



**IN THE HIGH COURT OF ESWATINI**

Held at Mbabane

Case No.:1470/2018

In the matter between

**MAPUTO PLANT HIRE (PTY) LTD**

**1<sup>ST</sup> PLAINTIFF**

**TRANS YUZA (PTY) LTD**

**2<sup>ND</sup> PLAINTIFF**

**AND**

**KUKHANYA CONSTRUCTION (PTY) LTD DEFENDANT**

**Neutral Citation:** *Maputo Plant Hire (pty) ltd & Another Vs Kukhanya Construction (pty) ltd (1470/2018) [2020] 27 SZHC 70 ( 26 February 2020)*

**Coram:**

Hlophe J.

**For the Plaintiffs:**

Mr K. Simelane

**For the Defendant:**

Mr F.M. Tengbe

**Date Judgement Delivered:**

26<sup>th</sup> February 2020

## Summary

*Civil Procedure – Summary Judgement application – Settled that Summary Judgement ought to be granted where there is no bona fide defence shown by the Defendant – This is to say where no triable issue has been raised by the Defendant necessitating that the matter goes on trial – Where there is acknowledgement of the indebtedness claimed, such amounts to a liquid claim which grounds the grant of a summary Judgement application in law.*

*Effect of a counter claim on the Plaintiff's claim weakened by the fact that the claims in question are all disputed and are not liquid – Secondly defendant's counter claim is less than the sum of Plaintiff's claim – Position settled such cannot be used to upset a claim based on a liquid claim unless the undisputed sum was paid into court – No such amount paid into Court and prospects of success against the Plaintiff from the counter claim are not so overt – Consequently summary Judgement succeeds – Defendant can always institute whatever claim it has against the Plaintiff.*

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## JUDGMENT

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- [1] This is a summary judgement application in terms of which the Plaintiff claims that this court issues an order inter alia compelling the Defendant to pay it a total sum of E1,206, 960.78 (One Million Two Hundred and Sixty Thousand Nine Hundred and Sixty Emalangeni and seventy eight cents) together with interest thereon fixed at 9% per annum.

[2] Plaintiffs application aforesaid arises from action proceedings in terms of which the Plaintiff, a sub – contractor to the Defendant, claimed the sum of money referred to above, together with costs and interest at 9%. This claim arises from business relationship between the Plaintiffs and the Defendant. In terms of this relationship the First Plaintiff provided trucks and plant machinery for use during the construction of the Gege – Nhlangano road to which the Defendant was the main contractor. The Second Plaintiff provided similar services to the Defendant as the main contractor in the construction of the same road.

[3] It is otherwise not in dispute that the First and Second Plaintiffs are sister companies, who were represented by the same officer in the performance of the contract concerned.

[4] It is apparent from the papers filed of record that the modus operandi between the Plaintiffs and the Defendant was that whereas the drivers of Plaintiff's trucks and plant machines would record the time spent in the performance of the work contracted for on the tally sheet at the site in the presence of an employee of the Defendant, the said tally sheets would

thereafter be sent to the Defendants for calculation and conversion into monetary value. This monetary value would be recorded on a certificate signed by the Defendant's Representative confirming how much was due to the Plaintiff. After this certificate had been signed and handed over to the Plaintiffs' Representative, the latter would then issue invoices based on the certificates issued by the Defendant. See the certificates and invoices from pages 113 – 144 of the Book of Pleadings. The tally sheets containing the information from which the certificates are based are from pages 144 – 147 of the book.

[5] It is therefore not true that the invoices on which the plaintiffs' claim is based were issued by the Plaintiff on information not known to or by the Defendant. In fact the invoices it is clear were merely a mirror image or a duplication of information contained on the certificates issued by the Defendant. This can also be seen from Annexure MP5 on the book.

[6] In fact the papers show that there were only two invoices claiming on behalf of the first Plaintiff and two more claiming on behalf of the second plaintiff;

which were not founded on the certificates prepared by the Defendants which were to later graduate into invoices. These invoices are referred to in the reconciliation documents at page 159 of the book with regards the invoices by the First Plaintiff and at page 162 of the book with regards those by the Second Plaintiff. Those at page 159 relating to the First Plaintiff are referred to as “KC007” and “KC008”. Those relating to the Second Plaintiff are at page 162 of the Book of Pleadings and are referred to as “TY007” and “TY008”.

[7] Although these latter two invoices are not apparently founded on a certificate by the Defendant, they were nonetheless later confirmed as legitimate by the Defendant in terms of an e-mail annexed to the papers at page 169 of the book. In there the Defendant had this to say with regards the statements based on the invoices concerned :-

*“After reviewing the statements, I agree with the said figures”*

These figures include those of the invoices without certificates. This then means that all the amounts claimed as reflected in all the invoices filed amounted to a liquidated claim. As such the amounts claimed after the

reconciliation were all liquidated amounts capable of being sought through a Summary Judgement Application.

[8] It becomes clear therefore that whatever issues one would have with regards the amounts contained in the invoices and what was eventually claimed in the particulars of claim are matters for simple calculation. The position of our law is now settled that the liquidity of a claim doesnot get spoilt merely because it requires a simple mathematical calculation to come up with the claim made. I am therefore convinced that the amount claimed is a liquid claim produced in the reconciliation of the invoices made by the parties.

[9] In so far as the amounts claimed arise from certificates prepared by the Defendant and where although they are not from such certificates but were acknowledged or agreed to by the Defendant in a process such as during a reconciliation, it does not seem to me that there is a triable issue there. The effect of a certificate on due or owing amounts was expressed in the following words in Ransden, Mckenzie's Law of Building And Engineering Contracts And Arbitiation, 6<sup>th</sup> Edition, Juta at page 190 to 191 (an excerpt I have been referred to by Plaintiff's Counsel):-

*“In the absence of contrary provisions in the contract, a provisions in the contract, a progress certificate is the liquid document that creates a debt and entitles the contractor to payment of the amount certified. This applies also in the case of contracts for specific work where normally the contractor would not be entitled to remuneration until completion. The same will in general apply to final certificates. Cancellation for a contract by the contractor may debar a claim based on a certificate and where a contractor has been liquidated and the liquidators have elected not to complete the contract, all the defences remain open to a claim based on a certificate, including set off, and a counter claim for damages for breach of contract, or a defence based on the specific terms of the contract. However, the right to remuneration of an innocent contractor suing on a prior progress certificate after he has cancelled the contract due to the employer’s breach, survives the cancellation of the contract..”*

[10] At pages 158 to 169 of the book of pleadings and whilst there covering the contents of annexure “MP8”, the sum of E1,299,625.10, as eventually claimed by the Plaintiff in terms of its particulars of claim so as to later form the basis of the summary judgement application, is agreed upon as the amount due. It at that stage includes both the amount of the sum of the certificates issued and the amounts earlier shown as not being based on the certificates but which were eventually agreed as due (see page 169 of the book of Pleadings).

[11] Describing a liquid claim, the Supreme Court had the following to say in **Dulux Printers (PTY) LTD Vs Apollo Services (PTY) LTD, Civil Appeal Case No.72/2012**, at page 6 thereof:-

*“From the foregoing, it is clear that the summons does disclose a cause of action. In addition, the claims for a liquidated amount of money as envisaged by Rule 32(2)(b). A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment; Superior Court Practice 1-210; Harms; Civil Practice of the Supreme Court P.35. Herbstein and Van Winsen et al The Civil Practice*



*of The Supreme Court of South Africa, Juta Publishers, 1997 at P435 to 436, define a liquidated amount as an amount based on an obligation to pay on agreed sum of money or is so expressed that the ascertainment of the money is a matter for mere calculation. There is no doubt that the calculation of the amount in annexure 'A' is capable of speedy and prompt ascertainment.”*

[12] It seems to me that taking into account all the circumstances of the matter including what has been said above, the defendant has not been able to raise a triable issues on the papers nor has it been able to establish a bona fide defence were it not for the counter claim raised, there would be no basis not to grant summary judgement as claimed. I must now consider the question of the counter claim including what effect it would have on the summary judgement application.

[13] The Defendant's claim is based an alleged breakdown of the excavator supplied by the Defendant which allegedly necessitated that another one be sourced at the Plaintiff's cost. The sum said to have been expended to which

the Plaintiff has to be restored is a sum of E362 659.40. A certain table was prepared showing an excavator's costs. There is nothing on the face of it that attributes the said excavator to that replacing the one by the Plaintiff.

[14] The counter claim is also based on a failure by the Plaintiff to advise the Defendant about the return of the machinery and equipment initially used at the Defendant's site to Mozambique which allegedly resulted in certain penalties in the sum of E468000-00 being levied against the Defendant by the Eswatini Revenue Authority. It was argued that the Defendant was entitled to recover the said sum of E468000.00 from the Plaintiff following the fact that had it not allegedly breached the contract with regards the return of the machinery to Mozambique, the Defendant would not have been ordered to pay such an amount to the Plaintiff.

[15] The total of the counter claim made of the sum of the E362 659.40 (mentioned above) and the sum of E468000.00 (mentioned in the foregoing paragraph) is a sum of E830 659.40.

[16] Whereas there are instances where a counter claim would lead to a refusal to grant a summary judgement, such does not happen in all instances. It seems to me that for that to happen the counter claim in question should have high or good prospect of success. The same thing should happen where the counter claim concerned is not less than or smaller than the claim due.

[17] In Trotman and Another Vs Edwick 1950(1) SA 367 at 379 this position was expressed in the following words:-

*“The question therefore arises whether this court has the right to delay the plaintiffs in the implementation of an admitted right to payment because the Defendant alleges he has claims of smaller amounts than plaintiff’s which claims are not capable of being set off against the claim. It seems to me that even if this be correct (and I accept its correctness) it does not follow that the defendant was entitled to claim that the clearly admitted right of the Plaintiff to a judgement should be postponed until his counter claim had*

*been adjudicated upon. Nor, in my opinion, does the rule that claim and counter claim were to be tried pari-passu lead to this conclusion. For inherent in this rule is the assumption that there is a claim to be tried.”*

- [18] On the issue of a set off not being applicable in a case where the counter claim is less than the main claim, the following was stated in **Voughan & Company Ltd 1919 TPD 165 at page 117:-**

*“Apart from questions of set off and questions of like character it is on the whole, generally speaking, right that a plaintiff should not recover money when he really owes more to the Defendant than the amount of his claim. Whatever the position might be when the counter claim exceeds the claim, it seems to me that this does not apply where the claim exceeds the counter-claim”*

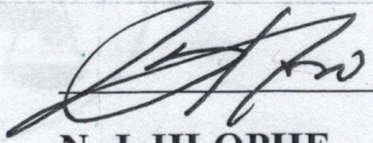
- [19] In the present matter, the claims by the defendant are not only illiquid in the sense that they are in the form of damages but they are also less than those

by the Plaintiffs. If I follow the foregoing principles, it seems to me that there would be no sound basis for me not to order that the Plaintiffs' Summary Judgement Application should be granted as prayed together with interest at 9% and costs of suit.

[20] Accordingly I make the following order:-

1. The Plaintiffs' application for Summary Judgement succeeds.
2. The Defendant's counter claim does not succeed, it is dismissed with the Defendant being given leave to pursue it as an independent claim or action proceedings against the Plaintiffs.
3. The Defendant be and is hereby ordered to pay Plaintiffs the total sum of E1,206,960.78 ( One Million Two Hundred and Six Thousand, Nine Hundred and Sixty Emalangeni, and seventy eight cents Only).
4. The Defendant is to pay interest on the foregoing sum fixed at 9% from date of Summons to that of Payment.

5. The Defendant is to pay the costs of suit.



**N. J. HLOPHE**  
**JUDGE – HIGH COURT**