

IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 4068/2005

In the matter between:

STANDARD BANK SWAZILAND LIMITED

PLAINTIFF

AND

JOSEPH SIPHO SHABANGU t/a
EKUTHULENI GENERAL DEALER

DEFENDANT

CORAM:
FOR THE PLAINTIFF:
FOR DEFENDANT:

MAMBA AJ
MR. MOTSA
MR. NZIMA

JUDGEMENT
21/04/06

[1] After a notice of intention to defend had been filed by the Defendant, this was followed by a declaration by the Plaintiff in support or amplification of its three claims contained in the simple summons. What followed was this application for summary judgement by the plaintiff.

[2] Claim 2 which was a claim for payment of E76275-00 is no longer relevant for purposes of this application as it was extinguished by payment by the defendant in December 2005 after the issue and service of the summons upon him.

[3] Claim 1 is for payment of the sum of E1 254 278.50 plus other ancillary relief, being money loaned and advanced by the plaintiff to the defendant in November 2004. In support of this claim, the plaintiff avers as follows in his declaration at page 10 of the book of pleadings

"4. The plaintiff duly and timeously complied with all its obligations in terms of the loan agreement and in particular, the plaintiff duly advanced the capital sum to the defendant.

5. As at the 30th October, 2005;

5.1. The prime rate was 10.5% per annum and margin B was 2% per annum.

5.2. The outstanding amount of the capital sum amounted to E1254 278.50 as

appears more fully from the certificate of balance and statement annexed hereto marked "E" and "F" respectively.

6. In the premises the defendant is;

6.1. Indebted to the plaintiff in the sum of E1254 278.50,

6.2. Liable to the plaintiff for the payment of interest at 12.5% per annum on the above sum calculated from the issuance of the summons to date of payment.

7. Notwithstanding demand, defendant fails and/or refuses and/or neglects to pay the sums referred to in paragraph 5.2 supra, to the plaintiff".

[4] Claim 3 is for the payment of the sum of E51 218.54 being monies lent and advanced to the defendant in October 2005.

[5] Again the following averments are made by the plaintiff in support of claim 3.

"16. Pursuant to the foregoing, the plaintiff on various occasions disbursed and paid out on the defendant's behalf certain sums of money, alternatively lent in advance certain sums of money to the defendant. 17. On the 30th October, 2005 the balance of the sums disbursed and paid out, alternatively lent and advanced as aforesaid, by the plaintiff to the defendant, together with interest and banking charges as aforesaid amounted to the sum of E51 218.54 ...as it fully appears in the statement and certificate of balance annexed hereto "K" and "L" respectively. Wherefore plaintiff claims for the orders as in the summons."

[6] The plaintiff has alleged in paragraph 14.1 of its declaration in respect of claim 3 that it was agreed between the parties that "all sums overdrawn would be repayable on demand".

[7] In opposing the application the defendant filed his opposing affidavit and was later, on application, permitted to file a supplementary affidavit after the plaintiff had filed its replying affidavit. Defendant has, essentially raised two points in his defence. First, that he has fully honoured his obligations under the two agreements by making regular and adequate payments to the plaintiff. Secondly, that the plaintiff's summons or declaration does not allege that he is in

breach of the two agreements forming the basis of the two claims, and if in breach to what extent he is in arrears with his payments. He has argued that the summons does not, as it stands, disclose a cause of action and is therefore excipiable.

[8] The defendant when he applied to file a supplementary affidavit stated that he had then since discovered documentary evidence in the form of bank deposit slips indicating that he had deposited monies into his accounts with the plaintiff and these monies had not been accounted for or credited into his account by the plaintiff. He said these deposits were substantial. Mr Motsa for the plaintiff very properly did not oppose this application.

[9] It is not necessary for me to go into detail on the contents of that supplementary affidavit. Suffice to say that these bank deposit slips supported the plaintiffs case instead in that all the deposits recorded therein had been credited into the defendant's accounts. After examining all the documentary evidence and hearing arguments on both sides I invited plaintiff's attorney to address me on whether or not the declaration was not excipiable. Mr Motsa submitted with regard to claim 3 that as a matter of law, an overdrawn account is payable on demand and the summons herein is such a demand. I accept this. However, this is what was submitted in argument. There is no allegation to this effect in the plaintiff's declaration namely, that a demand had been made prior to the issue of the summons.

[10] Again with regard to claim 1 the declaration as quoted above merely states that the defendant is indebted to the plaintiff in the sum of E1254 278.50 and notwithstanding demand defendant fails to pay. There is no allegation of breach and that as a result of such breach the plaintiff has elected to foreclose the loan account and call for the full payment of the outstanding amount. The plaintiff would have only had this right in the event that the defendant was in breach of the loan agreement. Money loaned is by its very nature owing. It is a debt and if it has fallen due and payable, for whatever reason, this should be stated in the plaintiff's summons because it is an essential element for the claim.

[11] In argument, I was referred to the case of **DAVID CHESTER v CENTRAL BANK OF**

SWAZILAND, appeal case no 50/03 where the court at page 4 - 5 stated that ;

"The main argument addressed to us on appeal by Mr Maziya concerns the allegations made by the respondent in its declaration. The question here is whether the allegations in the declaration constitute a cause of action justifying the respondent's claim against the appellant.

Even if a defendant in response to an application for summary judgement fails to set out a defence in compliance with rule 32 (3) this does not preclude him from taking the point that the plaintiff has failed to plead a valid cause of action in his summons or declaration.

In the case of **RITZ v KATZEFF 1950 (1) S.A. 584 (C)** the defendant excepted to the plaintiff's declaration. In his affidavit he did not set out the nature of his defence but merely referred to the exception he had taken to the declaration. The court held that the exception which was that the declaration was vague and embarrassing was not without substance, and summary judgement was refused. A similar decision was given in the case of **JAGGER & CO LTD v MOHAMED 1956 (2) S.A. 736 (W)**.

In the case of **Transvaal Spice Works and Butchery Requisites (pty) Ltd v Conpen Holdings (pty) Ltd 1959 (2) SA 198 (W)** no affidavit had been filed by the defendant but it was argued on its behalf that summary judgement should be refused because they appeared to be a measure of uncertainty in respect of the plaintiff's rights as set out in its summons. The court upheld this argument holding that in the light of the uncertainty the court should exercise its discretion against the grant of summary judgement. See also the case of **Dowson and Dobson Industrial Ltd v Van der Werf & others 1981 (4) SA 417 (C)** where it was held that if the defendant can show that the plaintiff's declaration lacks essential facts to constitute a valid cause of action this in itself indicates that the defendant has a bona fide defence to the plaintiff's claim....

The above cases also refer to the fact that the procedure of summary judgement constitutes an extraordinary and stringent remedy as it permits a final judgement to be given against a defendant without a trial. The court should therefore not grant summary judgement if there is a reasonable possibility that the plaintiffs application is defective or that the defendant has a good defence.

That the court has a discretion in these matters even where the defendant has failed to comply with the rule clear from the rule itself."

[12] I have taken into consideration the inherent and conflicting considerations with regard to such application and in particular what is stated by **Van Niekerk et al, SUMMARY JUDGEMENT - A PRACTICAL GUIDE (1998)** where the authors say;

"Prompt relief for a plaintiff at the expense of a defendant denied the normal trial procedures carries with it inherent risks. In the application of the remedy, therefore, it is of critical importance that there be an equitable balancing of the legitimate expectation of a plaintiff's claim on the one hand against the right of a defendant to a proper adjudication of his defence by means of the ordinary trial procedure, on the other."

[13] It is noted that the two claims are linked together in that all the monies to be credited into the loan account which is the subject matter of claim 1 ought to be debited from the current account which relates to claim 3. It would be inadvisable to adjudicate on these claims as though they were separate and distinct from one another. Because of the above facts I hold that the plaintiffs declaration is excipiable, that is to say it does not contain sufficient allegations to found the relief sought and consequently the application for summary judgement is refused.

The costs of this application shall be the costs in the course.

MAMBA J