

**THE HIGH COURT OF SWAZILAND**

**CENTRAL BANK OF SWAZILAND**

Plaintiff

**Vs**

**DAVID MUSA CHESTER**

Defendant

Civil Case No. 114/2003

Coram:	S.B. MAPHALALA - J
For the Plaintiff:	MR. K. MOTSA
For the Defendant:	MR. E. MAZIYA

**JUDGMENT**

(22<sup>nd</sup> September 2006)

[1] The Plaintiff prays for judgment based on its amended declaration that Defendant pays a sum of E87, 802-06; interest on the said sum at the rate of 9% per annum a *tempore morae* to date of final payment and costs of suit.

[2] The Defendant at all times material, was an employee of the Plaintiff, having been in the employ of the latter since 1 July 1981.

[3] On or about 4 April 2000, the Defendant's services with the Plaintiff were terminated in terms of the voluntary separation agreement annexed and marked as "A" which separation was upon the terms set out therein. During the course of the Defendant's employ with the Plaintiff and in particular the 14 October 1999, the Plaintiff duly pledged unto and in favour of the Swaziland Building Society

Permanent Shares in an amount of E87, 802-06 as security for a loan which the said Swaziland Building Society advanced to the Defendant. A copy of the pledge of shares is annexed marked "B". The said pledge of shares was executed by the Plaintiff in favour of the Swaziland Building Society as further additional security to a certain first mortgage bond which the Defendant passed in favour of the said Swaziland Building Society in terms of which he hypothecated certain Lot 2320 Extension 21 Embangweni Township, Mbabane, unto and in favour of the Swaziland Building Society for the sum of E230, 000-00.

[4] In terms of the separation agreement entered into between the Plaintiff and the Defendant, it was agreed;

"That the [Defendant] shall ensure that the outstanding housing loan of E224, 233-20 is transferred to Swaziland Building Society under commercial rate with the assurance that the Central Bank is no longer liable for anything regarding this loan".

[5] Further, "that subsequent to the above, the Central Bank of Swaziland is refunded its pledge shares by the Swaziland Building Society".

[6] According to the Plaintiff in its declaration the Defendant neglected in its obligation to comply with Clause "D" and "E" of the agreement and also failed to service his loan with the Swaziland Building Society and the said mortgage loan fell into arrears. As a result of this the Swaziland Building Society instituted legal proceedings and obtained an order for E255, 749-12 plus interest at 13.75% from 27 July 2000. A copy of the Writ of Attachment is annexed marked "C". Thereafter the property was put up for sale and sold for E192, 000-00 as reflected in a copy of a signed notice of sale marked "D". The Swaziland Building Society having failed to realise the whole of the Defendant's indebtedness lawfully demanded from Plaintiff the balance as it fully appears in a letter of 3 January 2002 and an "accounting report" marked "E1" and "E2", respectively. On 15 November 2002, the Plaintiff duly paid the Defendant a sum of E87, 802-06 and the Swaziland Building Society acknowledged same, as it fully appears in annexure "F1" and "F2".

[7] The Defendant opposes the granting of the above-cited claim and has filed an amended plea in this regard. At paragraph 3 therein Defendant states that he does not admit liability to refund the Central Bank of Swaziland the amount demanded because he complied with Clause "D" and "E" of the separation agreement and/or alternatively because the separation agreement has no clause that empowers the Central Bank to recover anything from the Defendant should Defendant fail to comply with any term of the separation agreement. Clause "D" and "E" requires Defendant to perform certain obligations for the Defendant to refund Plaintiff of the pledge in the event the said pledge is redeemed by the Swaziland Building Society from the Plaintiff.

[8] Furthermore, Defendant pleaded that when Plaintiff paid Defendant his terminal benefits after signing of the separation agreement it was agreed in terms of the said termination agreement Clause "F" thereof that "**this agreement constitute the sole and final settlement for now and for the future**". The separation agreement was not only the final agreement according to the terms thereof but full and final settlement of claims between the parties thereto and no party to the said agreement has the right to claim from another anything upon signature thereof, and in the circumstances, the Central Bank has no cause of action in terms of the separation agreement.

[9] Plaintiff led the evidence of two witnesses, namely PW1 Norman Msibi and PW2 Jabulani Dlamini. The Defendant gave evidence on his own behalf and did not call any other witnesses.

[10] PW1 Norman Msibi is a Mortgage Manager at the Swaziland Building Society. He testified that a Deed of Sale was signed between himself (in his personal capacity) and Defendant. Defendant then requested a loan from Swaziland Building Society under Plaintiffs housing scheme. The Swaziland Building Society granted the Defendant the loan. The loan was properly paid until April 2000. The Defendant called Msibi in or about 4 April 2000 and later wrote a letter in terms of which he stated that the house should be sold. He testified that the house was to be sold by Defendant not Swaziland Building

Society and he stuck to this even under cross-examination. He further testified that in August 2000 he wrote a letter to Plaintiff advising them of arrears as Swaziland

Building Society still considered the house to be under the Central Bank of Swaziland scheme. He received a response, but later met with Plaintiffs officers and clarified the position.

[11] PW1 testified further that due to Defendant's breach, attorneys were appointed and obtained judgment. As a consequence of judgment, the house was sold and E192, 000-00 was realised. His office kept Plaintiff informed of process. Furthermore due to the fact that the debt was not fully realised on auction Swaziland Building Society advised Plaintiff on its intention to call up the shares and furnished a report. He testified further that Plaintiff eventually paid E87, 802-06 being the value of the amount pleaded on Defendant's behalf.

[12] The second and last witness for Plaintiff was PW2 Jabulani Dlamini who is employed by Plaintiff as one of the Managers. He testified that Defendant signed annexure "A" (the separation agreement). He stated that Defendant as senior employee after furnishing exhibit "D" was paid his pension monies as they trusted that he was going to transfer the house in terms of Clause "D" of annexure "A". He was surprised to receive exhibit "F" and hence his reply in "exhibit "N". He testified further that his staff after the meeting with Swaziland Building Society was fully updated on the sale in auction leading to payment of the E87, 802-06.

[13] Defendant in his evidence testified that he applied for a loan and was guaranteed and subsidised by the Central Bank. In his evidence he acknowledges the first pledge but not the second pledge. He admits that the separation agreement was signed but not amicably. He complied with Clause "D", in terms of a letter at page 17 of Book "B" and he was paid his benefits. He was surprised by the present action which according to him is contrary to Clause "F". He knows about procedures on pledge for calling up shares and that he does not quarrel with same.

[14] The Defendant in evidence before court admitted the pledge and the separation agreement. In this regard I am in agreement with the Plaintiffs contention that Defendant cannot in his plea, as he seeks to do introduce or try to contradict its contents. Therefore, as put to Defendant he cannot be heard to be denying the pledge and that he did not give authority to Central Bank to pledge. In this regard I am in total agreement with the legal authority cited for the Plaintiff that of *Gordon vs Tarnow 1947 (3) S.A. 525* and the legal authors *Herbstein and Von Wins en, The Civil Practice of the Supreme Court of South Africa* at page 462 to the trite principle of law that once an averment is admitted one cannot be heard to be challenging it. The Defendant cannot depose that the amount of E87, 802-06 is exaggerated and he cannot disagree with it.

[15] It was contended for the Plaintiff citing a number of legal authorities that of *Kritzinger and Kahn, Principles of Law of Mortgage First Edition, Juta 1993* at page 14 and what is stated by the legal authors *Silberg and Schoeman, The Law of Property 4<sup>th</sup> Edition at page 351* that the principles of law of contract apply to a pledge and there are no formalities required to draft it. The pledger need not be the same person who owes the debt, so that a pledge may be validity given by surety. In the instant case Plaintiff (as a pledger) secured an obligation owed by Defendant and Swaziland Building Society on the pledge. In this situation Plaintiffs liability was limited to the amount it pledged. In this respect I am in total agreement with the Plaintiffs argument that the pledge herein was similar to a surety bond. A pledgee in law is entitled to foreclose the pledge on default (parate executive). (See the South African case of *Thienhaus No. vs Mietje and Ziegler Ltd and another 1965 (3) S.A. 36*).

[16] In the present case the Defendant admitted the pledge and the separation agreement and hence he is bound by its terms. The Defendant breached or neglected to comply with Clause "D" of the separation agreement. As a result the Swaziland Building Society sold the house on auction and the proceeds were not enough. The Swaziland Building Society then exercised its powers in the pledge and fore-closed. Defendant testified that he knew about the

procedures of fore-closing pledged shares. The Plaintiff in order to avoid the forfeiture of its shares paid E87, 802-06 and the Defendant on cross-examination stated that he is aware of such. According to the Plaintiff since Defendant had undertaken to transfer the house, hence the release of the shares to Plaintiff, it is entitled to seek repayment of the funds from Defendant. Alternatively, on the evidence that Defendant breached the contract and Plaintiff is entitled to seek general damages from Defendant of E87, 802-06.

[17] Defendant's contention as also found in his plea is that the separation agreement was conditional and that Defendant did not breach Clause "D" as it was difficult for him to comply with the said clause of the agreement. As to the pledge it is contended for the Defendant that the pledge does not come to play in the present dispute, as it constitutes another agreement between the parties. Therefore the pledge cannot be used against the Defendant in this case. The essence of the Defendant's defence to the action is that Defendant did not breach any terms of the separation agreement.

[18] It was contended for the Defendant further that Clause "D" and "E" of the separation agreement makes provision as to what was required of Defendant in order for him to be absolved of the pledge. Defendant complied with Clause "D" of the separation agreement in that the housing loan agreement was between the Swaziland Building Society and the Defendant and the Plaintiff was not a party to the said loan agreement. The consequences of Clause "E" should have taken place but Plaintiff neglected to see to it that it was refunded its pledge. Furthermore, it is contended for the Defendant that the pledge was a staff benefit which accrued to staff members but ceased on termination of employment. The pledge was a security for the loan, in other words, it was a deposit for a loan sometimes referred to as the commitment amount, being a benefit to the employee and existing as such as long as one is an employee. As soon as the employment contract ceases to exist the Central Bank was obliged to withdraw its pledge or deduct its dues in terms of the separation agreement between Plaintiff and Defendant.

[19] It would appear to me that the Defendant's contention that the separation

agreement was conditional is incorrect on a number of respects. Firstly, the witness Norman Msibi testified that the letter Defendant wrote was merely advising Swaziland Building Society that he was to sell his house, and did not do so, and hence Swaziland Building Society considered the house still to be under the Central Bank of Swaziland Housing Scheme. There is nothing conditional in Clause "D". Defendant merely failed to transfer the house to himself and also failed to pay from April to August 2000. The witness Norman Msibi testified that until the debt was reduced by E87, 802-06 Plaintiff was still bound. Defendant agreed in his testimony that indeed the letter he wrote at page

17 at Book B did not reduce the debt. Defendant confirmed that contrary to paragraph 2 of his letter he failed to pay.

[20] It would appear to me that the transfer within the contemplation of the Plaintiff and the Defendant in terms of Clause "D" was that the Defendant was to pay Swaziland Building Society the sum of E87, 802-06 to reduce his housing loan so that Plaintiffs shares were released from the subsidised rate to the commercial rate as Defendant was no longer employed by Plaintiff.

[21] Defendant's second defence is that the separation agreement does not authorise a refund. In this regard I am in agreement with the Plaintiffs view supported by the legal authority of *Van Der Merwe -Contract General Principles* at page 241 that firstly, the breach complained of herein is negative performance. That it is the Defendant wrongful failure to perform its obligations in terms of Clause "D" of the separation agreement. Secondly, there is repudiation by the Defendant as he now disputes certain clauses of the agreement. The Defendant now tries to resist from the contract without valid grounds. Further on the legal authority of *Van Der Merwe* at page 296 - 298 that in *casu*, the innocent party is entitled to claim restitution from the resiling party.

[22] The third defence raised by Defendant is that the house was sold without reserve. However, the evidence of Norman Msibi was to the effect that the

house was sold with reserve and there were no buyers. Later as *per* Swaziland Building Society policy the house was sold without reserve, but they did not bid and received a market related price of E912, 000-00. Furthermore, notwithstanding the fact that Plaintiff has no role in determining Swaziland Building Society reserve price, the

Swaziland Building Society was in law entitled to sell without reserve, (see *Malherbe vs Rautendach 1955 (2) S.A. 96*). Therefore, the third defence is not a defence at all.

[23] The fourth defence raised by the Defendant is that this matter was settled in full and final settlement. In this regard I am in agreement with the contention raised by the Plaintiff that this is incorrect. Whilst it is correct that Clause "F" mentions some settlement, it does not take away Plaintiffs right to sue on breach of that agreement. In law, the term "**full and final settlement**" means the amount offered is to be accepted only on the basis that the balance of the claim is abandoned, novated and compromised. After the separation agreement had been signed there was neither compromise nor novation of its terms. Therefore, there was no discharge of obligations herein.

[24] Lastly, Defendant further sought to advance two additional defences that of negligence and release. On both defences the Defendant has not pleaded to these in his plea. On the former I am in agreement with the Plaintiff that the agreement did not provide deduction of pension. In fact, even if the Plaintiff deducted Swaziland Building Society would still hold Plaintiff to pledge since Defendant failed to reduce the Swaziland Building Society debt to levels acceptable to the Swaziland Building Society. On the latter defence the Defendant sought to introduce this as some form of defence during his testimony by saying he did not part with the Plaintiff amicably. This defence was not pleaded in the papers filed of record.

[25] In the result, for the afore-going reasons judgment is granted in favour of the Plaintiff in terms of prayers (a), (b) and (c) of the amended Plaintiffs declaration.

S.B. MAPHALALA

JUDGE

