IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 1125/09**

In the matter between:

STANDARD BANK OF SWAZILAND LIMITED **Plaintiff**

And

PROTRONICS NETWORKING CORPORATION

LIMITED **1st Defendant**

SANDILE FRANCIS DLAMINI **2nd**

Defendant

Date of hearing: 30 July, 2009

Date of judgment: 12 **August, 2009**

Mr. Attorney K. Motsa for the Plaintiff

No appearance for the Defendants

JUDGMENT

MASUKU J.

[1] This is an application for summary judgment, which appears, on the papers, to be opposed. The Plaintiff applies for judgment against both Defendants jointly and severally in the amount of EI, 416, 030. 27; interest thereon at the rate of 20.5%, calculated from 28 February, 2009; an order declaring Portion 204 of Farm No.2 situate in the urban area, measuring 6450 square metres specially executable and costs of the suit on the scale between attorney and own client.

[2] The claim arises from overdraft facilities extended to the 1st Defendant with an initial limit of E500,000.00. In terms of some written agreements between the parties, the Plaintiff was entitled to levy interest on the 1st Defendant at prime rate plus 7.5% in cases where the limit was exceeded by the 1st Defendant. It is the Plaintiffs case that pursuant to the said agreements, the 1st Defendant drew cheques on the said account in excess of the limit agreed, hence the amount claimed. The 2nd Defendant is being sued in his capacity as surety and co-principal debtor with the 1st Defendant.

[3] Before dealing with the application for summary judgment proper, there is an issue that I need to advert to. It relates to the absence of the Defendants' attorneys of record during the hearing of the summary judgment application. Mr. Motsa, for the Plaintiff indicated that he was in possession of a letter from Messrs. Mofokeng Attorneys, dated 28 July, 2009, a copy of which was handed up to the Court, together with a response thereto dated 29 July, 2009, from Messrs. Robinson Bertram who, appear for the Plaintiff herein.

[4] In the aforesaid letter, Mr. Mofokeng indicated that his office was aware of the notice of set down of the matter but advised that his client was desirous of engaging Senior Counsel to handle the matter. Due to lack of funds, however, his client had been unable to secure the services of Senior Counsel as it had wished, which in turn resulted in the Defendant's attorneys of record being unable to file their heads of argument. The Defendants, it was further alleged in the letter, had indicated to Messrs. Mofokeng that they would be able to secure the requisite funding to enable them to engage Senior Counsel on

4 August, 2009. Messrs. Mofokeng further advised that he was not going to be available on the date of argument as he had to attend an \mforseen family engagement in South Africa'.

[5] Needless to say, the response from the Plaintiffs attorneys was in the negative. They simply did not accept the reasons furnished for the matter not being argued on the date in question as being genuine. They indicated that they would proceed to prepare for the argument of the matter, advising the Defendant's attorneys to do likewise. In a nutshell, the correspondence exchanged between the parties' representatives acuminates to what I have stated above.

[6] Having due regard for the entire conspectus of facts and circumstances surrounding this matter, I took the decision that it would not be proper or desirable that the matter be postponed at the behest of the Defendants' absent attorneys. I ruled that the matter should proceed even in the absence of the Defendants' representatives. I indicated further that the

Court would have regard to the papers filed by the Defendants in opposition to the grant of the application for summary judgment and would decide the matter from that premise.

[7] There are a number of disconcerting aspects to this matter in so far as the conduct of the matter by the Defendants' attorneys is concerned. In the first place, the matter was set down for argument in open Court, after both parties agreed on the date of hearing. The Court made it crystal clear on that day that the dates allocated were firm and that the Court would proceed to hear the matters on the dates so allocated. This was done on 17 July, 2009. On that day, I indicated to the parties' representatives, that they were required to file written heads of argument at least a week before the date of hearing. This was not done by the Defendants' attorneys up to this point.

[8] It was not until two days before the hearing allocated that an indication was made to Mr. Motsa via the letter referred to above, that the Defendants were experiencing the difficulties

alluded to earlier. It is of particular note that no notice of any difficulties allegedly faced by the Defendants was directly brought to the attention of the Court. The presiding Judge was merely regarded and treated as a pawn or stooge by the Defendants' attorneys and was adjudged by them not entitled to be advised of the difficulties alleged. The movement and direction of the Court's hands regarding its handling of the matter would be dictated by Mr. Mofokeng, he being the puppet master.

[9] What is more, Mr. Mofokeng did not, in view of the history of the matter, find it fit to attend Court and to move a formal application for a postponement of the matter as it is his ethical duty, nor did he make arrangements for a colleague to attend Court for that purpose. He simply decided that he was not going to attend Court but would give preference to an unspecified family engagement. This is wrong, improper and unethical behaviour on Mr. Mofokeng's part and I view it in a very serious light. Attorneys should be the last in the chain of persons who can even be remotely accused of causing an

assault on the dignity and esteem of the Courts of this country, which is exactly what Mr. Mofokeng has done. I accordingly call upon him to render a full written explanation for his behavior within fourteen (14) days from the date of service of this Court Order upon him.

[10] In view of all the aforegoing, particularly that the matter had been set down by the consent of the parties and in open Court and further considering that there was no formal or any other application nor any grounds, sustainable or otherwise, before Court for the postponement of the matter to another day, I found it my duty to proceed with the application even in the absence of Mr. Mofokeng. I shall, as I am in duty bound to, have regard to the papers filed of record opposing summary judgment. Parties should desist from impeding and frustrating the Court's quest to do its business efficiently by employing such dilatory stratagem.

Regarding the allegation that the Defendant wanted to instruct Counsel, it must be stated that relevant preparations should have been made from the time the matter was allocated a date of hearing. In the case of *Duncan v Roets* 1947 a judgment of the Transvaal Provincial Division, Lucas A.J. had this to say about a postponement sought on the grounds that Counsel was not available at p227:

> "I am informed by Mr. *Bekker,* who is briefed to apply for the postponement, that counsel who had been engaged for the respondent could not appear to-day. I do not think that is any reason why the case should be postponed. While the Court will do its best to meet the convenience of counsel, convenience of litigants must have prior consideration. Counsel must make themselves available for the dates assigned or else surrender their briefs.''

In the instant case, there is clearly prejudice suffered by the Plaintiff in the matter not coming to Court for adjudication on the date agreed to by the parties. It is also in the Defendants' interest that the matter be finalized as soon as practicable, unless there are cogent and compelling reasons why a

postponement should be granted. As earlier indicated, on the papers before me, there is no reason, compelling or otherwise.

[12] Regarding the proper approach to applications for postponements, the learned authors Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, 1997, Juta, say the following at p666:

> "Either party may by way of an application or: notice to his opponent before the trial or on the day of the trial apply for a postponement of the trial. The granting of such an application is in the nature of an indulgence and lies entirely in the court's discretion to grant or refuse the application. . . The reasons adduced for a party's inability to attend must be sound, and he cannot rely on the fact that his presence at the trial will greatly inconvenience him."

The above considerations, in my view, apply equally to motion proceedings where an application has been allocated a date of hearing as opposed to a date of trial. It will be seen from the foregoing that the Defendants are completely off-side, to resort to football parlance as they dismally failed to do what as required for

the possible grant of an application for a postponement. The foregoing, constitute the reasons why I decided to proceed with the application notwithstanding the muted indications that Mr. Mofokeng had desired a postponement of the matter from his learned friend.

I now turn to the merits of the application for summary judgment. In its affidavit resisting summary judgment, the Defendants have raised the following points of law: that the Plaintiff failed to join a second trustee in the name of Bhekiwe

Vumile Dlamini in the proceedings; the mortgage bond sued upon is invalid for failure to comply with the provisions of the trust document *viz* that only one trustee signed the resolution to register the bond contrary to clause 9.10 of the deed of trust; and that the interest charged is above the legal rate for interest.

[14] I must specifically record that the Defendants have not raised any triable issue or question nor have they raised *a. bona fide*

defence that *prima facie* carries a prospect of success at trial. See *Moses Dlamini v National Motor Company Limited* App. Case No. 9/1994; *Metro Cash & Carry t/a Manzini Liquor Warehouse v Enyakatfo Investments (Pty) Ltd* Case No. 1038/06. They have contented themselves with raising legal points, an issue I intend to revert to in due course.

[15] I should particularly state in this regard that the Defendants have not challenged the propriety of moving the application for summary judgment in this matter. In my view, this is a proper matter to bring by way of summary judgment as it is a claim for a liquidated amount and which amount is by all accounts, easily and speedily ascertainable - *Commercial Bank of Namibia v Trans Continental Trading* 1992 (2) S.A. 66 (Nm.HC). Furthermore, there is no dispute regarding the Plaintiff having fully complied with the formal requirements of such an application.

It may be convenient to commence with the last point raised by the Defendants relating to interest. They contend that the amount of interest claimed is above the legal rate. No information is before Court as to why this allegation is made or what the permissible rate of interest is. Whatever the point sought to be made is, it is clear from the documents annexed to the declaration that the parties agreed on the rate of interest and there is no indication or allegation that the Plaintiff has departed from the rate of interest agreed *inter partes.* It is in any event customary for banks, as did the

Plaintiff herein, to levy compounded interest. See *Barclays Bank International v Smallman* 1977 (1) S.A. 401 (R) at 402. I accordingly dismiss this point as meritless.

Reverting to the first legal point raised, namely the non-joinder of the said Bhekiwe Vumile Dlamini, there is a major if not an insuperable difficulty in the Defendants' way. The contractants in respect of the loan agreements are the Plaintiff and the 1st Defendant. The 2nd Defendant represented the 1st Defendant and signed in his capacity as a director of the 1st Defendant and further signed as a surety and co-principal debtor with the 1st Defendant. It

is clear from the documents filed of record that the S.M. Trust is not and was not a party to the loan agreements. Why it is alleged that trustees, as such Ms. Dlamini, should now be sought to be joined as parties beats reason. I say so acknowledging that even the deed of trust referred to has not even been placed before Court.

There is also no indication that Ms. Dlamini was a party, even in her personal or some other capacity to the contract in question such that she should have been cited as a party in the present proceedings. If she had any interest in the suit, which is certainly not established on the papers, she would, in any event have herself, as she is entitled to at law, applied to be joined as a party and this she has not done, assuming of course that she does have an interest. This point appears to have all the hallmarks of a weak attempt to clutch at straws and for the Defendants perchance to escape the reach of summary judgment. I accordingly dismiss this point.

Regarding the alleged invalidity of the mortgage bond sued upon, it is the Defendants' contention that only one trustee signed the resolution, thereby rendering the entire process invalid. I must

interpolate and observe that the resolution relied upon for this argument has not been annexed to the affidavit filed in opposition to the application for summary judgment. I need to emphatically point out that the cause of action in the instant matter does not arise from a mortgage bond but arises from loan agreements annexed to the declaration marked "A" and "B", respectively. The relevance, if any, of the trust and its trustees appears non-existent to me, regard had to the fact that the monies lent and advanced to the 1st Defendant have not been paid and this appears incontestable. Had the situation been otherwise, the opposing affidavit would have explicitly stated so.

Even if I can be found to have erred in my conclusions on the above issue in the preceding paragraphs, it is clear, regard being had to the aforesaid annexures "A"and "B", at pages 42 and 52, (particularly at (ii) and (vii) thereof), respectively, of the book of pleadings, that the 1st Defendant therein represented to the Plaintiff that "it has the power to enter into and perform in terms of the Letter of and the Security, and <u>all necessary shareholder and corporate consents have been obtained for the acceptance of the</u>

loan . . ." The Defendants also warranted that there were no material facts and circumstances in respect of the borrower, which were not disclosed but which would be likely to adversely affect the Plaintiffs decision to advance the loan in question.

[21] At the end, the 2nd Defendant appended his signature. It cannot be properly contended in the circumstances that where an entity like the 1st Defendant obtains a substantial loan like it did and has not repaid it as undertaken, it can be allowed to cite internal regulations it did not follow, having warranted that it did follow them, to defeat an application like the present. This is exactly what the Defendants seek to do in the instant case.

[22] The circumstances of the present case certainly bring it within the application of what is generally referred to as the rule in *Turquand's* case, i.e. persons contracting with a company and dealing in good faith may assume that acts within the company's constitution and powers and duly performed, are

not bound to enquire whether acts of internal management have been regular. It renders proof by the company that the internal formalities have not been complied with insufficient to enable it to escape liability under the contract. See Joubert, Laws of South Africa, vol 4 Pt 2, Butterworths, 1996 at para 184, page 331. I am accordingly of the considered opinion that this point is raised disingenuously and ought, like the others, to be dismissed as I hereby do.

I now revert to the issue raised in paragraph [14] above, *viz* that the Defendants contented themselves with raising points of law, without descending into the arena and dealing with the summary judgment on its merits. A party who follows that course is actually courting disaster should the Court, as it may do, find that the points of law are not meritorious. This is exemplified by the judgment of *Standard Bank of South Africa Limited v R T S Techniques and Planning (Pty) Ltd* 1992 (1) S.A. 432 at 442 A-C, where the learned Daniels J, said the following:

> "Apart from the fact that the procedure is prescribed in Rule 6 (5) (d), it is, as has been indicated, the established practice that a respondent should file affidavits on the merits, irrespective of whether a

> preliminary point is to be argued. He should not rely upon his preliminary point only. . . Obviously the Court is most reluctant to hear the case without giving the respondent an opportunity to file opposing affidavits. However, as the dilemma in which the respondents find themselves is of their own making, not only were they given every opportunity to address the merits, but they were invited to do so." See in particular, the enlightening remarks referred to made by Corbett J. (as he then was) in *Bader and Another v Weston and Another* 1967 (1) S.A. 134 (C) at 136.

The above case admittedly dealt with an application in terms of Rule 6 but it is clear in principle that the statement of the law would equally apply to summary judgment applications as the respondent is required to file an affidavit in response to the Plaintiffs affidavit in support of summary judgment. In the instant case, as indicated, although the Defendants did file an affidavit, it was confined to issues of law, with nothing alleged as a defence on the merits.

[25] Happily, there appears to be no indication that the Defendants seek to have a second bite to the same cherry as it were by being allowed to file an affidavit on the merits once it is clear, as it is, that the legal points they had raised do not have substance. It does need to be emphasized though in these matters that the affidavit in opposition to summary judgment, although raising points of law *in limine,* should proceed to

address the merits of the application, in case the Courts finds that the same merit dismissal.

[26] In the premises, I grant summary judgment in favour of the Plaintiff as follows:

[26.1] payment in the sum of EI, 416, 030-27;

[26.2] interest on the sum of EI, 416, 030-27 at the Plaintiffs rate of 5% above prime per annum *a tempore morae* to date of final payment;

[26.3] Costs of the suit on the scale between attorney and own client, including collection commission;

[26.4] Portion 204 of Farm No.2 situate in the urban area of Mbabane, Swaziland, measuring 6450 square metres, held by the mortgagor under Surety Mortgage Bond No.942/2007 be and is hereby declared specially executable.

[26.5] Mr. Attorney T.A. Mofokeng be and is hereby ordered within 14 days of service upon him of this Order, to furnish to the Court a full written explanation for his failure to appear before Court on 30 July, 2009 to argue the above matter.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE

12th DAY OF AUGUST, 2009

T. S. MASUKU
JUDGE

Messrs. Robinson Bertram for the Plaintiff Messrs.

Mofokeng Attorneys for the Defendants