IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1542/18

In the matter between

EXTRA DIMENSIONS 1168 CC t/a JONATHAN EGDES BROKERS AND AGENTS	**Plaintiff**
and	
NATIONAL MAIZE CORPORATION (PTY) LTD	**Defendant**

Neutral citation:	**Extra Dimensions 1168 CC t/a Jonathan Edges Brokers Agents v National Maize Corporation (PTY) Ltd**(1542/2018) [2019] SZHC 73 (18 April 2019)
Coram:	**MAMBA J**
Heard:	**07 December, 2018**
Delivered:	**18 April, 2019**

[1] *Civil Law and Procedure – Application for summary judgment per Rule 32 (1) and (2) of the rules of Court – claim for damages for breach of Contract. Calculation of some of the claims based on agreed terms and therefore constituting liquidated amounts in money in terms of Rule 32 (2) (b) of the Rules of Court.*

[2] *Civil Law and Procedure – Application for summary judgment. Defendant must 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 the claim or part thereof, per Rule 32 (4) (a).*

[3] *Civil Law – Application for Summary Judgment – claim based on breach of contract. Defendant alleging legal impossibility of performance based on law or import regulations in the country prohibiting import of product. This is a question that ought to be tried to determine whether the defendant is in law, in breach of the contract.*

[1] By Summons dated 01 October, the plaintiff claims an amount of about E3 595 475.80 together with interest and costs from the defendant. This sum is in respect of damages arising from breach of contract that had been entered into by and between the parties herein. The total amount claimed is made up of 11 separate claims. These claims arise from alleged breaches of two contracts that were entered into between the parties.

[2] The first of these contracts was entered into on or about 02 February 2017, alternatively on 15 February 2017. The plaintiff was duly represented by its Chief Executive Officer Mr J. Edges whilst the defendant was also duly represented by its Chief Executive Officer, Mr Sabelo Msibi. The agreement was written and duly executed and signed by the parties and was concluded in Eswatini.

[3] Similarly, the second agreement was also in writing and signed by the said representatives of the parties and this was on 20 February 2017 or alternatively on 22 February 2017 and was executed in Matsapha, Eswatini and or alternatively Johannesburg, in the Republic of South Africa.

[4] In terms of both Agreements or Contracts the plaintiff undertook to supply specified tonnes of white maize to the defendant at various specified times and on specific or agreed prizes. The initial terms of these agreements are not in dispute. They are common cause. However, the plaintiff alleges that both agreements were subsequently varied; again in writing. Plaintiff avers that the variation was in respect of the penalties or damages that were to be borne by the defendant in the event that the defendant failed to accept deliveries of maize as agreed in the main or initial agreements. Plaintiff avers further that the defendant was duly represented by Mr C. Lukhele in concluding the variations or novations aforesaid, whilst the plaintiff was represented by its Chief Executive Officer aforesaid. The defendant denies that Mr Lukhele had authority to enter into the said agreement or contract variations.

[5] In terms of the variation or novation referred to above, the plaintiff avers that the defendant bound itself to be liable to pay a sum of E43.60 per month per metric ton for every consignment of white maize not accepted for delivery by the defendant on the agreed period. The said period was stipulated in months.

[6] It is common cause that certain quantities of maize were delivered to and accepted by the defendant at various specified times. For example, '---

the defendant accepted delivery of the balance of white maize which was to be delivered during July 2017 during the months of August to November 2017 --- and pursuant to the variation of the first agreement, the plaintiff has suffered damages for storage costs and finance charges in an amount of E160 320.43.' The computation or calculation of these damages is clearly stated in annexure POC 6 at pages 31 to 33 of the Book of Pleadings. This is in respect of the first claim.

[7] It is common cause further that on or about 11 May 2018, the defendant cancelled or repudiated both agreements. This was in writing and was done by Mr Sabelo Msibi, the Chief Executive Officer of the defendant. The said cancellation was accepted by the plaintiff, again duly represented by its Chief Executive Officer, on 31 May 2018.

[8] In cancelling the contract, the defendant stated that it was forced to do so by or '--- due to circumstances beyond our control that have prevented the delivery of the maize to [it].'

[9] Following the repudiation aforesaid, the plaintiff demanded payment of the damages herein stated and as claimed in the Summons. The written demand was made on 09 July 2018, per Annexure POC 22.

[10] Following the filing of a notice of intention to defend the claim by the defendant, the plaintiff has filed this application for summary Judgment alleging that the defendant has no defence to any of its claims herein. The plaintiff alleges further that its claims are liquidated amounts in money and the defendant has filed the notice of intention to oppose merely for purposes of delaying the action. This is in respect of all 11 claims. The defendant denies that it has no defence to any of these claims.

[11] I have noted above that the defendant denies that Mr Cyprian Lukhele had the requisite authority to vary the terms of the two agreements executed by the two respective Chief Executive Officers of the parties. The other ground of opposition by the defendant is, 'that the contract between them [i.e. parties] became impossible to perform because of statutory barriers relating to importation of maize from the Republic of South Africa to the Kingdom of Eswatini; and that these difficulties were timeously conveyed to the plaintiff by the defendant. The defendant further avers that the plaintiff has not shown in its particulars of claim that it took every reasonable step to mitigate its losses in this case and therefore it cannot claim for such damages or at least in these amounts or scale. Lastly, the defendant states that plaintiff's claims for interest and bank charges have not been adequately pleaded or even shown or alleged

to flow ‘naturally and generally from the alleged breach’ of contract by the defendant.

[12] The impossibility of performance alleged by the defendant sterms from a legal prohibition of importation of white maize into Eswatini from the Republic of South Africa at the material time. The defendant avers that due to such prohibition by Eswatini, it could not accept deliveries of the maize from the plaintiff. This was thus a legal impossibility, which at the time of the conclusion of the Contracts did not exist and this was unknown to both parties.

[13] Mr Cyprian Lukhele, the employee of the defendant who agreed to the variations of the Contracts, on behalf of the defendant – has filed a confirmatory affidavit in support of that opposing or resisting Summary Judgment. He confirms the contents of the substantive affidavit by Mr Msibi, which amongst other things, states that Mr Lukhele did not have the requisite authority to novate or vary the agreement in question. This lack of authority is disputed by the plaintiff who states inter alia, that on 13 September, 2017 Mr Msibi referred him to Mr Lukhele, stating that he, Mr Msibi, did not deal with operational issues. The operational issues referred to herein were the actual deliveries of the maize within the predetermined or agreed time.

[14] In *Lindiwe Mkhwanazi V Manuel Tembe (828/2018) [2018] SZHC 219 (4 December 2018)* this Court noted as follows:

'[5] *In Thomas Moore Carl Kirk and another V Swaziland Posts and Telecommunications Corporation (1283/2018) [2016] SZHC 253 (16 December 2016)* this Court stated the law in the following terms:

'[8] Rule 32 (4) (a) of the Rules of this Court, which is the applicable rule here governing an application for Summary judgment provides that:

'Unless on the hearing of an application under sub-rule (1) either the Court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates 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, the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.'

These provisions have been interpreted and explained in countless cases before this court and the Supreme in this country. I do not think that any useful purpose would be served by any further elaboration on the meaning and import of these provisions. Suffice to quote what this court

stated in *Zeblon M. Malinga vs Marwick H. Dlamini (713/2016) [2016] SZHC 196 (28 September 2016)*:

> '[10] A defendant has to satisfy the court that he has a bona fide defence to the action or part thereof or satisfy the court that there is a triable issue or that there is a question in dispute which ought to be tried or that, for some other reason, the plaintiff's claim or part thereof ought to be referred to trial. In doing so, a defendant is not expected to state or fashion his defence with such precision or exactitude that would be expected of a litigant in his plea. The issue or defence must, however, be stated in such a way that the court is satisfied that it constitutes a triable issue, or, that if proven or established during a trial, it would constitute a defence to the plaintiff's claim, or part thereof as the case may be. Again, in deciding whether or not the issue raised would, if proven, constitute a bona fide defence, the court looks at the particular circumstances surrounding each case. What must be bona fide is the relevant material or defence rather than the defendant himself or itself. Vide *Dulux Printers (Pty) Ltd vs Apollo Services (Pty) Ltd (72/12) [2013] SZSC 19 (31 May 2013)* and the cases therein cited, *Central Bank of Swaziland v Yamthanda Investments (Pty) Ltd (59/2015(B))*

[2016] SZSC 11 (30 June 2016), BUSAF (PTY) LIMITED v VUSI EMMANUEL KHUMALO t/a ZIMELENI TRANSPORT, civil case 2839/08, judgment delivered on 6 February 2009, *Benedict Vusi Kunene and Mduduzi Justice Mdziniso and Another (1011/2015) [2016] SZHC 40 (12 February 2016)* and cases cited therein.'

Similar sentiments were expressed in *Busalive Bhembe v Basil Mthethwa (1675/2015) [2016]* where the court said:

'[8] … 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 (4) (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 Mabhoyane 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."

These remarks are applicable in this case.'

[9] I have narrated or set out what the defendant raises as its defence to this application. It is not for this court at this stage to determine whether the defence or issues raised are true or not. That is a matter for the court that would be seized with the merits in the main action. At this stage or in the application for summary judgment, this court is called upon to determine whether in the circumstances of this case, the

> defendant has raised a defence or defences, or an issue or issues, which if proven would constitute such a defence to the applicants' claim or part thereof. But of course, as stated in the authorities quoted above, the defendant may also raise an issue not necessarily a direct defence to the claim, that 'for some other reason, the matter ought to be referred to trial. See *Boy Boy Nyembe t/a Mr Trailer and One Stop Tyre Service and Another v VMB Investments (Pty) Ltd (22/2014) [2014] SZSC 73 (3 December 2014).'*

These observations are apposite in this case and are hereby re-iterated.

[15] Based on the Turquand Rule and the available material in this case, I have no hesitation is dismissing the assertion that Mr Cyprian Lukhele did not have the requisite authority to vary the relevant contracts in the present case. He had such authority, or at the very least, the plaintiff was made to believe by the defendant that he had such authority. And, in any event, the plaintiff had no reason to believe that he lacked such authority. Consequently, the Contracts were validly varied by the parties. That, however, is not the end of the matter.

[16] The defendant has, as already stated, averred that it could not legally import the maize into the country at the relevant times. The law prohibited such importation. It is plain from the material herein, mainly the emails exchanged between the parties that the defendant was having some legal impediments regarding the procurement of the requisite permits to import the maize into the country. This was constantly being communicated to the plaintiff by the respondent. For example, at one stage the plaintiff was requested to 'suspend' the delivery of maize. This was agreed to by the plaintiff and since the maize had to be stored by the plaintiff, it inevitably attracted the envisaged or agreed storage charges, so says the plaintiff. I deal with this later in this judgment.

[17] In its heads of argument, the defendant denies that the storage charges constitute a liquidated amount in money inasmuch as these charges cannot be reasonably and easily calculated or ascertained from the plaintiff's particulars of claim. I cannot agree. For example, claim 3 is for a sum of E327 000.00. This is made up of two invoices, namely POC 10a and POC 10b and is for 1000 metric tonnes of maize for a period of 7.5 months at E43.60 per month. Thus the simple calculation is as follows: 1,000 x 7.5 x 43.6 = E327 000.00. This can readily be ascertainable from the pleadings.

[18] The question that remains though is whether the defendant was legally at fault in failing to accept deliveries at the agreed period. The defendant has said it was legally prevented from doing so by the existing legislation or regulations at the time in the country. This is, in my judgment, a triable issue or question in dispute which ought to be tried. Consequently it constitutes a valid defence to this application for Summary Judgment. In short, if such an averment is proven at trial, it may constitute a valid defence to the claim – based of course on impossibility of performance. For the avoidance of doubt, it is only impossibility of performance that is culpable or legally blameworthy that attracts a penalty or damages.

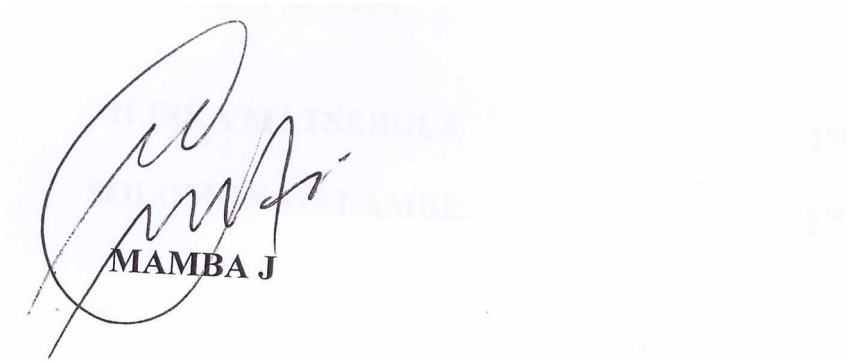
[19] The other claims by the plaintiff are not based on storage charges but on what is referred to as a 'washout' – having to resell the maize into the open market after the repudiation of the Contracts. (Vide annexures POC11a and POC11b). There was of course no agreement on the damages for such cancellation or how losses in such an eventuality were to be ascertained or determined. It remains unclear to me how these losses were arrived at or calculated in POC11b, or whether the plaintiff was able to resell the maize at the best price available in the market at the relevant time. This also has a bearing on the averred mitigation of damages made by the defendant. Consequently there is no material to indicate that this is a liquidated amount in money, simply because its

calculation is less than clear and obvious – or easily ascertainable from the pleadings.

[20] Lastly, it has to be noted once again that in terms of our rule on Summary Judgment applications, a defendant may successfully defeat such application on the basis that a vexed legal question is involved and this needs to be argued and ventilated in a trial rather that in an application such as this. I make this observation based on my assessment of the evidence that the plaintiff seems to have at one stage accepted that the defendant was not legally in breach of the Contract because of the relevant import regulations prohibiting the importation of GMO maize into the country. There is no material or averment in these papers on the size or quantity of the GMO maize that formed part of the stock that was either delayed or altogether not delivered to the defendant. (Vide RA7). In any event, where performance by the defendant was impossible, it appears to me that cancellation became the necessary consequence or step to take.

[21] For the foregoing reasons, I hold that the defendant has raised a triable issue in this case. Consequently Summary Judgment is refused.

[22] The defendant has prayed for an order for costs on a punitive scale. This prayer is premised, so the argument proceeded, on the ground that the plaintiff was aware that the defendant had a valid defence to the claims. In the view I take of the matter, whilst the plaintiff's case is certainly not unassailable, it is not hopelessly inappropriate for Summary Judgment application. I therefore decline such a prayer by the defendant. Costs shall be costs in the action proceedings.



For the Plaintiff: Mr Z. Jele

For the Defendant: Mr S. Dlamini