IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 06/2021**

In the matter between:

Lobulawu Investments (Pty) Ltd	**1'[1] Appellant**
Fikile Mthembu	**2nd Appellant**
And	
Ngwane Mills (Pty) Limited	**Respondent**
***TIA* Feedmaster**	

Neutral Citation:	Lobulawu Investments (Pty) Ltd and Another v Ngwane Mills (Pty) Ltd (06/2021) [2021] SZSC29 (4th November, 2021)
Coram:	RJ CLOETE JA, SB MAPHALALA JA, AND JP ANNANDALE JA
Heard:	12th October 2021
Delivered:	4th November 2021

CASE SUMMARY

Appeal against summary judgment: Total amount of indebtedness challenged by respondents. Full claimed amount accepted as correct but a portion thereof averred to be a discount, first to be deducted. Deductible amount in dispute: Either a discount agreed upon in the past, to be a credit for appellants, or utilised to facilitate purchase of a company, said to be beneficial for appellants. Factual dispute over this portion of entire claim, to be off-set or not. Potential to be a bona fide defence against this portion. Balance of initial summary judgment application excluding disputed portion, already paid to respondent. Disputed portion referred for hearing of oral evidence. Appeal against rate of interest allowed. Costs of the appeal ordered to be costs in the cause.

JUDGMENT

Annandale JA

[1] The poultry industry business may well be good and profitable, likewise with the suppliers of food to feed the hundreds and thousands of our feathery friends which produce eggs and meat for local consumption. Sometimes though, as in any other industry, problems come to the fore. The present appeal arises from a situation where a producer was taken to court by a chicken food supplier over outstanding payment obligations of El 026 956 and obtained summary judgment in the amount ofE400 000.

This was after the then defendants settled a part of the claim, amounting to E626 956. The disputed amount ofE400 00 was thereafter ordered by the High Court by way of summary judgment to be paid by the appellants, together with interest from the date the debt arose, and costs.

[2] The first appellant before us is a company which operated a chicken broiler business while the second appellant is a surety of the company, an obligation which she incurred when an application for a credit facility was made to the respondent in 2014. It was agreed that Feedmaster (respondent in the appeal) would supply chicken food to Lobulawu (first appellant) on credit, with due amounts to be paid within thirty days from date of statement, with a maximum credit limit of E1 250 000.

[3] It was further agreed, *inter alia*, that overdue payments shall bear interest at prime plus 3% per annum and that a certificate signed by an accountant ofFeedmaster shall be sufficient proof of all amounts owing. In the event of litigation in court, legal expenses would be payable on the scale of attorney and client, including collection charges. It was a further term that the supplier would not be liable for any damages or loss arising from the goods sold (chicken food) unless caused by gross negligence of

Feedmaster. Liability for consequential or any other indirect damages was also excluded, and limited to the purchase price of the product.

[4] In its combined summons, Feedmaster claimed the sum of El 026 956 jointly and severally from Lobulawu and Mthembu, the surety, together with interest and costs. This amount was certified by the financial manager of Feedmaster, not an accountant as per the credit agreement. No issue was taken with this. This aspect had no role to play in the Court below since the appellants acquiesced in it without raising any challenge to the designation of the author of the certificate of outstanding balance. It was not raised in the course of the appeal either and nothing turns on this point. In any event, a certificate of balance, such as the one that was placed before the Court in this matter, is no more than an evidentiary tool to facilitate proof of the *quantum* of the amount which was claimed by the plaintiff/respondent on appeal. See Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A) at 380H-383F. The certificate, which was agreed to in the sale agreement between the parties now on appeal, merely sought to be part of the facts underlying the defendant's liability to pay the amount as was ·certified. In itself, it does not constitute part of the cause of action. It serves as proof of the outstanding balance and no more.

[5] The claimed rate of interest was on appeal. In the Court below, interest was ordered "at the rate of 9% *per annum* from the date the debt arose until date of final payment." This is was in accordance with the claimed rate of interest, but not in line with the credit agreement between the parties, which governed the terms and conditions of their relationship. Their Sales Agreement stipulated that the terms of payment shall be that after due date, any outstanding amount. " ... shall bear interest at a rate of prime plus 3% *per annum".* No justification for the deviation from the agreed rate of interest vis-a-vis the claimed rate, which was granted in the High Court, appears in its judgment. It seems to merely be an error *per incuriam.*

[6] I am accordingly persuaded that the 5th ground of appeal should be allowed.

[7] The remainder of the appeal centres around the order that E400 000 was granted in the application for summary judgment without referring it to be dealt with in a trial. This is averred to be and in fact is to an acceptance of the plaintiffs version and a rejection of the defendant's contention. The further grounds of appeal take issue with the manner in which the Court *a quo* held that clause 6 of the agreement between the

parties ousted the "claim for agreed discount" on the purchase price, since it "was not and could not be regarded as a claim for loss or damage". Finally, a challenge is laid to clause 16 as having been held to be applicable to the matter before the Court.

[8] Clause 6 of the agreement seeks to indemnify Feedmaster against claims for loss or damage incurred or arising from goods sold and delivered, also against consequential or other indirect damages. It limits damages, but only in the event of gross negligence by Feedmaster, to the value of the purchase price of supplied product. If supplied and delivered product was passed on to anyone else by Lobulawu, it was obliged to inform the further consumer or customer of this limitation clause.

[9] It is trite law that a claim for damages cannot be used to set-off a liquid claim for goods sold and delivered but unpaid, such as argued by the respondent is in the present matter. Black's Law Dictionary (7th ed, 1999) defines set-off as "A defendant's counterdemand against the plaintiff arising out of a transaction independent of the plaintiff's claim", or as "A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counter balancing sum owed by the creditor", (emphasis added). Set-off can only take place if both claims are

liquidated in the sense that they are capable of speedy and easy proof. This was held in Blakes Maphanga Inc v Outsurance Insurance Company Ltd 2010 (4) SA 232 (SCA) at paragraph 15. In as much as set-off operates *ipso iure,* " ... if a party to an action wants to obtain the benefit of set-off, he must claim to be entitled the benefit of set-off; see Hardy NO and Mostert v Harsant 1913 TPD 433; Bain v Barclays Bank (DC&O) Ltd 1937 SR191"., as was stated by Lichtenberg Jin Herrigel NO v Bon Roads Construction CO (Pty) Ltd and Another 1980 (A) SA 669 (SWA) at 676. However, in its affidavit resisting summary judgment, the appellant did not rely on a claim for damages to substantiate the amount ofE400 000. Instead, it was said that: "... The Managing Director further made an undertaking to pass a credit discount of E400 000 first defendant's last batch of chicken feed as first defendant was selling its shares in Kikilikigi (Pty) Ltd". They went further and said that when the amount of El 026 956 became due, the plaintiffs managing director was reminded of the E400 000 credit discount as per their verbal agreement but that it was unsuccessful. He allegedly claimed that their credit discount as per their verbal agreement, was used to assist another company to purchase their shares in Kikilikigi. The sale of shares was held out to be a private treaty between the appellant and the other purchasing company, a matter in which Feedmaster had no legal interest. The plaintiff company and its managing director was therefore regarded

as having performed an act of generosity towards Emerald Hills (Pty) Ltd (the share purchasing company), adversely affecting the agreed discount between the present parties.

[10] In response, Feedmaster denied having made an undertaking to have offered' a discount ofE400 000, *inter alia* by reliance on clause 16 of the agreement which has it that credit terms and subsequent changes shall be conveyed by letter. It also sought to take refuge under clause 6 of the agreement which limits its liability for loss or damage arising from goods sold and delivered. This refers to substandard chicken food, which the appellant held out to be the reason why discount on its future purchase was said to have been agreed upon in the first place, from the onset.

[11] In its judgment, the Court *a quo* makes reference to text messages (SMS's) between the litigants, copies of which were attached to the defendant's affidavit resisting summary judgment. It centres around the disputed E400 000, defendant saying that it was a promised credit, plaintiff saying it was its contribution to *"get the deal done"*, in probable reference to the sale of defendant's company. The managing director's irritation with this issue comes to the fore when he also texted that: *"So*

don't try this card again, this all was discussed in the m..." (message incomplete).

[12] The appellants filed an additional affidavit to their resisting affidavit, the admissibility of which is not dealt with in the impugned judgment. It sought to introduce further copies of SMS's between the directors of the two companies, again pertaining to the E400 000 and its denial to have been regarding a promised discount as stated in reply by Feedmaster.

[13] The second appellant wrote on the 13th February 2018 to the respondent's director, seeking to remind him that: *"You promised to reduce the debt by* E400K". In response, he said: *"Hi Fikile. We agreed to resuce (sic) [reduce?] debt by E400k but we need to sign the agreement first. When can we do so?".*

[14] What all of this serves is to indicate that there is a clear and manifest dispute of fact over the amount of E400 000 and what it was designated for. The two versions are contradictory and potentially even in self contradiction. Whether the initial origin may have been, it is held out by the appellant to be a negotiated discount, to be deducted from the final

consignment of chicken food. It is pleaded in resistance to summary judgment to be a valid defence, in good faith, and not a delaying tactic in order to avoid judgment, as was argued by the respondent on appeal. As stated above, it could not hold water if it was proffered as a reduction of the liquid claim as consequences of damages. Feedmaster acknowledges the amount but as having it to have been expended to facilitate the sale of appellant's company.

[15] Whoever is correct or wrong in their contradictory versions has not yet been ventilated in a trial where evidence is adduced, challenged and considered by a Court of law, with an eventual judicially considered finding. It is this issue which is central to the appeal before us and which requires anxious consideration.

[16] In his judgment, the learned judge of the High Court, with reference to the SMS text messages stated that: *"One thing to note about the SMS is that the Plaintiff vehemently denied that the E400 000 was towards the credit discount agreement. The E400 000 pertained to a bail out which was caused by the Defendants agreeing to sell their shares in Lobulawu Investments (Pty) Ltd. The amount of shares was 2.9 million and Emerald (Pty) Ltd could only afford 2.5 million. The Plaintiff would pay*

the difference and then be entitled to the assets of the Defendant's Investment Company. The issue of the E400 000 is *clearly explained by the plaintiff'*.

[17] Appreciating the risk of repetition, such clear explanation is not so clear anymore if regarded is to be given to the further SMS's (at page 159 of the record) where Mr Van Niekerk says: *"Hi Fikile we agreed to resuce* (sic) [reduce] *debt by E400 000 but we need to sign the agreement first';*. In my respectful view, it is an issue which can only be properly decided in the course of a trial. The pleaded defence has not yet been subjected to the rigours of a trial, but summarily rejected on the say-so of the respondent company.

[18] Summary Judgment Applications are governed by Rule 32 which provides as follows:

> "32. (1) Where m an action to which this rule applies and a combined summons has been served on a defendant or a declaration has been delivered 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 to a particular part of such a claim, apply to the court for summary judgment against that defendant.

(2) This rule applies to such claim in the summons as is only-

a) on a liquid document;

b) for liquidated amount in money

c) for delivery of specified movable property; or

d) ejectment.

(3) (a) An application under sub-rule (1) shall be made on notice to the defendant accompanied by an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be and such affidavit may in addition set out any evidence material to the claim".

[19] By all counts, the summons and subsequent application for summary judgment meet the criteria of the Rule. The Court *a quo* could not have been at fault if it initially was to have entered judgment in respect of the

amount that was paid over to the plaintiff, thereby avoiding judgment for the remaining amount of E400 000. It is this amount, the subject of appeal, which needs consideration under the provisions of Rule 32(4), which provides the following:-

> "32. (4) (a) 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 part of the claim, to which the application relates that there is an issue or question in dispute which ought'to be a tried or that there ought for some other reason to be trial of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed" (underlining added).

[20] In the present matter, the appellant raised the issue of off-setting of a part of the original claim, stating that it was a discount due to it, but with the plaintiff denying it to be so. The same amount was said to have been appropriated for another purpose, faciliting the purchase and transfer of a transaction in favour of the appellant. This being disputed by the appellants, it brings to the fore the question of whether there "... is a

question in dispute which ought to be tried or that there ought for some other reason to be a trial of that ... part" (of the claim).

[21] This Court in Dulux Printers (Pty) Ltd v Apollo Services (Pty) Ltd (72/12) [2013] SZSC 19 (13 May 2013) at para [11] held that, (per MCB Maphalala JA, as he then was):

> "The purpose of the summary judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. See *Herbstein and Winsen (supra)* at pp 435-436. This is understandable because the remedy is final in nature and closes the door to the defendant without trial. Ramodibedi JA, as he then was, in the case of Zanele Zwane v. Lewis Stores *(PTY)* Ltd t/a Best Electric Civil Appeal No. 22/2007 stated the following:
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> > "8. It is well-recognised that summary judgment is an extra ordinary remedy. It is a very stringent one for that matter. This is so 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 has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiffs claim against a defendant to which there is clearly no valid defence: see for example *Maharai* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A), *David Chester* v. *Central Bank of Swaziland* CA 50/03. Each case must obviously be judged in the light of its own merits, bearing in mind always that the Court has a judicial discretion whether or not to grant summary judgment. Such a discretion must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion."

[22] In Maharaj v Barclays Bank *(supra)*, which has frequently been accepted and applied in ESwatini (see for instance Variety Investments (Pty) Ltd v Motsa 1982 - 1986 SLR 77(CA) at 80A-E and David Chester v Central Bank of Swaziland *(supra))*, Corbett JA stated at 426 A-E:

"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 enquires 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 both *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".

[23] The learned judge of the High Court summarily rejected any notion that the appellants might have disclosed a *bona fide* defence to the relevant part of the claim. This was, firstly, because the plaintiffs explanation concerning the E400 000 was readily accepted and secondly, because the negotiated discount initially originated from damages, losses said to have arisen from goods sold and delivered. However, no such losses or damages were held out to justify off-setting of the claim, but instead, a negotiated discount which was not deducted from the original claimed amount. The Court also relied on a prohibition of any change to the credit agreement unless it is in writing and signed by Feedmaster.

[24] In view of all the above, it is my considered view that the door should not have been summarily closed on the appellants, without first referring the issue ofE400 000 claimed discount to be off-set against the claim against them, to be dealt with by way of trial thereon. By so saying, I do not at all hold that it must indeed be off-set, or that it must form a valid defence. All that is required is to evaluate all of the relevant facts of this contention, whereafter an informed and judicially considered evaluation may be reached subsequent to a trial.

[25] In the event, I would order that:

1) The appeal is upheld to the extent that the disputed amount of E400 000 is referred to trial in the High Court.

2) The appeal against the rate of interest is upheld. The order of the High Court in this regard is set aside and substituted with an order that: "Interest shall accrue at the rate of prime plus 3% from the date on which the debt arose until the date of final payment".

3) Costs of the appeal are ordered to be costs in the cause.

JACOBUS ANNANDALE

Justice of Appeal

I agree:

Justice of Appeal

I agree:

SB MAPHALALA

Justice of Appeal

For the Applicant: Mr SC Simelane ofN.E. Ginindza Attorneys.

For the Respondent: Mr V. Dlamini ofBoxshall-Smith Attorneys.