

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 622/08

In the matter between:

**SWAZILAND DEVELOPMENT
FINANCE CORPORATION (FINCORP)**

PLAINTIFF

and

**MOIRA NONTOBKO NTSHANGASE
T/A PHUMELELE HAIRDRESSING SALON
SIBUSISO BHEKI FAKUDZE
ESTHER JABHILE NDLANGAMANDLA
DEFENDANT**

**1ST DEFENDANT
2ND DEFENDANT
3RD**

CORAM: Q.M. MABUZA-J

FOR THE APPLICANT: MR. S. MDLADLA OF S.V. MDLADLA & ASSOCIATES

FOR THE RESPONDENTS: MR. B.S. D LAM INI OF B.S. & ASSOCIATES

RULING 3/10/08

[1] The 3rd Defendant is an adult woman who stood surety for the 1st Defendant for a loan that 1st Defendant had obtained from the Plaintiff on or about the 23/5/06. She is now being sued jointly and severally one paying the other to be absolved with the 1st and 2nd Defendant for payment of the loan.

[3] She resisted an application for summary judgement and

raised certain points *in limine* to bolster her case namely:

- i. She argues that the Plaintiff has approached the court with dirty hands in that it placed a garnishee order against 3rd Defendant's salary without a court order or any valid legal instrument.
 - She was unable to place such a garnishee order before court. Mr. Mdladla correctly took issue on the point of unclean hands. Counsel should desist from using this unsalutary label against another litigant unless they have full proof evidence if they do not wish to risk costs **de bonis propriis** should they fail to prove such.
- ii. The 2nd point she raises is that there is no legal document on which the 3rd Defendant may be said to be legally liable towards the Plaintiff.

[4] In terms of the Deed of Suretyship the loan was granted on the 23/5/06 she signed on the same date as surety therefore.

[5] On the same date she completed an authorisation for Fincorp to deduct monthly loan repayments from her monthly salary in the amount of E2,000.00. She must have discussed this aspect of

the loan how else would the staff at Fincorp have known what figure to write there in. There is handwritten information at the left top of the authorisation letter detailing repayment within 42 months. I do not believe that she was unaware of what she was getting into especially as I am informed that she is a lecturer at a teacher training institution at Nhlanguano.

[6] Mr. Dlamini has also informed the court that a female cannot enter into such agreements. That is not true. He is taking the womens movement for equality a step back. Even the Constitution refers to equality before the law for all genders. If such an authority exists then it must fall flat in the face of the Constitutional provisions.

[7] She further states that nobody explained the consequences of her signing as a surety. I do not believe this. The authorisation form is quite detailed. The questions and her responses should have alerted her of treading on troubled waters. I am aware that when people desperately need money they tend to overlook what is important and what may come back to bite them later on. This is what has happened to the 3rd Defendant.

[8] She also states that what disturbs her is that there has been no attempt to recover the money from the 1st and 2nd Defendants. In my view the Plaintiffs do not have to do this. The

summons which has been issued is the Plaintiffs way of recovery of its money from the 1st and 2nd Defendant but the 3rd Defendant is delaying this process. There is nothing wrong with a Plaintiff in arming itself with a judgment while deducting the money on the basis of the authorisation. It can always suspend execution of the writ against the 3rd Defendant. The execution of a writ against the 1st and 2nd Defendant may even accelerate relief for the 3rd Defendant.

[9] She may also sue the 1st and 2nd Defendants for the moneys that have been deducted from her and compete with the Plaintiff when execution of the writs is being effected.

[10] I agree that courts are reluctant to close a door on a Defendant who has a good defence in summary judgment applications. This case clearly is not one of those. The points *in limine* are dismissed and the application for summary judgment is granted with costs.

Q.M. MABUZA-J