IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1447/2005

In the matter between

Moses Ncala	Plaintiff
And	
Swaziland Perishables (Pty) Ltd	Defendant
Coram	Jacobus P. Annandale
For Applicant /Plaintiff	Mr. Madzinane of Thwala Attorneys, Manzini
For Respondent/Defendant	Mr. B. Maphalala of Maphalala and Company, Manzini

JUDGMENT

29 November, 2005

[1] In this application for summary judgment, the plaintiff seeks payment of a sum of money, interest and costs in respect of the first of two claims against the respondent.

[2] The particulars of claim forms part of a combined summons, with claim one being in respect of arrear rentals amounting to E l l 611.64 and claim two amounting to damages, caused by water leakages, of some E9 018.80, a total of E20 630.44.

[3] Following an appearance to defend the action, the applicant/plaintiff enrolled the matter for hearing of an opposed application for summary judgment. As provided for under the rules, the applicant filed an affidavit which confirms the familiar statement that the cause of action and amounts claimed are confirmed and that the defendant has no *bona fide* defence, opposing it merely to cause a delay.

[4] In turn, the respondent or defendant in the action filed an affidavit to oppose the granting of a summary judgment against it.

[5] The issue to decide is whether summary judgment ought to be entered or not. The bone of contention is that the applicant has it that it only seeks summary judgment in respect of its first claim, that of unpaid rentals, and that no defence was raised against it. The respondent, on the other hand, has it that it has raised sufficient issue against summary judgment in that it has a counterclaim which is in excess of the total of both claims, further that it indeed has a valid defence

against the second claim which relates to damages caused by water leakages.

[6] The outcome of this application was delayed due to an unbearable workload at the High Court and not the complexity of the matter, either in law or fact. It could not be disposed of at the end of hearing argument herein due to many other contested motions also having had to be heard on the same day and further, to receive copies of authorities that the court was referred to but which are not readily available to the court. This unfortunate situation is hopefully to be alleviated in the near future once the compliment of only three judges at the High Court is increased. I express my gratitude for the helpful heads of argument and authorities which were availed to the court and from which I liberally incorporate parts thereof into this judgment.

[7]As brief background to the action with its two different claims, for unpaid rentals and water-caused damages, I refer to the pleadings.

[8] It is common cause that the parties had entered into a written contract of lease on the 1st August 1994 for a period of three years. The rental was E3 000.00 per month with an escalation of 15% per annum. The lease expired in July 1997 and the parties subsequently entered into an oral lease agreement which was renewable on a monthly basis. The terms of the oral agreement were the same as the expired lease.

[9] On the 1st October 2004 the Defendant gave notice to the Plaintiff that it would vacate the premises at the end of that month. Plaintiff alleges

that Defendant did not pay rental for October 2004, the same month that it vacated the premises. Defendant used the premises as a general dealer shop.

[10] It is also common cause that floor tiles in the shop were damaged during the currency of the lease. Also, there are alleged further damages to the merchandise and equipment of the tenant. The floor tiles and other items were damaged by water, giving rise to plaintiff’s second claim as well as defendant's counter-claim. There is a dispute of fact between the parties as to the origin of the water. The plaintiff attributes the origin of the water to the faulty cold storage apparatus belonging to defendant which it was using in the shop. On the other hand, the defendant denies this allegation and attributes the source of the water to a leak at the rear door which permitted rain water to enter the shop freely.

[11] Furthermore, defendant avers that it was the duty of the plaintiff to repair the leak, and that plaintiff was advised of the leak but that it did not repair it. The defendant denies that it undertook to remedy the damage caused to the floor tiles as alleged by plaintiff. Plaintiff claims that it engaged the services of "private persons" to repair the damage at a cost of E9 018.80 inclusive of labour and materials. This forms the first claim of the plaintiff.

[12] On the other hand, the plaintiff alleges that the damage was caused by the negligence of the defendant, a delictual claim for damages suffered. There is a factual dispute as to which of the parties were

responsible for repairing the damage to the floor tiles, presumably also in respect of making good the damages alleged by the defendant, regarding merchandise and equipment, as elucidated in the counterclaim.

[13] Relying on clauses 6.1 and 7.7 of the lease agreement, the defendant submits that the damage to the floor tiles was not caused by its own negligence as alleged. The agreement requires of the tenant to keep and maintain the interior of the premises in good order and repair at own expense. The landlord is required to keep and maintain the exterior of the premises likewise. Defendant avers that plaintiff was the sole cause of the damage because he neglected his duty imposed by the lease to effect repairs on the exterior of the premises which caused water to enter the interior of the premises and damaged the floor tiles. The defendant further submits that plaintiff was duly advised to effect the repairs but that he neglected his duty, further that he was aware at the time that he instituted these proceedings that the defendant would raise the defence that he himself was the cause of the damage.

[14] It is because the plaintiff has two claims against the defendant, each with a different cause of action although both emanate from the occupancy of the same leased premises, and because summary judgment is only applied for in respect of the first of the two claims, that the applicant/plaintiff argues that it ought to be successful.

[15] The argument is that the defendant did not disclose a *bona fide* defence against the first claim, for unpaid rentals, but only against the second claim for damages. Therefore, the argument goes, summary

judgment should be granted as applied for and the second claim can take its usual course.

[16] To substantiate this, Mr. Madzinane referred the court to the applicable principles that usually form a ground to grant summary judgment, even in the face of opposition thereto, due to the failure to set out a triable defence, as is concisely summarised by **Herbstein and van Winsen** in "The Civil Practise of the Supreme Court of South Africa", 4th edition at page 442, vis-a-vis Sub Rules 32(4) and (5) of our domestic rules:

"*A* bona fide *defence is disclosed if the defendant swears to a defence valid in law, in a manner that is not inherently or seriously unconvincing. In other words, the affidavit must set out facts that, if proved at the trial, would constitute a defence to the plaintiff's action. Failure to allege an essential element of the defence may result in summary judgment being granted.*"

[17] The applicant further relies on the *dictum* by Masuku J in **Swaziland Industrial Development Co. Ltd v Zamokwakhe (Pty) Ltd and Another,** Civil Case No. 3988/00 (unreported) at page 4:

'The *defendant must not be vague, sketchy and laconic. The defendant must depose to facts which if accepted as the truth or which can be proved at trial with admissible evidence disclose a defence.*"

[18] Further, also quite correctly, he relies on what was held by Corbett JA (as he then was) in **Maharaj v Barclays National Bank Ltd** 1976(1) SA 418(A) at 426 - A, where the learned judge stated that the enquiry in summary judgment applications is two pronged viz;

"*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 either the whole or part of the claim, a defence which is bona fide and good in law.*"

[19] What the applicant loses sight of is that its own action arises from the occupancy of leased premises by the defendant, which give rise to the two claims it instituted - firstly, alleged unpaid rentals and secondly that the premises have been damaged by water leakage, both a liquidated and unliquidated claim. When it applied for summary judgment, the defendant opposed it by way of an affidavit resisting the application, in which it states its reasons for doing so.

[20] Yes, it is true that the application refers to only the liquidated claim for unpaid rentals and yes, it is not shown in the respondent's affidavit that it has a triable defence against that part of the action. But that is not the end of the matter.

[21] In its resisting affidavit, the respondent/defendant sets out a full and comprehensive version, which in my judgment raises a triable defence. The tenant takes issue with plaintiffs claim in that it not only avers a totally different cause or reason for the water leakage that admittedly damaged floor tiles of the premises, but more importantly, incorporates details of a counterclaim that it is about to institute against the plaintiff. Whereas it was sued for damaged floor tiles amounting to about E9 000, it now avers that the water leakages, arising from a different source than that stated by the plaintiff, caused itself to suffer damages of some E36 500.00.

[22] The cause of the damages to both the floor tiles and fittings, equipment and grocery stock is placed in issue.
It is in dispute whether it was due to defective cold storage equipment or because of a leaking rear door on the premises, also whose responsibility it was to rectify the cause of water leakage - an issue that can only be resolved on trial if it remains in dispute.

[23] Further, there is the issue of a refundable deposit of E3000-00 which is said to have been paid by the tenant, and how it is to be dealt with.

[24] In all, the counterclaim raised by the defendant totals E39 500, almost double the amount of the full claim of the plaintiff.

[25] The plaintiff has not filed a replying affidavit in which the counterclaim is dealt with, nor was it barred or otherwise prevented from doing so.

[26] When an applicant seeks summary judgment, it has to be borne in mind that it is a drastic remedy which closes the doors of court against a defendant who wishes to have a triable defence to be heard. If it has an answer to the case against it, which it discloses at this stage, the court should be chary of denying him to have it adjudicated upon. In this regard, the wise words of Marais J in **Mowschenson & Mowschenson vs Mercantile Acceptance Corporation of SA Ltd** 1959(3) SA 362 at 366 E - H, has been the beacon in many a situation like this.

"*The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant. (See the case of* ***Symon & Co,,*** *supra), (Symon & Co. v Palmer's Stores (1903) Ltd., 1921(1) KB. 259. My addition). That can only be done if there is no doubt but that the plaintiff has an unanswerable case. If it is reasonably possible that the plaintiffs application is defective or that the defendant has a good defence, the issue must, in my view, be decided in favour of the defendant. It is true that the rule requires the defendant "to satisfy the Court... that he has a* bona fide *defence to the action," but, since the plaintiff is deprived of all opportunity of testing the averments of the defendant if the latter testified orally, and of contradicting the defendant on affidavit if he answers by way of affidavit, and since the Court itself is by*

implication precluded from cross-examining the defendant, the word "satisfy" cannot refer to a conclusion arrived by weighing the defendant's positive averments against the plaintiff's opposing allegations in the latter's verifying affidavit. If there is nothing inherently incredible in the defendant's answer and if that answer, if proved, would support a defence that is good in law, the Court would be obliged to dismiss the application and to give the defendant leave to defend the action."

[28] Presently, the defendant says that it does have a case which, if resolved in its favour, will not only be a defence to the claim against it, at least with regard to the second claim of damages, but that it will have the nett effect of receiving money from the plaintiff instead of itself being ordered to pay the plaintiff.

[29] Obviously, it is premature to come to any view at this stage as to who is right, who can prove what it says it can. At minimum, the defendant lays a foundation to substantiate what it alleges, facts which if proven could cause it to be successful. So is it with the plaintiff.

[30] There is a factual dispute of substance, which cannot be resolved as the matter now stands, which has to result in a refusal of the application for summary judgment, but which the plaintiff resists in yet one further aspect. This is that it contends that a counterclaim, which has been raised but not yet formalised, cannot be found to be a bar to its application. The defendant properly relies on **Variety Investments**

(Pty) Ltd vs Motsa, 1982-86 SLR 77 at 80 (C.A.) where Aaron JA stated the applicable position in Swaziland insofar as to what extent a defendant has to satisfy the court that he has a fully disclosed defence, with which I respectfully fully agree. He said:

"*There has been much discussion in the reported cases in South Africa as to how far a defendant need go before he can be said to have "satisfied" the court, and as to what is meant by the requirement that the affidavit should "fully" disclose of the nature and grounds of the defence. In* ***Maharaj vs Barclays National Bank Ltd*** *1976(1) SA 418(A), Corbett JA said, at 426A-E: "Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, 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 either 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, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It 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*

particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide *defence.*"

[31] It is this question as to whether the counterclaim debars the plaintiffs application for summary judgment that is the *crux* of the matter.

[32] In their authoritative work, the Civil Practice of the Supreme Court of South Africa, 4th edition, **Herbstein & van Winsen** say at page 444 that it is open to the defendant to raise a counterclaim to the plaintiffs claim and that sufficient detail must be given of the claim to enable the court to decide whether it is well founded. Further, that the claim may be unliquidated and need not necessarily arise out of the same set of facts as the claim in convention, though it must be of such nature as to afford a defence to the claim.

Although these learned authors do not refer to it *per se,* the legal position is succinctly stated by Coetzee AJ in **A.E. Motors (Pty) Ltd vs Levit** 1972(3) SA 658 (TPD) at 661G to 662-A. I am in respectful agreement with the following dictum:

"*It is perfectly clear from judgments in the Cape Provincial Division, where summary judgment procedure has existed for a long time, that this type of counterclaim, if otherwise valid, can certainly be raised successfully in opposition to summary judgment applications. I refer particularly, in addition to* ***Weinkove vs Botha,*** *1952(3) SA 178(C), quoted by Vieyra, J., to the case of* ***Spilhaus & Co. Ltd vs Coreejees,***

1966 (1) SA 525(C), where Watermeyer, J., says at p. 529 that it is firmly established that where the amount of the counterclaim exceeds that of the claim, even if it is unliquidated, it is one that can be raised. The learned Judge goes on to say:

"*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.*"

This judgment was given shortly before promulgation of the Uniform Rules of Court and it is now clearly so, with respect, as the learned Judge set forth, that it is a proper way of pleading and the proper way of opposing any money claim. The pleader raises an unliquidated counterclaim and prays that judgment on the main claim be stayed pending determination thereof."

[34] The present defendant/respondent sets out fully the details on which it seeks to rely in its counterclaim. It is not detailed to the same extent as it conceivably will be done and pleaded in due course but at the same time, it is not far removed from it. There is no blanket statement of the total amount of the counterclaim or that it leaves it open to conjecture as to how it seeks to plead the details thereof. It is contrary to the position where Dunn AJ (as he then was) dismissed a similar application in **Bank of Credit and Commerce International**

(Swaziland) Ltd vs Swaziland Consolidated Investment Corporation Ltd and Another, 1982-86 SLR 406 at 408 H to 409A:-

"*Whilst it is open to a defendant in an application for summary judgment, to raise a counterclaim to the plaintiff's claim, it is well settled that sufficient detail of the claim must be given so as to enable the court to decide whether it is well founded. See Herbstein and van Winsen the Civil Practice of the Superior Courts in South Africa 3ed, 306 and the authorities there referred to. The defendant has not given an indication of the amount of the counterclaim and has merely contented himself with stating that such claim "is far in excess of the amounts claimed by the plaintiff.*""

[35] In the matter before me, the position of the defendant is clearly and persuasively stated to be that it not only has a counterclaim against the plaintiff, which amounts to almost double the claim in convention, but also that it is able to plead in sufficient detail, when it is given an opportunity to do so, a cause of action which if proved, will defeat the claim against it. It is therefore unjust to deprive it of the opportunity to do so, by granting summary judgment against it at this premature stage. The merits of the defence as per the intended counterclaim requires to be canvassed and ventilated at a trial where the claims of the plaintiff are likewise to be considered.

[36] Should either party not be wholly successful, the trial court will be in a position to decide the extent in which either litigant has to be held liable. To now do so in part by acceding to the application for summary

judgment in respect of one leg of the claim, will not be in the best interests of justice to the parties before court.

[37] It is therefore that the application for summary judgment stands to be dismissed.

[38] In my view, it will best be considered at the trial as to the order that will be appropriate as to the costs occasioned by this application. It is thus further ordered that costs of the application for summary judgment be reserved for determination by the trial court.

[39] Finally, unless it has already been done, the defendant is given a period of fourteen calender days from date of this judgment to file its counterclaim, failing which it shall be barred from doing so, unless an extention of time is granted on an application to court.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE