



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3578/2009

In the matter between:

**MOSES MOTSA T/A EVUKUZENZELE
WHOLESALEERS**

Plaintiff

And

MOSES SHONGWE

Defendant

Neutral Citation: Moses Motsa t/a Evukuzenzele Wholesalers v Moses Shongwe
3578/2009) [2012] SZHC 208 (14th September 2012)

Coram: M. Dlamini J.

Heard: 4th July 2012

Delivered: 14th September 2012

*Summary judgment application – totality of averments raises dispute of fact
– court obliged to refer matter for trial.*

Summary: The plaintiff, a wholesale business owner lodged combined summons against defendant who runs a grocery shop business. Plaintiff claims for balance of money for goods sold and delivered at the behest of defendant. Defendant raises in defence a number of issues to plaintiff's application for summary judgment.

[1] The plaintiff and defendant were in a contractual sale agreement dating way back as 1985. Under this contract, in the period of September 1991 and January 1992 defendant purchased from plaintiff on credit goods to the total value of E321,540.80. Defendant paid a sum of E85,000 and the balance was E236,540.80. The summary judgment application is in respect of the claim of E236,540.80. These are common cause between the parties.

[2] In his affidavit resisting summary judgment, the defendant raised *a point in limine* which was however, not pursued during submission. I need not say not say much on the *point in limine* except that defendant position for abandoning the same is commended as from authorities and rule 32 (2) there was totally no substance in it. The defendant had stated that the plaintiff had embarked on a wrong cause of action in that his claim fell outside the ambit of summary judgment application.

[3] Although the transaction under issue is one for 1992, plaintiff instituted proceedings on the 11th August 2009 as per the Registrar's stamp on the combined summons.

[4] Rule 32 (3) (a) states as follows:

“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."

[5] The purpose of the rule as introduced in England was "to assist a plaintiff in a case where a defendant, who cannot set up a bona fide defence or raise against the plaintiff an issue which ought to be tried" as per **Erasmus**, "Superior Court Practice, 1999 at page B1-206.

[6] This procedure has been held by **Horwith J.** in **Eisenberg v O. F. S. Textile Distributors (Pty) Ltd 1049 (3) .A.A 1047** at **1054** as:

"constitute a negation of a fundamental principle in the administration of justice, audi alteram partem. Consequently the drastic remedy provided therein should only be resorted to and accorded where plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence or raise a fairly triable and arguable issue."

[7] *In casu* the defendant states in opposition to plaintiff's application:

"7. Ad Paragraph 6 & 7

The contents of these paragraphs are disputed and I aver that:

7.1 *I am not indebted to the plaintiff and do not owe a cent to him;*

7.2 *The said amount of E236,540.80 (Two hundred and thirty six thousand five hundred and forty Emalangi and eighty cents) was fully paid to the plaintiff in the following manner:*

7.3 *Over and above the payment of E85,000 (Eighty five thousand Emalangi) and E15,000 (Fifteen Thousand Emalangi) by way of two cheques totaling to the amount of E90,000 (Ninety thousand Emalangi). Copies of the said cheques are annexed hereto and marked “MS1 and 2” respectively.*

7.4 *Further, I voluntarily handed over to the plaintiff the following movable and immovable property as payment of the said debt I had with the plaintiff:*

- i) A Nissan 3 litre Van registered SD 399 KL worth E50,000.00*
- ii) A 1995 Toyota Tipper Truck worth E75,000.00*
- iii) Stock and fixtures and fittings from my restaurant business worth E175,000.00.*
- iv) 22 head of cattle valued at E2,500.00 each and totaling to the amount of E55,000.00.*
- v) Certain Lot 261, situated at Siteki valued in the amount of E85,000.00. I had purchased the said immovable property from a certain Mhlanga. The said immovable property was transferred directly to the plaintiff from the said Mhlanga.*

7.5 The total payment made to the plaintiff in the light of the above, is the amount of E440,000.00 (Four hundred and forty thousand Emalangi).

7.6 I submit therefore that the plaintiff's claim was fully paid and I exceeded the said amount due by an amount of E203,459.20 (Two hundred and Three Thousand four hundred and fifty nine Emalangi twenty cents).

7.7 Therefore I verily believe that I have a counter claim against the plaintiff in the said amount of E203,459.20.

[8] In assessing the defence on whether it is *bona fide*, **Horwitz J.** *supra* at 1055 highlights:

“a defendant adduces sufficient facts and particulars which show he has “a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence... It is not contemplated by this rule that the Magistrate shall investigate any disputed question of fact in detail or that he decide whether the defence is likely to succeed or not, if the affidavit discloses the nature and ground of the defence that is sufficient, provided that it is a bona fide defence. It does not appear to be necessary to show a complete defence, but “a fair probability of a defence”. (words underlined, my emphasis)

[9] **De Villiers J. P.** in **Lombard v Van der Westhuizen 1953 (4) S.A. 84** at **88** citing with approval **Sutton J.** in **Roscae v Stewart 1937 C.P.D. 138** stated as well:

“Now it is not contemplated by this rule that the Magistrate shall investigate any disputed question of fact in detail. It is not his function to endeavour to decide whether the defence is likely to succeed or not. If the affidavit discloses the nature and grounds of the defence, that is sufficient, provided that it is a bona fide defence. It is not intended that the court shall investigate the defence, and decide, as in a provincial sentence case, as to whether the probabilities of success are with the defendant or not. In the first place all that the plaintiff has to do is to verify his claim, and what the defendant has to do is disclose in his affidavit fully the nature and ground of his defence, and also allege that it is bona fide.”

[10] It is against this backdrop that I determine the issues herein. As already alluded to, the defendant alleges that the debt was settled in full, part by attaching two copies of cheques. Plaintiff in his reply, disputes this and informs the court that the payment was in respect of other debts due and owing by defendant to himself or his business. This on its own leaves room for a dispute which needs to be addressed on trial moreso because the pleadings close upon plaintiff’s reply.

[11] Defendant also alleges that part payment was in a form of cattle. In reply the plaintiff states that although he received cattle from defendant, they were purchased by his son-in-law from defendant and ferried by defendant to him. Defendant also avers that he paid by transferring a piece of land to plaintiff. Plaintiff again in reply denies such.

[12] As already indicated herein, my duty is not to ascertain the truthfulness or otherwise of the defence. That is a matter for trial. My duty is to determine

whether the defendant has established the nature and ground of his defence and whether it is *bona fide*.

[13] Following the principle laid down in **Fikile Mthembu and Standard Bank Swaziland Limited, Civil Appeal 3/09** unreported where his **Lordship The Acting Chief Justice**, as he then was, eloquently articulated:

“There can be no doubt in my mind that by insisting on “proof” of the alleged payment at that stage the court a quo pitched the required standard of establishing a bona fide defence for resisting summary judgment too high ... The appellant was not called upon to “prove” her defence at that stage.” (words underlined, my emphasis)

[14] **His Lordship** then cited **Watermeyer J.** (as he then was) in **Chambers v Jenker 1952 (4) S.A. 634 (C)** at 637 as follows:

*“Now it was said, in the case of **Estate Potgieter v Elliot, 1948 (1) S.A. 1084 (c)** that it is not incumbent upon a defendant in formulating his opposition to an application for summary judgment, to do so with the precision required in a plea, and a bona fide defence does not necessarily mean anything more than the substantiation of facts which, if proved, would give rise to a valid legal evidence.”*

[15] **De Villiers supra** making reference to **Jacob v Booth Distilling Co. 85 L.T. 262** states:

“Judgment should only be ordered under rule 14 where, assuming all the facts in favour of the defendant they do not amount to a defence in cases where there is a triable issue. Though it may appear that a defence is not likely to succeed, the defendant should not be shut out from trying the defence before the court either by having judgment entered against him or being put to terms to pay money into court as a condition of obtaining leave to defend.” (words underlined, my emphasis)

[16] Similarly, as already demonstrated above, the court cannot *in casu* “shut the door” as it were against the defendant who has raised as evident from the plaintiff’s reply, a triable issue.

[17] Accordingly, the application for summary judgment is refused. The matter is referred to trial. Costs shall be costs in the cause.

M. DLAMINI
JUDGE

For Plaintiff : **Mr. N. Mazibuko**
For Defendant : **Adv. L. Maziya**