

THE HIGH COURT OF SWAZILAND

NISELA FARMS. (PTY) LTD

Plaintiff

And

FORBES MICHAEL

Defendant

Civil Case No. 781/2004

Coram

S.B. MAPHALALA – J

For the Plaintiff

MR. K.MOTSA

For the Defendant

MISS MCHUNU

JUDGMENT (12/11/2004)

[1] Before Court is an opposed application for summary judgment where Plaintiff is seeking payment of E4, 296-53 together with interest from date of summons to date of payment and costs of suit,

[2] On or about the 1st July 2002, the parties entered into a written employment contract, which was subsequently terminated by the Plaintiff on the 31st June 2003. The Defendant then launched an application in the Industrial Court of Swaziland under Case No. 19/04 wherein compensation for unfair dismissal is sought. The

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Plaintiff subsequent to this application, issued summons for the repayment of certain tyres purchased on the account of the Plaintiff by the Defendant for his own personal use. The plaintiff's claim therefore is based upon the Defendant having unduly benefited from the purchase of the tyres from which the Plaintiff would derive no benefit.

[3] The Defendant in his affidavit resisting summary judgment relies on a counterclaim as a bona fide defence to the plaintiff's claim. The relevant averments are found in paragraphs 8 to 9 of the said affidavit. They read as follows:

8. DEFENCE

8.1 I humbly submit that I have a counter-claim against the Plaintiff of an amount of at least E40, 000-00 {Forty Thousand Emalangeni). On the basis of paragraph 7.7 of annexure "A" I am entitled to compensation for the use of my personal motor vehicle for the four months that I used it which compensation should be calculated at the basic hire rate.

8.2 I am advised and verily believe that the basic hire rate of a bakkie is E334-00 (three hundred thirty four Emalangeni) per day and 3,67 per kilometre, (see annexure "MF3").

8.3 I utilized the vehicle for at least 100 (one hundred days) when calculating using the number of working days recognized by the Law, which amounts to E33, 400-00 (thirty-three thousand four hundred Emalangeni). I humbly submit that I have not included days worked overtime and I hereby pray to deal with same in the main action.

8.4 The kilometres travelled during the four months add up to the 10, 800 (ten thousand eight hundred) kilometres. By virtue of the basic hire rate as stated in paragraph 8.2 above, I am entitled to E39, 636-00 (thirty-nine Emalangeni six thousand and thirty-six).

8.5 I submit that these are some of the amounts that are due to me and I intend to raise them in the main action, I also intend to include a counterclaim for the wear and tear of my motor vehicle.

9. On the basis of what I have submitted above, I humbly submit that I bona fide defence to Plaintiff's claim and have not filed my Notice of Intention to defend solely for purposes of delay.

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[4] The arguments advanced on behalf of the Plaintiff against the Defendant's counterclaim is that such is not a bona fide defence for purposes of Rule 32 because the plaintiff's claim is based on the unlawful purchase of tyres on the plaintiff's account for the Defendant's own personal use and is not directly related to his employment with the Plaintiff.

[5] The general position as regards a counterclaim raised by a Defendant in summary judgment application has been established in many decided cases in South Africa. In the case of Trotman vs Edwick 1950 (1) S.A. 376 (C) it was stated that a Defendant may rely on an intended counterclaim in an un-liquidated amount which exceeds the plaintiff's claim and must state the extent of such counterclaim. Further in the case of Spilhaus & Co. Ltd vs Coreejees 1966 (1) S.A. 52S(c) Watermeyer J expressed himself as follows on the subject:

"In all the cases to which the Court was referred by Counsel, and which I have been able to find, the basis of this Rule is stated to be that upon judgment being given on the counterclaim set off would operate. This method of pleading has now been sanctioned by Rule of Court 22 (4), and the basis is again stated to be that the giving of judgment on the counterclaim would extinguish the claim, either in whole or in part. If it would not be wholly extinguished the Court would have a discretion, if no other defence were raised, to give judgment in favour of the Plaintiff for such part of the claim as would not be extinguished".

[6] It appears therefore from the above-cited authorities that the Court has a discretion, if no other defence were raised, to give judgment in favour of the Plaintiff. The question which then presents itself is whether the Defendant's counterclaim is sustainable in law. A similar question confronted the Full Bench of the Eastern Cape Division in the case of Crede vs Standard Bank of S.A. Ltd 1998 (4) S.A. 786 where that Court held, inter alia, that a person who raises a counterclaim must show that it is sustainable. A Full Bench of the Appeal Court in Swaziland in the case of Variety Investments (Pty) Ltd vs Motsa 1982/86 S.L.R. 77 applied the same principle as in the latter case in Crede (supra).

[7] Following the above legal position therefore, it now behoves me to examine the sustainability of the Defendant's counterclaim as per the dicta in Crede's case

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supra. For Defendant to succeed in law in the present case he must prove the following requirements:

- (i) Breach of contract.
- (ii) Damage.
- (iii) Factual causal connection between breach and the damage; and
- (iv) Foreseeability.

[8] I shall proceed to examine the above requirements ad seriatim, thus:

- i) Breach of contract

The contract which the Defendant has annexed is an employment contract and it has not been shown that Plaintiff did not comply with it until the Defendant was dismissed in August 2003. The Defendant always had in his possessions a company vehicle besides his personal vehicle SD 911 MG.

ii) Damages

Assuming that the Plaintiff breached the contract the Defendant still has to prove that he suffered a financial loss (patrimonial loss). Annexure "MF3" in the Defendant's affidavit resisting summary judgment fall short in proving patrimonial loss because the Defendant never entered into a contract of hire with the Plaintiff hence he cannot even use the rates of Imperial to assess the purported loss. At the most the Defendant can claim reasonable costs of using his vehicle, which is different from claiming damages (see Isep Structural Engineering vs Inland Exploration Co. (Pty) Ltd 1981 (4) S.A. 13 and Groeneland vs Plattenbosch Farms (Pty) Ltd 1976 (1) S.A. 548).

iii) Causation.

The enquiry in this respect is two-fold, namely, the factual and legal causation, (see Christie R.H, The Law of Contract, 4th ed at 629 - 630).

In respect of factual causation the company always afforded the Defendant a company vehicle for his use and hence if he used his vehicle the

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purported loss was not caused by the Plaintiff. Therefore in casu there is no factual causation. Further, the Defendant cannot establish legal causation on the facts of the present case. The parties herein were in an employment arrangement not a hire arrangement. There was no obligation on the Defendant to use his vehicle for doing his work as Plaintiff provided company vehicles for that purpose, (see International Shopping Company (Pty) Ltd vs Bently 1990 (1) S.A. 680. (700 - 701).

iv) Remoteness.

In this regard the submissions made by Mr. Motsa for the Plaintiff are correct that the damages purported to be claimed by the Defendant were just too remote.

[9] In the totality of what I have stated above the counterclaim advanced by the Defendant cannot succeed in law and also on the basis of the facts laid down by the Defendant in his own affidavit. A car allowance is generally given to employees for the purpose of buying personal motor vehicles or use in the furtherance of the employers business. It cannot be said that the employee suffered damages because he was forced to utilise the vehicle purchased with a car allowance.

[10] From the documentation attached to the plaintiff's replying affidavit it is abundantly clear that the Defendant had other vehicles at his disposal. I find that there was no need for the Defendant to use his personal vehicle and therefore there is no basis for the counterclaim whereby the Defendant holds the Plaintiff liable for the cost of renting a vehicle.

[11] For the afore-going reasons I find that the Defendant has not disclosed a bona fide defence in this matter and therefore an order is granted in terms of prayer 1 and 2 of the plaintiff's declaration.

S.B.MAPHALALA

JUDGE