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IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.1903/2001

In the matter between:

EPHRAIM MAGAGULA

PLAINTIFF

VS

VJR AGENCIES

DEFENDANT

CORAM

: ANNANDALE J

FOR PLAINTIFF

: MR. DUNSEITH

FOR DEFENDANT

: ADV. FLYNN

(instructed by Robinson Bertram)

JUDGMENT

16TH OCTOBER 2002

Plaintiff in this application for summary judgment is a man who owns fixed residential properties which he let through defendant as his agent. One of his properties, which gives rise to the matter, is in Mbabane and was let to one Victor de Oliveira as tenant at the monthly rate of E1 213.00. Contrary to what so frequently happens, de Oliveira was a tenant who kept to his side of the bargain and paid rentals when due. There is no dispute between the parties that this was the case. The litigation arose when plaintiff found that the collected rental monies which were received on his behalf did not find their way to his pocket. He himself instituted this action, wherein defendant avers that "Yes, we did receive the rentals but we have fully accounted for it – some of the monies have been paid into your banking

account, the rest by way of payments made directly to yourself." To substantiate its defence, the Estate Agency's proprietor, Mr. Brian Martin, file a computer generated "General Ledger" covering the period in question.

Each of these "General Ledger" printouts reflects the monthly accounting statement or "Property Owners Control" of E.N. Magagula, the plaintiff. Each monthly statement generally details a receipt number and date in respect of payment received as rental in the amount of E1 213, the same amount that plaintiff alleges in his particulars of claim. The general ledger printouts also generally reflect payments made to either the plaintiff or Swazi Bank, the same bank account referred to by plaintiff in his particulars.

In his affidavit resisting summary judgment defendant's proprietor states that all payments received from the tenant are properly accounted for and tendered timeously to plaintiff, either by payment directly into his banking account or directly to plaintiff himself. It is these records of account, referred to as "General Ledger" that are enclosed with his affidavit. He further states in his affidavit that each and every cheque in respect of such payments will be made available at the hearing and that if necessary, leave of court will be sought to file those cheques. He had not yet been able to locate the cheques in the time available at the stage he filed his affidavit resisting the summary judgment application. Only one cheque drawn in favour of Swazi Bank, endorsed "E.N. MAGAGULA", was enclosed with his papers, which cheque is in respect of a period falling outside the period of the claim.

The defence raised to oppose summary judgment is thus that in respect of the period over which payments were received in favour of the plaintiff, all payments to plaintiff by defendant had been made, either into his banking account as instructed or directly to himself from time to time. If that was the totality of the defence, it was open to be found bald, sketchy and vague. But it is not the case. Defendant set out how each such payment was made, the date when it was done and the amount paid.

All the defendant did not do is to provide actual proof of payments in the form of the physical cheques in favour of the plaintiff and showing that same have been honoured by its own Bank. As reason for this, as aforesaid,

was the lack of time to locate the cheques. There is no allegation in plaintiff's claim that such cheques were dishonoured.

On these facts, I am hard pressed to find that defendant did not fully disclose the nature and grounds of his defence and the material facts on which it is based. Whether the cheques allegedly drawn in favour of plaintiff were indeed drawn and either deposited into his banking account or received by himself is a factual matter that cannot be decided on the papers as they now stand.

On the papers, it certainly appears that defendant fully disclosed his defence, which if proven as it says it can, may well dispose of the matter. It is however a factual dispute between the parties on the issue of the actual payments, as alleged by defendant and denied by plaintiff. Rule 32(4)(a) refers to an application for summary judgment and reads:-

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

From this emphasised part of the rule in relation to what has been outlined above, I hold the view that indeed here is a factual dispute which ought to be referred for trial. Accordingly, the application for summary judgment is dismissed, with costs ordered to be costs in the cause.



J.P. ANNANDALE

Judge