THE HIGH COURT OF SWAZILAND

NEDBANK (SWAZILAND) LIMITED

Plaintiff

And

JONATHAN FAKUDZE Defendant

Civil Case No. 978/2004

Coram S.B. MAPHALALA – J

For the Plaintiff MR. K. MOTSA

For the Defendant MR. MDLULI

JUDGMENT (13/08/2004)

Before court is an opposed application for summary judgment in terms of Rule 32 of the High Court Rules.

The application is based on two claims, thus "2. Claim 1,

2.1 Pursuant to Defendant's request on or about the 6th February 2002 at Mbabane, alternatively Manzini the Plaintiff represented by its credit and accounts relationship managers agreed in writing to grant Defendant a small scale facility of E50, 000-00 which he accepted. A copy of the facility letter is annexure marked "N1"

The second claim is premised as follows:

"3. Claim 2.

3.1 At all material times, the Defendant operated a current account no. 04000129568 with the Plaintiff at its Manzini branch.

3.2 Plaintiff from time to time by agreement lent and advanced money in varying amounts on overdraft to the Defendant at his special instance and request.

In respect of Claim 1 the Plaintiff seeks for an order for payment of the sum of E45, 967-05, interest at prime rate plus 10% calculated from issue of summons to date of final payment, costs of suit at attorney and own client scale including collection commission; and further and/or alternative relief.

In respect of Claim 2 the Plaintiff is seeking for payment of the sum of E4, 513-77, interest at prime rate plus 10% and costs of suit at attorney and own client scale including collection commission.

The Plaintiff in its Declaration contends that it was a material term of the agreement that interest was chargeable at prime +1%. From about early 2003, the Defendant has breached the loan agreement in that he failed to pay the monthly amounts outstanding. In respect of Claim 2 it is contended that the Defendant issued cheques well knowing that there was insufficient funds in his banking account to honour the cheques. In terms of the overdraft facility granted to the Defendant, all sums overdrawn would be repayable on demand and would attract interest at the plaintiff's usual rate of interest on such overdraft facilities.

The Defendant on the other hand has advanced a defence in his affidavit resisting summary judgment. However, it remains to be seen whether such a defence is a bona fide defence for purposes of Rule 32.

The defence is found in paragraphs 5 to 8 of the affidavit resisting judgment, thus:

5.

"In terms of the loan facility agreement i.e. annexure "N1" the Plaintiff was in terms of paragraph 4 thereof provided with the following security:

a) Lien over my Sivuno savings Account at Nedbank which holds E13, 000-00, and
b) A Central Bank guarantee for the sum of E37,500-00.

These amounts, I was made to understand by Plaintiff, would immediately be paid to the Plaintiff upon default in the payment of the instalment.

6.

To the best of my knowledge and belief the Plaintiff had every right to utilise the above named securities to settle the capital amount including interest due to it in full and, if not in full, then at least the capital excluding the interest. As of now I have not been informed by Plaintiff what has become of the securities delivered to it and I verily belief these have been utilised by Plaintiff to reduce my indebtedness.

7.
On my instructions my attorneys requested the Plaintiff's attorney to agree to a meeting at which this matter could be discussed and/or the accounts debated. In the event that an agreement is arrived at and it is found that I am still indebted to Plaintiff then I am prepared, in order to avoid unnecessary and costly litigation, to enter into an arrangement with Plaintiff for settlement of that amount. To date however no meeting has taken place between the parties.
8.
I deny that the Plaintiff is entitled to claim interest at prime rate plus 10% as it has done in as much as the loan facility agreement makes provision at paragraph 2.1.2 for interest at the rate of prime +1%. Furthermore, even on the assumption that any portion of the capital is still outstanding, the Plaintiff is not entitled to charge any penalty interest without the accounts having first been debated and agreed".

It is contended, therefore on behalf of the Defendant that the above constitutes a bona fide defence to satisfy the requirements of Rule 32.

It was further argued that the Plaintiff has failed to disclose or render proper accounts explaining that between September 2003 to April 2004 certain amounts were deducted monthly from Defendant's personal savings account no. 040000035337 with the Plaintiff as repayment of the loan.

It is a trite principle of law that in order for the Defendant to succeed by not having summary judgment granted against him, he must show that he has a bona fide defence. For the court to make the decision whether the Defendant has set out his defence all Defendant needs to show is whether he has disclosed the nature and grounds of his or her defence, and whether, on the facts so disclosed the Defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. (see Maharah vs Barclays National Bank Ltd 1976 (1) S.A. 418 (A) at 427 and Silverleaf Pastry and Confectionary Co. (Pty) Ltd vs Jourbert 1972 (1) SLA. 125(c) at 129).

The questions therefore for determination in this case are, firstly, whether the loan facility agreement, a lien over his Sivuno Savings account and the Central Bank of Swaziland guarantee in the amount of E37, 000-00 constitutes a bona fide defence within the purview of the rule, secondly, whether the Plaintiff has failed to render full and proper accounts to the Defendant, and thirdly and lastly whether the denial by the Defendant that the Plaintiff is entitled to claim interest at prime rate plus 10% constitute a bona fide defence.

I shall proceed to address these questions ad seriatum.

It would appear to me that the lien and the Central Bank guarantee do not afford the Defendant a defence to the plaintiff's claim, as they are not immediately payable. With respect to the savings account this can only be used to reduce the Defendant's arrears if Defendant authorised the Plaintiff to do so. There is no evidence before the court that the Defendant has done so before the commencement of these proceedings.

5

With regard to the Central Bank guarantee Clause 6.3 of the Small Scale Enterprise Loan Guarantee Scheme provides as follows:

"A participating institution may invoke the guarantee in respect of any amount in default on account of advance covered under the terms of the scheme provided:

a) The guarantee is in force at the time of default;
b) The financial institution has made every reasonable effort to recover the amount in default and the amount in default cannot be realised in full through enforcing other securities or resorting to legal remedies;
c) The CBS has been informed promptly of the said default".

The consequence of the above therefore is that the Central Bank will not pay the amount sought in this application for summary judgment until the Plaintiff has exhausted legal remedies against Defendant. In casu the Plaintiff has not done so as prescribed in Clause 6.3 (b) cited above.

The second issue is that Plaintiff has failed to disclose or render proper accounts in respect of the Savings Account No. 040000035337. In the present case the Plaintiff has annexed statements and certificates of balances proving the amount owing. According to the dictum in the case of Ex parte Minister of Justice in re: Nedbank Ltd vs Abstein Distributors (Pty) Ltd and others and Donelly vs Barclays National Bank Ltd 1995 (3) S.A. 1 a certificate of balance in law gives prima facie proof of the amount owing at the time. In the present case the Defendant in his opposing affidavit has failed to disprove the evidence advanced by the Plaintiff showing that the amount are owing.

The Defendant in his supplementary Heads argued that the Plaintiff has failed to render proper accounts or disclose that between September 2003 to April 2004 certain amounts were deducted monthly from Defendant's 2000 Savings Account No.

040000035337 as repayment of the loan. He listed the dates and that they were for the sum of E2, 530-57.

6

It would appear to me that the contention advanced on behalf of the Plaintiff is correct that the deductions from Defendant's savings account are towards the payment of his personal loan and they have nothing to do with the Small Scale Loan facility and the overdraft which are the subject matter of the present proceedings. In sum therefore in this regard the Defendant has not advanced a bona fide defence for purposes of Rule

32.

The last issue for determination is the contention made by the Defendant that the Plaintiff is not entitled to claim interest at prime rate plus 10% as it has done in as much as the loan facility agreement makes provision at paragraph 2.1.2 for interest at the rate of prime +1%. This complaint in my view, is answered by Clause 5 of the agreement which provides as follows:

"5. Penalty interest.
Any amount owing to Nedbank which are not paid on the due date shall bear penalty interest at Nedbank's prime lending rate from time to time, from the date until the date of receipt of such amount by Nedbank".

In sum therefore, I am in total agreement with Mr. Motsa for the Plaintiff that a bona fide defence would entail some reason as to why the amount is not owing, not that the Plaintiff has other remedies and should have exhausted them first. Further, the argument that the parties should have met first does not assist the Defendant.

In the result, judgment is entered in favour of the Plaintiff as follows:

a) Claim 1.

1. Defendant is order to pay the sum of E45, 967-05;
2. Interest at prime rate plus 10% calculated from issue of summons to date of final payment;
3. Cost of suit at attorney and own client scale including collection commission.

b) Claim 2.

1. Defendant is ordered to pay the sum of E4, 513-77;

2. Interest at prime rate plus 10% calculated from issue of summons to date of final payment;
3. Costs of suit at attorney and own client scale including collection commission.

S. B MAPHALALA

JUDGE