IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 969/2008

SWAZILAND DEVELOPMENT & SAVINGS BANK Applicant

And

JOHANNES MANGULUZA TSABEDZE Respondent

Coram S.B. MAPHALALA - J

For the Applicant MR. N. MABUZA

For the Respondent MR. T. NDLOVU

JUDGMENT

[1] The Applicant being Swaziland Development and Savings Bank filed an ex parte application under a Certificate of Urgency for an order against the Respondent one Johannes Manguluza Tsabedze on the following terms:

1. Dispensing with the usual forms and procedures relating to the institution of those fillings and allowing the matter to be enrolled and heard as one as urgency in terms of the provisions of the above Honourable Court;

2. Condoning Applicant's non-compliance with the Rules of Court.

3. That a rule nisi do hereby issue returnable on a day to be determined by the above Honourable Court calling upon the Respondents to show cause why an order in the terms set out hereunder should not be made final;

3.1 Declaring the entire loan agreement marked annexure "Al" hereby due and payable.

3.1.1. Declaring certain movable property listed in schedule 5 of annexure "A2" specifically hypothecated and declared executable, alternatively, that such movable property be attached forthwith and put under the custody of the Applicant pendent elite.

3.2 Directing the Respondent to deliver to the Applicant all assets and stock and/or crop of the Respondent as stated under schedule 5 of annexure "A2" forthwith.

3.3 That failing the return of the aforesaid movable property in 3.2 to the Applicant forthwith, the Sheriff or his Deputy in the Lubombo district be authorized and directed to take possession of the goods listed in the fifth schedule of annexure "A2", wherein the same may be found, and deliver same to the Applicant.

3.4 Directing that the Respondent pay the Applicant the amount of E78, 644-49 being the amount due and owing to the Applicant by the Respondent in terms of the agreement.

3.5 That the Respondent pay costs of this application alternatively, directing that the costs of this application be costs in the application or action to be instituted for the recovery of the sum stated in paragraph 3.4 hereinbefore.

3.6 Alternatively, 3.1 to 3.5 above pending the outcome of this application alternatively, proceedings to be instituted for the determination of the relief set out in 3.1 to 3.5 above that the Deputy Sheriff be authorized and directed to attach and remove the hypothecated movable property listed in schedule 5 of annexure "A2" wherever same may be found and to deliver the same to the Applicant to hold in safe custody, alternatively, to hold the hypothecated property under attachment.

4. Directing that paragraphs 3.1 and 3.2 of the rule nisi operate with immediate and interim effect pending the return date of this application.

5. That the Respondent be entitled to anticipate the above order within 24 hours of service by the Deputy Sheriff.

6. Further and/or alternative relief.

[2] The application is founded on the affidavit of one Maurice Thwala who is the Senior Manager Recoveries of the Applicant where he has related the material facts in this dispute. In the said affidavit pertinent annexures are filed in support thereto.

[3] In opposition the Respondent has filed his opposing affidavit canvassing his defence on the points in limine and on the merits of the case.

[4] The points in limine are the following:

Applicant herein seeks a declaratory order against me, declaring the executability and/or exercise of certain rights and duties flowing from a written agreement entered into between myself and the Applicant. In so doing the Applicant, being fully appreciative of the attendant serious and substantial disputes of fact that so glaringly plague the matter, has chosen to approach court by way of application, and by urgent ex parte application for that matter. Applicant should have approached court by way of summons. These disputes inter alia relate to:

2.1 Whether or not the respondent is in breach of the agreement entered into between the parties;
2.2 Whether or not the Applicant is entitled to declare the entire loan repayable, having not furnished such full loan thereof;

2.3 Whether or not the interests charged, from time to time, are in terms of the agreement entered into between the parties;

2.4 Whether or not the Applicant is at liberty to cancel the agreement;

2.5 Whether or not the Respondent is indeed indebted to the Applicant, and if so, the exact extent of such indebtedness;

2.6 The Respondents rights of seeking performance under the agreement. By the same token Applicant therefore seeks to claim or recover an illiquid claim, the existence and extent of which can never be ascertained without extrinsic evidence, and by way application. Again the Applicant has clearly adopted a wrong procedure in claiming the relief he seeks

Applicant has further approached court by way of urgency. I deny that the matter is urgent for one or more of the following reasons:

4.1 The agreement in issue herein was drawn, entered into, and began developing compliance difficulties, caused solely by the Applicant, a decade ago. Applicant can therefore not come to court some ten years later and plead urgency. The same is sincerely an abuse of court process. And even more so because, the loans advanced related or were mainly concerned with purchase of farming implements. To this end Applicant had a lien over a power generator and certain pipes.

4.2 Applicant failed to fully honour its obligations under the agreement. As a result the said generator and some of the pipes, sought today to be attached, are since in a dilapidated state. Applicant is aware of this.

4.3 I brought the same to its attention during the year 1996 when it ceased performing its obligations under the agreement. Applicant can not, after 10 years come to court and claim such items are likely to be disposed off by myself. Such failure is dealt with in detail in the paragraphs that follow below.

4.4 The Applicant, in bringing the present application, on ex parte basis, has failed to discharge the onus resting upon an ex parte. Applicant in failing to make full disclosure of all material facts related hereto. The Applicant has failed inter to disclose;

4.4.1 That it did not advance to me the full loan that it now seeks repayment of;

4.4.2 That it in fact breached its obligations having undertaken to loan me the amount and/or sum now in contention;

4.43 That it was agreed between members of the our said farmers association and the bank, the bank at

the time being represented by one Mr. Dlamini, who was the then branch manager, that the interest payments sought would stopped with effect from the year 1995 owing to the banks breach of its undertaking evinced by its failure to furnish the full extent of the loan amounts granted to us.

[5] The crux of the arguments for the Respondents before me is that Applicant seeks to claim or recover an illiquid claim, the existence and extent of which can never be ascertained without extrinsic evidence by way of application. The Applicant has adopted a wrong procedure in claiming the relief he seeks.

[6] The respondents further contend that Applicant herein seeks a declaratory order against the Respondent, declaring the executability and/or exercise of certain rights and duties flowing from a written agreement entered into between the parties. In so doing the Applicant, being fully appreciative of the attendant serious and substantial disputes of fact that glaringly plague the matter, has chosen to approach court by way of application, and by urgent ex parte application for that matter. Applicant should have approached court by way of summons.

[7] Furthermore Respondent contends that these disputes, inter alia relate to:

1.1 Whether or not the Respondent is in breach of the agreement entered into between the parties;

1.2 Whether or not the Applicant is entitled to declare the entire loan repayable, having not furnished such full loan thereof;

1.3 Whether or not the interests charged, from time to time, are in terms of the agreement entered into between the parties;

1.4 Whether or not the Applicant is at liberty to cancel the agreement;

1.5 Whether or not the Respondent in indeed indebted to the Applicant, and if so, the exact extent of such indebtedness;

1.6 The Respondents rights of seeking performance under the agreement;

1.7 By the same token Applicant therefore seeks to claim or recover an illiquid claim, the existence and extent of which can never be ascertained without extrinsic evidence, and by way application. Again the Applicant has clearly adopted a wrong procedure in claiming the relief he seeks.

[8] In support of his arguments the court was referred to a plethora of decided case by this court and in Elmon Masilela vs Wrenning Investments (Pty) Ltd and Thomas Moore Carl Kirk - Civil Case No. 1768/2008 Masuku J stated the following:

> "It is becoming a habit to bring applications to court on controversial issues and then to endevour to turn them into trial actions. Applicants thereby obtain a great advantage over litigants who have proceeded by way of action and who may have to wait for many months to get their cases before court. Such applications cum trials interpose themselves, occupying the time of the judges and still further delaying the hearing of legitimate trials ... in the foregoing the proper order would be hat the application be and is hereby dismissed with costs".

[9] On the other hand the Applicant contends that the application does not contain a dispute of fact. If there is a dispute it is so narrow that it can be resolved on the papers and at worst by oral evidence. Such dispute, if any, is deliberately being created by the Respondent to delay the Applicant.

[10] The Applicant contends that the loan agreement, Annexure "Al" is a liquid document and the amount claimed by virtue of the loan does not need evidence extrinsic or not, to prove it. In this regard the court was referred to High Court Case of Swaziland Development and Savings Bank vs Shali Investments (Ply) Ltd - Civil Case No. 4459/2005 at page 16 -18.

[11] Having considered the arguments of the parties I have come to the considered view that in casu there are disputes of facts as outlined above in paragraph [7] of this judgment and these disputes of fact should have been foreseen by the Applicant but it adopted a wrong procedure in claiming the relief sought. In this regard I find the dictum by Masuku J in Elmon Masilela (supra) apposite on the facts of the present case.

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

Pronounced at the High Court sitting at Mbabane this.....29th:....day of August 2008.

S.B. MAPHALALA

PRINCIPAL JUDGE