

THE HIGH COURT OF SWAZILAND

FINSWA (PTY) LIMITED

Plaintiff

And

LINDIWE KHUMALO

Defendant

Civil Case No. 477/2003

Coram

S.B. MAPHALALA – J

For the Plaintiff

MR. B. MAGAGULA

For the Defendant

MR. M. SIMELANE

JUDGMENT

(11/06/2004)

Before court is an opposed application for summary judgment in terms of Rule 32 of the High Court Rules. The plaintiff's claim against the Defendant is for payment of the sum of E9, 052-92, being monies due, owing and payable by the Defendant to the Plaintiff in respect of monies lent and advanced in terms of an oral agreement on the 3rd November 2002. The Defendant has acknowledged her indebtedness to the Plaintiff in terms of a letter annexed to the plaintiff's papers marked "F1". The Plaintiff alleges that notwithstanding demand, the Defendant fails, neglects and/or

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refuses to pay the said sum. The Plaintiff also prays for interest on the sum of E9, 052-92 at the rate of 9% per annum to date of issue of summons and costs of suit.

The Defendant has filed an affidavit resisting summary judgment. The Defendant put forth a defence that annexure "F1" on the Plaintiff declaration is by no means an admission of liability. She admits that there are certain monies that she owes the Plaintiff, but that these amounts are far less than E9, 052-92. She avers further that the matter is not suitable for summary judgment, in that the source of the indebtedness is not so clear cut.

In annexure "F1" the Defendant wrote to the Plaintiff on the 5th December 2002, and stated the following:

"My bankers have agreed to lend me an amount of not more than E4,200 (repayable over a period of 5 months) on an exceptional case because I have another loan with them. This loan can only be afforded to me if it will be paid to you as full and final payment for all monies due to you. The bank says that this has to be the case because if after payment of this amount there will be an outstanding balance, then I will be unable to service both their loan and yours. They have calculated their repayment to be in the region of E905.00 monthly inclusive of their interest. This I can afford.

I request that you agree to this proposal and draft me a letter indicating that the sum indicated above will form full and final payment of monies due to you. This letter will be shown to them".

On the basis of the above the Plaintiff is of the view that the Defendant acknowledged her indebtedness in the sum of E4, 200-00 mentioned in this letter. The question which vexes the court in the present case therefore is whether annexure "F1" reflects a liquidated amount in money to satisfy the requirements of Rule 32 (1) (b) of the High Court Rules.

The argument for the Plaintiff is that the court is perfectly entitled to enter judgment for the specific amount that is not in dispute. The specific amount is the amount is the sum of E4, 200-00 mentioned in annexure "F1". It is argued in this regard that this amount is liquidated within the meaning of Rule 32.

On the other hand it is argued for the Defendant that the plaintiff's claim does not fall under Rule 32 (1) (b) in that it is not a liquidated amount in money. The Defendant's indebtedness is not clearly spelt out, how it arose, what payments have been made to date, and what interest is being charged. In this regard the court was referred to the cases of *Edwards vs Menezes* 1973 (1) S.A. 299 (NC) and that of *Gilinsky vs Superb Launderers* 1978 (3) S.A. 807 C to the proposition that the court should not lightly deprive a Defendant of the right he would have had in an appropriate case.

Mr. Simelane for the Defendant further advanced a very novel argument that annexure "F1" by the Defendant constituted an offer to the Plaintiff which was rejected by the Plaintiff. The latter put forth a counter offer. Therefore, so the argument goes, the counter offer by the Plaintiff destroyed the offer entirely. Mr. Simelane relied on what was said by Watermeyer CJ in the case of *Collen vs Rietfontein Engineering Works* 1948 (1) S.A. 413 (A) 420 where the learned Chief Justice expressed himself in the following terms:

"It must also be remembered that a counter offer is in general equivalent to a refusal of an offer and that thereafter the original offer is dead and cannot be accepted until revived (see *Watermeyer vs Murray* 1911 A.D. 61").

Having considered the arguments advanced from both sides I am inclined to agree with the position adopted by the Defendant in this case. In my estimation the Plaintiff has not set out an unanswerable case against the Defendant. The Defendant's indebtedness is not clearly spelt out, how it arose, what payments have been made to date and what interests is being charged. The amount is clearly not liquidated to conform to the rule and in this regard I agree with what is contended by Mr. Simelane and his reliance in what was said by Watermeyer CJ in *Collen vs Rieffontein* case (supra).

In the present case it cannot be said that annexure "F1" constitutes a liquid amount in money within the ambit of Rule 32, There are triable issues in this case.

In the result, the application for summary judgment is refused and costs to be costs in cause. The matter to proceed in the normal way.

S.B MAPAHALALA

JUDGE