



**IN THE HIGH
COURT OF SWAZILAND**

JUDGMENT

HELD AT MBABANE

Case No. 1669/2017

In the matter between:

INTER AGENCIES (PTY) LTD

Plaintiff

And

CORBAN ELETRICAL & ELECTRONICS (PTY) LTD 1st Defendant

THEMBINKOSI NKONYANE 2nd Defendant

DUDUZILE MAHLALELA – NDLOVU 3rd Defendant

**Neutral Citation: Inter Agencies (Pty) Ltd v. Corban Electrical & Electronics
(Pty) Ltd & others (1669/17) [2018] SZHC 170 (26th July 2018)**

Coram: J.S Magagula J

Date heard : 12th July 2018

Date delivered: 26th July 2018

[1] This is an application for Summary Judgment in which the plaintiff claims:

“ 1.1 Payment of the sum of E1 210 000-00 (One Million Two Hundred and Ten Thousand Emalangeni);

1.2 Interest on the capital debt calculated at the rate of 9% per annum from date of summons to date of final payments;

1.3 Costs of suit at attorney and own client scale.

1.4 10% collection commission on the capital debt.”

BACKGROUND

[2] On the 13th November 2014 the Plaintiff and 1st Defendant entered into an agreement of sale of immovable property to wit: Certain: Portion 1 of Lot No. 368 Manzini Township, District of Manzini.

[3] The initial agreed purchase price was the sum of E3,500 000-00. However through an addendum to the initial agreement and after revaluation, the purchase price was increased to E5 000 000 (Five Million Emalangeni).

The 1st Defendant paid the sum of E 3 500 000-00 soon after conclusion of the sale agreement and it was agreed that the balance of E1 500 000-00 would be liquidated in 150 monthly instalments of E10 000-00 each.

[4] Both the main agreement and the addendum are attached to plaintiff's particulars of claim. It is Plaintiff's claim that the 1st Defendant has breached the agreement by failing to pay the monthly instalments timeously. I may mention at this juncture that this is not the first time the parties are before court on the same matter. The plaintiff has previously instituted proceedings against the 1st Defendant under case No.1402/2015.

Like in *casu* in that case the Plaintiff was claiming that 1st Defendant should pay the full outstanding amount since it had failed to pay monthly instalments timeously. Hlophe J who heard the matter dismissed an application for summary judgment on the ground that Plaintiff had failed to comply with the provisions of clause 6 of the agreement. Clause 6 provides:

“ Should the purchaser have failed to make any payment stipulated in clauses (sic) I hereof at the time stated, or to pay any transfer costs or transfer related

costs as aforesaid within a reasonable time after demand has been made for the same then, the seller may claim immediate payment of the full purchase price as the case may be, or alternatively may cancel the deed of sale without any notice to the purchaser in which case any money already paid by the purchaser shall be forfeited in terms of the estimate of damages suffered by the seller.”

[5] The question of compliance with the provisions of clause 6 of the agreement has again arisen in *casu*. Referring to the judgment of Hlophe J in the previous case the deponent to the affidavit resisting summary judgment in *casu* states at paragraph 5.5 thereof:

“The court in dealing with this matter dismissed some of the points in limine and upheld the point with respect to service of a letter of demand which again finds its way in this matter...”

The deponent then proceeds to canvass the point on failure to make any written demand for the amount claimed in the summons particularly pin pointing that the Plaintiff has no right to institute legal

proceedings for recovery of the amount claimed without first having made a demand for the same.

- [6] In the summons the Plaintiff is claiming payment of the sum of E1 230 000-00 and it has not produced proof that it first made a demand for this amount before the issuance of summons. In paragraph 5.7 of the affidavit resisting summary judgment it is stated *inter arlia*:

“ ...Until this (sic) proceedings Defendants had no knowledge of a demand being issued and served upon them as envisaged by annexure “F” of the Plaintiff’s summons. This demand is being brought to Defendants attention for the first time these proceedings.”

- [7] The Plaintiff does not in its papers at least, claim to have made any demand of the outstanding balance being claimed in the summons. It maintains that it has made demands for overdue instalments.

It further maintains that although these instalments were eventually paid, they were not paid within a reasonable time after demand. This therefore, Plaintiff contends, entitles it to sue for payment of the full outstanding balance of the purchase price. In other words the Plaintiff understands clause 6 to be saying that the demand is only required where the 1st Defendant has failed to pay transfer costs or an

instalment on due date. Actually this does seem to be the import of clause 6 of the agreement. However the clause does not specifically exclude the requirement of a demand when it comes to the claim for the outstanding balance of the purchase price. There is therefore no reason for concluding that the requirement of a demand prior to institution of legal proceedings is excluded in this regard.

[8] In any event Plaintiff claims that the 1st Defendant has breached the contract in that it has “...*failed to make any instalments payments for the months of April, May, June and July 2015, August, September and October 2016, September and November 2017*”.

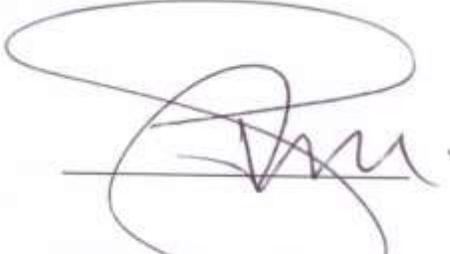
During arguments it became abundantly clear that at the time of the issuance of summons on the 31st October, 2017 the only outstanding instalments were those of September and October 2017 and these instalments were settled on 20th November 2017. Although counsel for the Plaintiff also tried to include August 2017 from the bar, there is clearly no claim for such month in the summons.

[9] Also, although there are some letters addressed by the Plaintiff to the 1st Defendant and purporting to be letters of demand, none of these letters demand any specific amount from the 1st Defendant. They are just reminders requiring the 1st Defendant to update its instalments.

During the hearing I asked counsel if there was any outstanding installment on the date. Plaintiff's attorney acknowledged that an instalment was paid on the 6th July 2018 but he was not sure if the account was up to date. Defendant's attorney stated that his instructions were that the account was up to date .

[10] It appears to me that there is a triable issue regarding whether or not a demand as anticipated by clause 6 of the agreement was made. In the result I cannot grant summary judgment.

The application for summary judgment is accordingly dismissed with costs.



J.S MAGAGULA J

For the Plaintiff: N. Manyatsi

For the Respondent: T. Hlandze