

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1182//2008

TEMAHLUBI INVESTMENTS

Plaintiff

And

STANDARD BANK OF SWAZILAND

Defendant

Coram: S.B. MAPHALALA - J

For the Plaintiff : MR. L. MAMBA

For the Defendant: MR. K. MOTSA

JUDGMENT

13th June 2008

[1] The Plaintiff operates a current account with the Defendant. The Plaintiff has issued summons seeking an order that the Defendant be directed to "**honour all cheques and instruments drawn by (it) on the (Defendant) provided there are sufficient funds to meet same**" as per prayer A of the Plaintiffs Particulars of Claim.

[2] The Defendant entered a Notice to defend and the Plaintiff now seeks summary judgment.

[3] The Defendant has raised a point *in limine* to the argument that the Plaintiffs cause of action does not constitute a valid ground for summary judgment under Rule 32 (2) of the High Court Rules. The Defendant contends that the above Rule has not been met. The said Rule provides as follows:

"This Rule applies to such claims in the summons as is only:

- (a) On a liquid document;
- (b) For a liquidated amount in money;
- (c) For delivery of specified movable property; or
- (d) Ejectment

together with any other claims for interests and costs"

[4] To support its arguments the Defendant has cited the case of *Hugo Franco (Pty) Limited vs Gordon 1956 (4) S.A. 482 - 45*.

[5] It is further contended for the Defendants that that the Plaintiffs claim is one for specific performance. This remedy presupposes an existence of a contract and an anticipated breach. In this regard the court was referred to the case of *Van der Merwe et al, Contract General Principles, 3rd Edition Juta 2007* at page 1381.

[6] On the other hand the Plaintiff contends that this is not so on the basis of the *dictum* in the case *Meddent Medical Scheme vs Avalon Brokers (Pty) Ltd 1955 (4) S.A. 862 (D)*.

[7] Having considered the arguments of the parties it would appear to me that the Defendant's argument is correct on the facts of the matter. The Plaintiffs claim is one for specific performance. This remedy presupposes an existence of a contract and an anticipation on breach. The Plaintiff has alleged breach (at paragraph 4 and 5). The Plaintiff is not concerned about a breach still to be committed, and consequently this is not an appropriate remedy and Plaintiff ought to sue for damages.

[8] It would appear to me that Defendant is correct in its submission that even assuming that the court can grant the order for specific performance, there is the issue of breach which the Plaintiff has to prove by way of *viva voce* evidence. An order for specific performance is not appropriate in summary judgment.

[9] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA
JUDGE