

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1269/2018

In the matter between:

VOLTEX (PTY) LTD t/a VOLTEX

NELSPRUIT

PLAINTIFF

And

SUPA SAVERS INVESTMENTS (PTY) LTD FIRST DEFENDANT

HENWOOD WARREN CEDRIC SECOND DEFENDANT

Neutral citation : *Voltex (Pty) Ltd t/a Voltex Nelspruit v Supa Savers
Investments (Pty) Ltd & Another (1269/2018)*
[2022] SZHS 185 (26/08/2022)

CORAM: B.S. DLAMINI J

DATE HEARD: 16 August 2022

DATE DELIVERED 26 August 2022

Summary: Civil Procedure-Application for summary judgment in terms of Rule 32 of the High Court Rules. Plaintiff alleging that its claim can be swiftly determined by invoking Rule 32 (2) of the High Court Rules. Defendants on the other hand are disputing being indebted to the Plaintiff and allege that they have settled all sums due to Plaintiff.

Held; The application for summary judgment by Plaintiff cannot succeed as there are triable issues. The matter is accordingly referred to oral evidence.

JUDGMENT

INTRODUCTION

[1] By way of summary judgment, the Plaintiff seeks payment of the sum of E 348,818.18 from the Defendants which is in respect of goods sold and delivered by the former at the latter's special instance and request.

[2] It is alleged by the Plaintiff in its particulars of claim that;

- "4. Plaintiff's claim is against the first defendant for payment of the sum of E 348,818.18 being in respect of goods sold and delivered by the plaintiff to the first defendant at the special instance, order and/or request of the first defendant in and during 2017/2018.*
- 5. Payment of the said price would be due and payable by the Defendants to the Plaintiff within 30 (Thirty) days of date of delivery, alternatively within 30 (Thirty) days of Plaintiff's Statements, further alternatively within a reasonable time of delivery, further alternatively upon demand.*
- 6. Goods were duly sold and delivered by the Plaintiff to the Defendants in and during the period 2017/2018. A copy of the Plaintiff's Statement is hereto annexed marked "A".*

7. *Despite 30 (Thirty) days from date of delivery, alternatively 30 (Thirty) days from date of Plaintiff's Statement, further alternatively a reasonable time after delivery, further alternatively upon demand, the Defendants have failed, refused and/or neglected to effect payment of the aforesaid sum of E 348,818.18 which said amount remains due, owing and payable.*

9. *A Certificate signed by the General Manager of the Plaintiff setting out indebtedness in the amount of E 348, 818.18 of the Defendants to the Plaintiff is annexed hereto marked "C".*

[3] After filing a notice of intention to defend by the Defendants, the Plaintiff moved an application for summary judgment in terms of Rule 32 of the High Court Rules. The Defendants filed an affidavit resisting summary judgment in which they basically dispute being indebted to the Plaintiff. In the affidavit resisting summary judgment, the Defendants dispute that there existed a Credit Facility Agreement between the parties. It is alleged by the Defendants that the business relationship between the parties was based on a 'cash on delivery' arrangement. This means, according to the Defendants, it was required

that payment be made to the Plaintiff immediately upon delivery of the goods as opposed to paying after a period of 30 days or upon the expiry of a reasonable period.

DISPUTE BETWEEN THE PARTIES

- [4] The Plaintiff places reliance to its summary judgment application on two documents namely; the Statement issued to the Defendants dated 31 March 2018 and also the Certificate of Balance dated 30 July 2018. The statement issued by the Plaintiff indicates that goods were sold and delivered to the Defendants from 24 October 2017 up to 07 February 2018 which left the Defendants with an outstanding balance of E 348,818.18. The same figure or amount is reflected in the certificate of balance issued to the Defendants by the Plaintiff on the 30th July 2018.

- [5] In the affidavit resisting summary judgment, it is alleged by the Defendants that;

“7.1 I specifically deny that the Defendants are indebted to the Plaintiff in the sum of E 348,818.18 as per statement of account attached marked “B 1” and/or for any amount.

7.2 *I further deny that there existed a credit facility between the Plaintiff and the Defendants.*

7.3 *I submit that all orders I made the Plaintiff would compute the costs of the orders, and Plaintiff would compute the costs of the orders, and payment would be made on the same day of the orders, thereafter the goods would be delivered to the 1st Defendant's premises.*

7.4 *I submit that there was never a time when goods were delivered without having made payment.*

7.5 *I submit further that the amount claimed by the Plaintiff as per statement "B1" has been erroneously calculated, as it does not incorporate and or include:*

(i) *The payments the 1st Defendant made during the period claimed, that is October 2017 to February 2018.*

(ii) *The credits reflected on the said statement and;*

(iii) *The payment of E 24,982.31 even though it has been acknowledged to have been received in February 2018-*

has also not been deducted from the amount allegedly owed by the Defendants.”

- [6] It is clear from the above that the parties are not in agreement as regards the debt of E 348,818.18 allegedly owed by the Defendants. The Court is thus called upon to determine whether such dispute is capable of being resolved through the mechanism provided under Rule 32 of the High Court Rules.

ANALYSIS AND CONCLUSION

- [7] Rule 32 (1) of the High Court Rules of Eswatini provides that;
- “Where an action to which this rule applies and a combined summons has been served on a defendant or a declaration has been served to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or a to a particular part of such a claim, apply to court for summary judgment against that defendant.”**
- [8] The test to be employed by the Court in a summary judgment application involves an assessment of whether or not the Defendant

has a defence to the Plaintiff's claim. This assessment is obviously a judicial enquiry. Properly construed, the test is whether the Defendant has raised a 'plausible defence' or what other judgments refer to as a 'bona fide defence' or whether there is a 'triable issue' in the affidavit resisting summary judgment. The words 'no defence' used in Rule 32 should therefore not be taken in the literal sense as this would defeat the purpose and objects of the Rule.

- [9] The Plaintiff has referred the Court to the local decision of the Supreme Court in **DULUX PRINTERS (PTY) LIMITED v APOLLO SERVICES (PTY) LIMITED (72/2012)[2013] SZSC 19 (31 MAY 2013)** in which the Court stated the following;

"[18] Similarly, Corbett JA in the case of *Maharaj v Barclays National Bank 1976 (1) SA 418 (A)* at 426 A-E stated the following:

"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his

summary or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court requires [to look] into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to whether the whole or part of the claim, a defence which is bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully"...connotes in my view that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least, disclose his defence and the material facts upon which it is based with sufficient particulars and completeness to enable the court to decide whether the affidavit disclosed a bona fide defence."

[10] In **Nedbank (Swaziland) Limited v Baslam Investments (Pty) Ltd t/a Fair Price Furniture and Another (2016/11) 65 SZHC (20 March 2013)**, the High Court of Eswatini stated that:

“[18] It is in a bid to ensure that this procedure is properly utilized, that the rules require a Defendant who is opposed to summary judgment to file an affidavit resisting same. The task of the court in the face of such an affidavit resisting summary judgment, is to scrutinize the affidavit to ascertain whether “there is an issue or question that ought for some other reason to be a trial of the claim or part thereof.”

[19] Once the Defendant raises a triable issue or discloses *a bona fide* defence in its affidavit, that should emasculate summary judgment and permit the Defendant [to] proceed to trial. As the declared in the case of **Mater Dolorosa High School v R.J.M Stationery (Pty) Ltd, Appeal Case No. 3/2005**;

“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."

- [11] The Plaintiff's claim on the facts of the present matter is for goods sold and delivered to the Defendants during the period of 2017 to 2018. The business relationship between the parties appears to have commenced in 2014. In the replying affidavit of the summary judgment application, it is stated by the deponent thereof, one Stacey Duncan, who describes herself as the Plaintiff's Legal General Manager that;

"15. An invoice in an amount of E 148, 538.26 dated 17 December 2014 is listed on the reconciliation in respect of which a payment of only E 5,000.00 was made on 23 December 2014.

16. The failure to make full payments resulted in an outstanding amount of E 193, 981.47 as at the end of December 2014."

[12] The averments referred to above by the Plaintiff's Legal General Manager give the impression that the overall outstanding balance, which must have increased over the years (according to the Plaintiff) has been rolled over from the year 2014. If this is to be true, then the assertion in the particulars of claim that the Plaintiff's cause of action arose from 2017 to 2018 is not entirely correct. In order to determine the Plaintiff's claim, the Court is required to go back to the year 2014 when the business relationship between the parties started.

[13] The Plaintiff's claim is further complicated by the payment of E 24,986.31 made by the Defendants on 7 February 2018. In its supplementary heads of argument, the Plaintiff's Attorney submitted that a part of this amount which had been paid by the Defendants in the sum of E 1,578.23 was allocated to Invoice No. 218073 and the remaining amount (E 23,098.75) was allocated to Invoice No. 218639. As at the 31 March 2018 when the final statement was prepared by the Plaintiff, Invoice No. 218073 had no outstanding balance, probably because the sum of E 1,578.23 had been paid. The same applies to invoice No. 218639. Any person objectively reading the statement would not know that the sum of E 24,986.31 was split between the two invoices, namely invoice numbers 218073 and 218639. This

aspect of the statement requires further explanation and this can only be done through oral evidence.

- [14] It follows therefore that if payments made in 2018 or the years before could be applied or utilized to settle previous outstanding invoices for goods supplied, then the Court would logically need to go back and assess the outstanding balances from the first invoice which was not settled up to the last invoice issued to the Defendants. Put conversely, the statement or invoices said to be for goods supplied from 2017 to 2018 could actually have been fully or partly paid, but such payments were applied to outstanding balances from 2014, 2015 and 2016. These outstanding balances were carried forward to 2017 and 2018. This is taken from the Plaintiff's explanation in its supplementary heads to the effect that the sum of E 24,986.31 was actually applied to two different outstanding invoices from the past. This is further supported by the allegation in the Plaintiff's replying affidavit to the effect that as from December 2014, there remained an outstanding balance of **E 193, 981.47.**

[15] It would therefore not be proper for the Court to simply confine itself to the statement prepared by the Plaintiff on the 31 March 2018 and ignore the business relationship of the parties in the other previous years. The Court needs to assess the relationship of the parties from start to finish. It is the only way in which justice can be realized.

[16] As was stated by the Supreme Court in the case of *Musa Sifundza v Swaziland Development and Savings Bank, Civil Case No. 67/12 at paragraph [8]* it was held that;

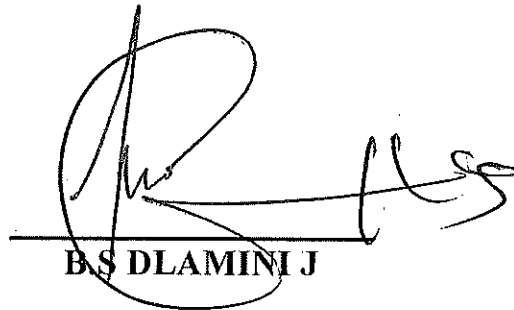
“[8] It is well recognized that summary judgment is an extra-ordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay.”

[17] The Court therefore comes to the conclusion that it would not be proper to grant summary judgment in favour of the Plaintiff on the

facts of this matter. In the circumstances, the Court grants orders as follows;

(a) The application for Summary judgment is dismissed and the Plaintiff's claim is referred to oral evidence.

(b) Costs are to be costs in the main cause.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Plaintiff: *Mr.K.N Simelane (KN Simelane Attorneys in Association with Henwood & Company.)*

For Defendants: *Mr. C. Bhembe (Bhembe & Nyoni Attorneys)*