



838

**SWAZILAND HIGH COURT**

**CITY COUNCIL OF MBABANE**

*Plaintiff*

vs

**DOUGLAS TEE MASUKU**

*Defendant*

Coram

SAPIRE CJ

For Plaintiff

MR. P. FLYN

For Defendant

MR. B.G. SIMELANE

**JUDGMENT**

(12/07/2000)

The plaintiff has sued the defendant claiming payment of E101, 391.27. The amount represents the balance of monies lent and advanced by the plaintiff to the defendant in terms of and pursuant to a scheme operated by the plaintiff for the benefit of its employees.

The defendant purchased a motor vehicle utilising the finance made available to him by the Plaintiff in terms of the scheme.

The Defendant gave notice of intention to defend the action. The Plaintiff responded by applying for summary judgement. The Defendant opposes this application and has filed an affidavit in which the basis of his opposition is set forth.

The Defendant has not raised any meaningful defence to the merits of Plaintiff's claim but has

1. advanced points *in limine* challenging the propriety and regularity of the application for summary judgement and
2. referred to circumstances which he alleges give rise to one or more counterclaims.

The points *in limine* fall to be dealt with first. The Defendant has enunciated the issue thus in paragraph 4 of the founding affidavit.

"4.1 The Honourable Court will note that Gideon Mhlongo purports to be duly authorised to represent the plaintiff by virtue of the fact that

*he is employed by the plaintiff as a City Clerk and Chief executive officer. Gideon Mhlongo has failed to annex a Resolution or Authority of the Council that he is entitled to bring the present action in terms of the Urban Government Act 1969. I submit and I am advised that it will be argued when this matter is heard that Gideon Mhlongo was never authorised by the Council to bring these proceedings and thus lacks the necessary authority to sign any affidavit on behalf of the Plaintiff."*

The passage quoted demonstrates the basic misconception under which the defendant, (and/or who ever advises him and drafted the affidavit to which the Defendant subscribed), labours.

- Mhlongo has not brought the instant action, and is not the applicant in the present summary judgement proceedings. The Plaintiff /Applicant is the City Council of Mbabane.
- As a body corporate the Council can only litigate through and be represented in court by, an attorney.
- An attorney represents the plaintiff in these proceedings.
- The rules of court provide that the attorney so appointed need not file a power of attorney, supported by a resolution. A party may challenge the authority of an attorney in the manner contemplated in the rules. In such event, the authority of the attorney can be proved by the production of a power of attorney authenticated by resolution.
- The defendant has challenged Mhlongo's authority not that of the attorney.
- Mhlongo has done no more than, as a witness to testify under oath, to facts of which he by virtue of his office, he personally knew to be true has. For this like any other witness, he requires no authorisation.

The point raised by the Defendant *in limine* is without substance

It turn now to the counterclaims.

(a) Claim Paragraph 10 of Defendant's affidavit

This Claim is based on a Swaziland Government circular of 1993 which prescribed the payments which were to be made to

employees who took up study leave. The Defendant claims that as in 1992 he left the Plaintiffs employment on study leave it being agreed or arranged that he would receive his salary for one year. He claims that he is entitled to the increased benefits provided for or proclaimed in the Government circular. Such claim defendant says is an amount of E52 000.

There is no basis for this claim,

- (i) The circular deals with Government policy in relation to its employees. It does not apply to employees of the Plaintiff or create contractual obligations in favour of such employees.
  - (ii) The claim if there ever was one cannot now be enforced as it has become time barred in terms of Section 116(1) of the Urban Government Act, 1969
- (b) Allegations in paragraphs 12 and 13

The defendant has challenged that the finance afforded him in terms of the plaintiff's scheme was governed by an oral agreement. He claims that a draft agreement was submitted to him for signature. Before signing it he made amendments to the draft to provide that should the balance of the amount owing become due because his relationship with the plaintiff was severed, the amount to be paid by him in respect of the loan would be reduced by any amounts owing to him by the plaintiff. There is however, nothing to suggest that a written agreement amended as alleged was ever signed. In any event, such a term would not have been necessary to advance defendant's case, because of the automatic operation of prescription. On the other hand, Defendant does not deny that he received the financial assistance in the form of a loan which enabled him to purchase his vehicle. It is common cause that he is no longer an employee of the plaintiff and that the balance of the loan is owing and has been due and payable since September 1997. I can find nothing in these paragraphs to

indicate a defence to the claim apart from the alleged claims which the defendant makes elsewhere in the affidavit.

(c) Allegations in paragraph 16 of Defendant's Affidavit

Defendant refers to a recommendation made by K.P.M.G. which had been had been employed to advise the Plaintiff on the revision of the salary scales of its employees. The Defendant does not disclose the particulars of the recommendation but claims that by virtue of that alone he is entitled to payment from the Plaintiff of an amount of approximately E11 000. There is nothing to show that the recommendation, which in itself could not create an obligation by the plaintiff to the Defendant, was ever implemented. Moreover if implemented there is nothing to indicate that at the time of implementation the defendant was entitled to the benefits thereof.

This claim apart from the question of being time barred is also unsubstantiated.

(d) Claim for E34 000 Swaziland Employee Benefit Consultants.

There is nothing alleged in paragraph 17 to indicate why an amount allegedly owing by the firm mentioned should constitute a debt owing by plaintiff to the Defendant.

(e) Claim for E18 000 leave pay- paragraph 18.

The Defendant has failed to allege any facts upon which this claim can be considered. The bald allegation of indebtedness unsupported by details as to how the claim is computed is not enough to constitute a bone fide counterclaim and as such a reason for deducting it from the amount of plaintiff's claim for summary judgement.

(f) Claim for Car Allowance E18 000 -paragraph 19

Similarly, this claim is stated with a degree of vagueness which makes it impossible to treat it as a bone fide counterclaim.

(h) Claim E250 000 alleged defamation – paragraph 25

The allegations made to demonstrate or indicate this counterclaim are incomprehensible. There are no allegations as to what was published, where and to whom such publication was made, and to show that the publication was defamatory. Such a counterclaim is so insubstantially that it plays no part in a proper consideration of this application.

The Defendant goes on in his affidavit to categorise the plaintiff's claim as malicious; citing its knowledge of the defences which the defendant has seen fit to raise. There is little merit in this form of attack on the Plaintiff for pursuing its claim against the Defendant. The Defendant has not hitherto taken any positive step to advance its claims. Indeed it has delayed so long that the claims have all become time barred. This the Defendant has himself recognised. In paragraph 24 of his affidavit he says

*“ I am also aware that there is an element of prescription as to the claim I have against the plaintiff. It is my intention to ask for leave of the above Honourable Court to file an application the late filing of a counterclaim as I believe that I have good grounds for not having sued the plaintiff before the expiry of the prescription period.”*

While defendant may believe that he has prospect of success in such an application, no facts have been placed before the court, which indicate the basis for such belief.

The plaintiff has argued that the High Court has by reason of the provisions of Section 2 and Section 5 of the Industrial Relations Act no jurisdiction to entertain those of Defendant's counterclaims which arise out of the relationship of the Plaintiff and Defendant as employer and employee respectively. This is a doubtful proposition having regard to the decision in the Appeal Court<sup>1</sup>, which seems to rule otherwise. Because of the uncertainty and

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<sup>1</sup> *Sibongile Nxumalo and others v Attorney General*

*Court of Appeal case No. 25/96*

because there are other ample reasons for finding adversely to the respondent in the present application no decision on this point need be made.

En fin I find that the defendant has not raised any bone fide defence to the claim and that the alleged counterclaims advanced are unmaintainable.

There will be summary judgement for the plaintiff for

- (a) Payment of the sum of E101 391,27
- (b) Interest on the said amount calculated at 7% per annum from 7<sup>th</sup> January 1999 to date of payment
- (c) Costs of the suit

  
SAPIRE, C.