IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.: 708/2018

In the matter between

SWAZI CABLES AND LIGHTING (PTY) LTD **Plaintiff**

T/A AUTO TECH SOLUTIONS

AND

ATLANTA PRODUCTS (PTY) LTD **Defendant**

Neutral Citation: *Swazi Cables And Lighting (PTY) LTD t/a Auto Tech Solutions Vs Atlanta Products (PTY) LTD (708/2018) [2019] SZHC 59 (29th March 2019)*

Coram: Hlophe J.

For the Applicant: Mr L. Manyatsi

For the Respondent: Mr S. Simelane

Date Heard: 24th July 2018

Date Judgement Delivered: 29th March 2019

Summary

Action proceedings – Summary Judgement Application – Whether Plaintiff has established a case in which the Defendant has no Defence – Claim by the Plaintiff not disputed on its own except that Defendant claims to have a counter claim against the Plaintiff – Effect of a counter claim to a claim in convention in law discussed – Counter claim disputed by Plaintiff – Court has a discretion to exercise whether in the circumstances the determination of the claim in convention should await the determination of the counter claim – Instances when discretion is to be exercised in the Plaintiff's favour discussed.

JUDGMENT

[1] After the Defendant had filed a notice to defend a claim instituted by the Plaintiff and particularized in terms of a Declaration following the same notice by the Defendant, the former (Plaintiff) filed an application for summary judgement against the Defendant claiming payment of the total claim in the sum of E102, 186.28, whilst contending that the notice of intention to defend had been filed for purpose of delay allegedly because the Defendant had no defence.

[2] The basis of the Plaintiff's claim is that the parties to the proceedings had, during the month of December 2016, concluded a written agreement in terms of which the Plaintiff leased out to the Defendant four of its fork lifts

for utilization by the Plaintiff in the conduct of its business. The contract concluded by the parties was annexed to the summons as annexure A.

[3] Whereas it is not in dispute that the Defendant had paid for utilizing the said fork lift for the period since inception (March 2017) to November 2017, it allegedly failed to pay for the period December 2017 to January 2018, resulting in the current proceedings to claim what was now referred to as the outstanding rentals for the four machines over the aforesaid two months period.

[4] It is not in dispute that three of the machines on behalf of which the claims have been made were gas operated, only one was diesel operated. Otherwise the rates for the gas operated machines differed from those of the diesel operated one. Whereas the diesel operated one was fixed at E55.00 per hour; the gas operated ones were fixed at E60.00 per hour per machine. It had also been agreed that in each month, if the machineries had been operated in full, they would charge for a total of 334 hours.

[5] After clarifying that in each one of the two months forming the basis of the claim, none of the machines had been utilized for the maximum hours claimable, the Plaintiff stated how long each machine had been utilized including the amount claimable for each one of the two months. The amount claimable for each machine in each one of the two months was expressed in invoices reflecting each machine for each month. Those invoices in respect of the diesel machine described as "B" were marked "B1" for December 2017 and "B2" for January 2018 one. The first machine among the gas operated ones was named "C" and the invoices relating to it were marked "C1" for December 2017 and "C2" for January 2018. The second one among the gas operated machines was named "D" and the invoices for it were respectively marked "D1" for December 2017 and "D2" for January 2019 respectively. The third one of the gas operated machines was named "E" and the invoices relating to it were "E1" for December 2017 and "E2" for January 2018 respectively.

[6] It is not in dispute that the total claim arising from the utilization of the four machines for the two months in question (that is December 2017 and January 2018) amounted in all to a sum of E102,186.79.

[7] In an endeavor to meet the contention that it did not have a bona fide defence and that it had filed the notice of intention to Defend solely for purposes of delaying the Plaintiff's claim, the defendant merely raised a counter claim, contending that based on the same contract to which the claims for December 2017 and January 2018, were founded the Plaintiff had previously (and that is from inception of the contract in March 2017 to October 2017) fraudulently billed it for operational hours available on each day as opposed to hours for which the machines had actually been used which it alleged would have been the proper claim.

[8] Although these claims had been paid as and when the invoices were issued to the Defendant, the latter claims it had mistakenly paid those invoices as it was actually made to pay for operational hours when the machines had been parked instead of paying for hours when the machines were actually used. For that reason it contended that the Plaintiff had fraudulently taken advantage of it and caused it to pay amounts it should not have paid. It then sought to claim back the amounts allegedly fraudulently claimed from it and paid to the Plaintiff. The Defendant contends further that the amounts

claimed by the Plaintiff for the December 2017 to January 2019 period by means of its conventional claim today should be set off against the amount it paid to the Plaintiff when it should not have. It said that the amount due to it was going to be more than that it had to pay to the Plaintiff which meant it should be paid back the balance.

[9] In a nutshell, the Defendant's case is simply that whereas it owes Plaintiff the amounts for the months of December 2017 and January 2018, those amounts should be set off against the counter claim it has against the Defendant. This counter claim was still going to be instituted.

[10] It was agreed between the parties that the question to ask on the claim is what is the effect of a counter claim (particularly a disputed one) against an undisputed claim in convention? A further question is whether disputed counter claim be used as a defence for set off purposes against an undisputed claim in convention?

[11] The general rule is that a court ought to postpone judgement on a claim in convention where there has been filed a claim in reconvention, particularly if

the amount of the counter claim is more than that of the claim in convention. This rule is however subject to the discretion of the court as it could in certain befitting circumstances grant the claim in convention despite the filing of a claim in reconvention:- See in this regard the case of **Standard Bank of South Africa Ltd Vs SA Fire Equipment (PTY) LTD And Another 1984 (2) SA 693 (C)** as well as **Amavuba (PTY) LTD V Pro Nobis Landgoed (EDMS) BPK And Others 1984 (3) SA 760**.

In the latter case, the court had the following to say while emphasizing the discretion of the court:-.

> *"It also seems clear that the court has a discretion in appropriate cases to depart from the general rule. (See **ERE Fowdry V San Sales 1984 (1) SA 732 (D)**. I cannot see what prejudice first respondent would suffer if an order was made on Applicant's Claim for ejectment before the determination of first Respondent's claim in reconvention. The first respondent would not be unable to enforce any judgement which might later be granted in its favour"*

[12] The general rule was otherwise expressed in the following words in **Herbstein and Van Winsen, The Civil Practice of The Supreme Court of South Africa, 4th Edition, Juta at page 512**:

> "*The premiss of the rule is that the claim and the counter claim should be adjudicated pari pasu, but the court has a discretion to refuse to stay judgement on the claim in convention. This discretion is wide and is not limited to cases in which the counter claim is frivolous or vexatious and instituted merely to delay judgement on the claim in convention." See also* ***Amavuba (PTY) LTD V Pro Nobis Landgoed (Edms) BPK & Others (Supra)****. (underlining has been added)*

[13] In **Truter V Degenaar 1990 (1) SA 206 (T) at 211 E-F** the court refused to apply the general rule of postponing the claim in convention until it was decided pari pasu with the claim in reconvention because the counter – claim in question was doubtful to succeed when the prospects of its success were considered.

[14] Applying these principles in case, it is clear that whereas it is not enough to say that because the counter claim is not liquid the claim in convention should therefore not be postponed, it is a weighty consideration that the defendants prospects in proving the counter claim are not so obvious. When considering this point and the fact that the Defendant had paid off the amounts it now seeks to dispute that it had paid them because they were due for close to a year, and has all of a sudden found a problem with that payment, in circumstances which are unclear how that had come about and how it is going to change now other than suggesting that the claim in reconviction is instituted to delay the Plaintiff's claim; this Court is of the view that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff and grant the relief sought with the Defendant having to sue the Plaintiff in a separate claim if it will do so for what it feels should form the basis of a counter claim.

[15] Accordingly, this court makes the following order:-

1. The Plaintiff's Application for Summary Judgement succeeds with the result that Defendant is to pay Plaintiff a sum of E102,

186.29 (One Hundred And Two Thousand One Hundred and Eighty Six Emalangeni Twenty Nine Cents).

2. Payment of interest on the sum of E102, 186.29 at 9% from the date of summons to that of payment.

3. Costs of suit on the scale as between attorney and client in line with the lease agreement.