for recovery of a principal debt, is that of a co- principal debtors and co—sureties.

[20] In a more recent South African High Court decision in ***Boshoff v Propinvest Eleven (Pty) Limited (A3928/2007) [2007] ZAGPHC 147*** the learned judge **Levenberg AJ** proceeding on the basis of the above principles takes the view, correctly in my respectful opinion, that co-principal debtors and sureties do not fall within the recognized categories of persons with respect to whom joinder is necessary. The premise on which this position is based is that a co-debtor does not have an interest in the subject matter of the action; his interest being merely 'financial'. I would say that such interest is not direct in the sense of being beneficial or inuring to the favour of these categories of persons. It becomes a matter of obligatory connection than a right or interest that stands to be prejudicially affected.

[21] In the Boshoff case the court concluded that co-debtors and sureties do not fall within the recognised categories of persons with respect to whom joinder is necessary. I agree and would go so far as to say logically that equally applies to guarantors. I respectfully associate myself with the view that a co-debtor does not have a legal interest in the subject matter of the action for recovery of the principal debt against the debtor; the interest of the co-debtor being merely financial.

I would add that the position of the surety or co-debtor is akin to that of a guarantor and for that reason I do not think a guarantor is a necessary party in an action against the debtor.

[22] Applying these principles to the case at hand I have great difficulty in appreciating what legal interest in the sense of either a financial interest or right the Central Bank of Swaziland can conceivably be regarded to have in the subject matter of the litigation at hand.

[23] Clearly this is a matter involving a purely financial transaction and ultimately if successful, may also bring to bear any securities that may lie in favour of the plaintiff in execution of judgment. At the moment the securities have not been invoked or called in the sought remedies and as such this is merely an action for the recovery of a debt by a creditor.

[24] The defendant has not attempted to set out even an iota of evidence to show what interest of the Central Bank, as a third party' stands to be affected by the proceedings let alone a direct or substantial interest in the subject matter or any potential prejudice the stand of summary judgment would be occasioned to the Central Bank.

[25] The Central Bank may well be a guarantor to the defendant but that is the only level of its involvement or interest, if at all, in the matter. I have not been furnished with the full terms and conditions of the guarantee to ascertain its true nature as only the first page of the form has been given. However, from the disclosed contents in the annexure[1] it appears quite clear

[1] Annexure D comprising the approval advice issued to the creditor (p19 of Book of Pleadings), and the signed (approved) Application/Proposal form at page 21 of the Book. That guarantee covered 85 % of the credit risk in the sum of E302, 816.75 and is issued to the defendant as the borrower.

that this is in the form of a 'demand guarantee' given to the borrower (the defendant) as a beneficiary. Ordinarily he would have to call on it or 'demand' the same upon the setting in of certain event. From this I surmise that the guarantor stands merely in the position of an insurer and a *res inter alios* in relation to the plaintiff. It has no privity of contract with the plaintiff whatsoever and neither stands in any other conventional capacity of interest either as a co-principal debtor or co-surety. Even if it were I am satisfied that such a connection would not serve as basis for the defendant to demand its joinder' as the Central Bank (even in such a hypothetical case) would not stand to be adversely affected or prejudiced by non-joinder.

[26] I must add also that I do not see how an exception of non-joinder would ordinarily have been fatal to the plaintiff's case. For the above reasons I am therefore not persuaded as to the merits of this point as a ground for contesting summary judgment. As the defendant's first two grounds hinge on it I must therefore conclude that they are equally without merit and are dismissed.

Unauthorised deductions

[27] I now briefly turn to the last and final reason or point taken by the defendant - the claim that the plaintiff made certain unauthorized deductions from his account and possibly and consequently that defendant has a counterclaim for damages- as alluded to and or foreshadowed in his affidavit.

[28] At best way to describe the Defendant's claim is that it has some makings of a counter-claim. I can do no better than that. Because that is very different to

saying he has set out or disclosed sufficient cogent material facts to ground a sound counterclaim.

[29] Ordinarily where a counterclaim is put up as a defence in an action, a full disclosure of the nature and grounds thereof must be made in order for it to succeed as a defence. In the context of a summary judgment procedure it would be sufficient to set out those facts from which a viable counterclaim could be founded. ***(See Soil Fumigation Services Lowveld CC v Chemfit Technical Products 2004 (6) SA 29 SCA**.)*

[30] In his papers what the defendant does is merely allude to a potential counterclaim. However in my view, the facts he has set out in his papers would fall far short of the requisite material facts to found such a claim.

[31] On the defendant's own affidavit he neither disputes his indebtedness to the plaintiff for the said loan nor does he contest the computation of the outstanding sums in the certificate of balance submitted by the plaintiff. Instead he purports to put up a delictual claim for damages. In any event the key and pertinent question is whether even if he did, such a claim should serve as a valid basis for refusing the summary judgment herein. I now turn this consideration.

[32] Under the old rule on summary judgment there was nothing in principle to prevent a Defendant from pleading a counterclaim founded on a separate and

completely unrelated cause of action in defence to an action. In that regard there is a preponderance of judicial opinion in support of the proposition that a Defendant could raise the existence of an unliquidated counterclaim as a defence to the plaintiff's action. ***(See Wilson v Hoffman and Another 1974 (2) SA 44 (R); HI Lockhart (Pty) Ltd v Domingo 1979 (3) SA 696 (T) and see also Statten v Stoffberg 1973 (3) SA 725 (C))***

[33] Now it goes without saying that the South African judgments I refer to here deal with principles postulated upon interpretation and application the rules of summary judgment proceedings in that country. Historically the South African rule was similar in its wording to the provisions of our old rule on the subject. That was before an amendment of our rule that altered this position substantially.

[34] The provision governing summary judgment procedure occurs under Rule 32 (3) (b) of the South African uniform Rules of Court which reads as follows:

> ***"Summary judgment 32 (3) upon the hearing of an application for summary judgment the Defendant may-***
>
> ***(a) -----***
>
> ***(b) Satisfy the court by affidavit (which shall be delivered before noon on the court day but are preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or any other person who can swear***

positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore"

[35] In the series of decisions of this court on summary judgment that I referred to earlier, the learned Mamba J has eloquently drawn the distinction between the formulation of the above rule as it was in our old rule on summary judgment contrasting it with the new rule 32 (4) (a). As his Lordship has fully quoted the sub-rule 32 (4) (a) in his remarks above it is unnecessary reproduce it here.

[36] I need only highlight that the operative qualifying words or phrases that define what would constitute valid grounds for refusal of summary judgment that a defendant must set out are simply that he must satisfy the court or demonstrate:

"With respect to the claim or the part to the claim to which the application relates that there is an issue or a 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"

(My emphasis)

[37] Our current rule is clear in that any 'cause', 'reason' or 'question' or issue that the defendant raises must not only some triable issue but must be

germane, relate or be in respect to the whole or part the claim to which action relates.

[39] Upon that premise and in the context of our sub rule 32 (4) (b), it is my considered view that in terms of our rules as presently framed, a bare counterclaim for an unliquidated claim for damages does not constitute a valid defence to a summary judgment application. It is my understanding that such a claim in reconvention founded, as it were, on a separate cause of action does not qualify as a valid ground for resisting summary judgment. That sub-rule is complementary to Rule 32 (4) (b).

[40] I am fortified in my analysis in this regard by the wording of Rule 32 (4) (c), which reads as follows:

> ***"The court may order and subject to such conditions, if any as may be just stay execution of any judgment given against a defendant under this Rule until after the trial of any claim in reconviction made or raised by the defendant in the action"***

[41] The defendant averments although no fully articulated with sufficient clarity and particularity as to disclose the existence of a genuine counterclaim suggests that he contemplates the bringing of such counterclaim. Even if it were otherwise and he had fully set out such a claim that would at best portend a claim in reconvention as envisaged by Rule 32 (4) (b).

[42] Nonetheless, I incline to the position that that in terms of this sub-rule the existence of a possible counterclaim can be no justification for refusing to grant summary judgment.

[43] It appears to me that the most appropriate approach to adopt in summary judgment proceedings is that when faced with a counterclaim founded on an independent cause of action, this Court has a discretion to grant summary judgment. However, if satisfied that it is in the interests of justice to do so the Court may, but is not obliged, to stay execution of summary judgment pending trial of an action in respect of the counterclaim as per Rule 32 (4) (c). In other words the existence of a counterclaim or claim in reconvention is no bar to the grant of a summary judgment.

[44] Considering the facts of this case I see no reason why the defendant if so minded cannot bring an action to prosecute any claim for damages whose prospects are suggested in his papers. That however ought not be an impediment to the grant of summary judgment.

[45] I now turn to the claim for an alleged unlawful deduction or debit I find the defendant's deposition in this regard to be not only inconsistent but also unsatisfactory in the following respects:

45.1 Firstly I note that he has contradicted himself in some very pertinent material respects.

At paragraph 3 of his affidavit resisting summary judgment he states the following:

> ***"My defence to the plaintiff's claims will be summarized as follows:***
>
> ***3.1.--------***
>
> ***3.2.--------***
>
> ***3.3. Plaintiff unlawfully and without transacted in my current business amount and debited the account with an amount of E50,000.00 on the 28th February 2014 thereby depriving the business of cash to sustain itself --- The plaintiff is indebted to me for damages caused thereby"***

However, these averments are in contradistinction with what he further says at paragraph 13 of the very same affidavit, where the amount allegedly appropriated by the plaintiff is stated as E60,000. 00.

45.2. Secondly it is quite clear that these averments are intended to be merely foundational to the defendant's supposed counterclaim and not raised as a stand-alone claim for restitution. As I have already addressed the notion of a counterclaim notion I need not revisit this aspect.

[46] In the circumstances it is my considered decision that the Defendant has failed to satisfy this court that he has proper cause to forestall summary judgment.

[47] I therefore grant summary judgment as prayed with costs as per the application before me.

MAPHANGA J

Appearances:

For the Plaintiff: Ms. N. Dlamini

Mlangeni & Company.

For the Defendant: Mr. M. Nkomondze

Nkomondze Attorneys