



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 77/2013

In the matter between:

SITHEMBISO JERRY DLADLA

Appellant

And

DUMISANI HAMILTON MANANA

Respondent

Neutral citation: *Sithembiso Jerry Dladla v Dumisani Hamilton Manana (77/2013)*
[2013] SZHC 254 (11th November, 2013)

Coram: M. Dlamini J.

Heard: 30th October 2013

Delivered: 12th November 2013

– appeal from Magistrate’s Court – summary judgment application – where magistrate hold that counter-claim lacks causa – magistrate ought to grant leave to amend with cost except where the claim is totally or manifestly devoid of causa – bona fide defence – must be honest and genuine – appeal dismissal.

Summary: This is an appeal from the Magistrate sitting in Mbabane who granted respondent summary judgment on the basis that the counter-claim by appellant did not disclose any cause of action.

Background

[1] Around April, 2012, the parties entered into a lease agreement of a motor vehicle. The purchase price was the sum of E40,000.00 with a deposit of E21,000.00. The balance was to be paid in monthly installments of E3,000.00.

[2] In the months of May, June, July appellant fell into arrears. Respondent instituted action proceedings for the balance of E9,000.00 claiming breach of contract. Subsequently, respondent filed for a summary judgment application.

[3] It appears that before the closing of pleadings, respondent without a court order, repossessed the *merx*. Appellant filed a *mandamus van spoilie* application. It was granted in his favour.

[4] Taking advantage of this situation, appellant in defence of the pending summary judgment against him raised a counter claim. He alleged that he lost business to the tune of E10,000 at the instance of respondent when he dispossessed him of the said *merx* without a court order.

[5] When the matter was called, respondent raised a *point in limine* to the effect that the counter-claim filed by the appellant failed to disclose a cause of

action. In the counter-claim, respondent contended, failed to allege negligence.

[6] The learned Magistrate upheld the point and granted summary judgment.

Appeal

[7] The appellant's grounds of appeal are:

“1. *The court a quo erred both in fact and in law by dismissing appellant's counter-claim on the basis that negligence had not been alleged as negligence was not a necessary element of the claim.*

2. *The court a quo erred by entering summary judgment against appellant when he had a bona fide defence.”*

Determination

[8] The appellant submits that it is unnecessary to allege negligence as his cause of action is based on paragraph 4 of the counter-claim. Paragraph 4 reads:

“4. *Defendant alleges that on or about the 17th of October 2012, Plaintiff unlawfully repossessed from him a motor vehicle more fully described as:*

TOYOTA

1992 MODEL

1790 WEIGHT

4Y9104594 ENGINE NUMBER”

[9] I do not intend to venture into the debate as to whether applicant ought to have alleged negligence or not. However, it is my considered view that the appropriate order which ought to have been entered by the learned Magistrate following his

opinion that negligence ought to have been alleged would have been to grant the appellant an opportunity to amend his counter-claim with an appropriate order as to cost rather than dismissing it. I say this because appellant at paragraph 4.5 of the counter-claim states:

“4.5 Defendant alleges that as a result of the aforementioned it sustained damages in the amount of E10,000.00 (Ten Thousand Emalangeni) being in respect of loss of business.”

[10] Reading appellant’s paragraph 4 together with paragraph 4.5 cannot be said that appellant does not inform the other party with clear particularities the ground of his case. It is only in cases where one having considered the pleading, would conclude that the party instituting proceedings or defending a matter has dismally failed to disclose its cause of action or defence as the case may be, that a dismissal is warranted. The action must be devoid or manifestly lacking in *causa* for it to be dismissed. The *dictum* in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors [2006] SZSC 11** has since become a principle of law in our jurisdiction. Their Lordships at page 23 paragraph 39 propounded:

“The learned Judge *a quo* with respect, also appears to have overlooked the current trend in matters of this sort, which is now well recognised and firmly established, viz. not to allow technical objections to less than perfect procedural aspect to interfere in the expeditious and, if possible, inexpensive decisions of cases on their real merits”(underlining my emphasis)

[11] Their Lordships then cited the case of **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) S.A. 81** at 95F-96A as follows:

“The Court should eschew technical and turn its back on inflexible formalism in order to secure the expeditious decisions of matter on their real merits, so avoiding the incurrance of unnecessary delays and costs.”

[12] To throw, as we often say, “*root and branch*” the counter-claim without interrogating its merit on the basis that negligence was not alleged, was a travesty of justice.

[13] To ensure that justice is not only done but manifestly seen to be done, the *court a quo* ought to have postponed the matter to allow the appellant to amend his counter-claim with an appropriate order as to costs. On the return date, the matter would have been deliberated on merit.

[14] It is on the basis of the above that when the matter first appeared before me, I postponed the matter and ordered both Counsel to address me on whether there was a *bona fide* defence raising a triable issue. I was not inclined to refer the matter back to the *court a quo* as that would have delayed the matter and increased unnecessary costs.

[15] One of the requirements of resisting a summary judgment application is for the party to establish a *bona fide* defence.

[16] **Swaziland Industrial Agencies (Pty) Ltd t/a Builders Discount Centre v S.I.G. Investments (Pty) Ltd (619/08) [2012] SZHC** where the court noted at page 5 paragraph [5] as follows:

“It has been repeated over and over that summary judgment is an extraordinary, stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial ... It is for this reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going to far...”

[17] The learned judge proceeds at paragraph [8] page 6:

“It is further the judicial accord, that, in as much as the defendant is not required at this stage to demonstrate his defence with the precision or exactitude required of a plea, however, to raise triable issues, the Defendant’s affidavit must be bona fide, forthright, unequivocal and must contain sufficient material facts in answer to the plaintiff’s claim, to enable the court reach the concluded opinion, that a triable issue is raised or that there ought for some other valid reason to be a trial of the claim or part of it.”

[18] In other words for the defence to be said to be *bona fide*, it should be “*forthright*” and “*unequivocal*”. I may also add that it should be genuine and honest in the circumstance. This raises the question: Can it be so said of appellant’s counter-claim *in casu*?

[19] The counter-claim arises from the following circumstances as demonstrated by appellant in his affidavit resisting summary judgment application.

“4.1 On or about the 17th of October 2012, the Plaintiff unarmed with a Court Order unlawfully took from my possession my motor vehicle (the vehicle which forms the subject matter of the claim in connection).

4.2 The plaintiff’s conduct was unlawful and amounted to self help.

4.3 As a result of the unlawful conduct of the Plaintiff my vehicle which I use as a public transport could not continue its operations and consequently was not able to earn any revenue.

4.4 I state that on average the vehicle brings in a daily average collection of E625.00 (Six Hundred and Twenty Five Emalangeni).

4.6 *I therefore submit that the Plaintiff is able to compensate me the total amount of E10,000.00 (Ten Thousand Emalangi).*

[20] These averments are scantily repeated in the counter-claim.

[21] The arrears under the summary judgment application were for the months of May, June and July 2012. The events complained about in the claim in reconvention occurred on the 17th October 2012.

[22] Suppose one would have gone to appellant at the beginning of May, 2012 and enquired; “*you have not paid the respondent, what is your reason?*”? Would appellant in the circumstances of the case *in casu* have replied: “*I have not paid him because he owes me the sum equivalent or above the one due to me?*”

[23] The answer *in casu* would be a clear “*no*” by reason that such events had not happened nor were they anticipated. The same question would be repeated and same response would avail for the subsequent months. In summary, appellant’s defence is not *bona fide* because the events which led to the counter-claim were not there when the breach of contract was committed. They could not have been reasonably anticipated. Innes CJ in **Symon v Brecker 1904 T.S 745** at 747 states of compensation:

“Compensation by our law is really equivalent to payment; it operates ipso facto as a discharge. So soon as there are two debts in existence, between which there is mutuality, so that the one can be compensated against the other, then by operation of law, the one debt extinguishes the other pro tanto.”

[24] Secondly, under the circumstances of this case, in October 2012, by virtue of the breach of contract at the instance of appellant, appellant was in law not entitled to enjoy use of the *merx*. His right to usufruct was inherent in the very contract which he had so breached. To allow appellant to reap under a contract which fell at his

instance, would be to recognise a right which he himself terminated, a situation which is untenable in the administration of justice as it would amount to unjust enrichment.

[25] Thirdly, it is not clear why it took appellant sixteen days to have an order of spoliation from this court and served same to respondent in light of Rule 6 (25) which entitles appellant access to a remedy within few hours. Nothing is averred to justify such a delay.

[26] In the absence of any averments attributed to the respondent for the delay in obtaining the order under spoliation which is readily available, the court is left with one irresistible inference which is that the delay was only to ensure that the sum under counter-claim would be equivalent to the amount in the summons thereby defeating appellant's legitimate claim.

[27] In the totality of the above, I hold that the appellant has failed to establish a *bona fide* defence necessary to raise a triable issue. The following orders are entered:

1. Appellant's appeal is dismissed.
2. Costs to follow the event.

M. DLAMINI
JUDGE

For Appellant : **S. C. Dlamini**
For Respondent : **X. Mthethwa.**