IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 4/08

In the matter between:

STANDARD BANK OF SWAZILAND LIMITED PLAINTIFF

AND

MAKHATHU INVESTMENTS t/a KILIMANJARO RESTAURANT & COFFEE HOUSE	1st DEFENDANT
WELILE MABUZA WELILE MKHATSHWA	2nd DEFENDANT
SIBUSISO KUBHEKA FIKILE THALITHA	3rd DEFENDANT
MTHEMBU	4th DEFENDANT
	5th DEFENDANT

CORAM	MAMBA J MR K.
FOR PLAINTIFF	MOTSA MR B. ZWANE
FOR 2nd AND 3rd DEFENDANTS	NO APPEARANCE
FOR 4th DEFENDANT FOR 5th DEFENDANT	MS X. HLATSHWAYO

JUDGEMENT

23rd JANUARY, 2009

[1] This is an application for summary judgement against the second, third, fourth and fifth defendants in terms of rule 32(1) of the rules of this court wherein the plaintiff claims for:

(A) payment of the sum of E400.059.71 plus interest thereon at the agreed prime lending rate plus 5% per annum;

(B) payment of the sum of E129, 939-35 and interest thereon at the bank's overdraft rate of 5% above prime per annum a *tempore morae;* and

(C) payment of the sum of E58, 609.02 plus interest thereof at the rate of 11.5% per annum, a *tempore morae.*

There is also a prayer for costs of suit including costs of counsel to be duly certified, on the scale as between Attorney and own client, and collection commission.

[2] The application is supported by the usual or customary affidavit wherein the plaintiff's agent one Alvin Healy avers that he verifies the facts, cause of action and the amount claimed and is of the view that the three Defendants who have filed their respective notices to defend the action have "no defence to the claim and the notices of intention to defend have been filed solely for purposes of delaying the action". (Whilst the deponent does not specifically refer to each defendant as not having a bona fide defence to the action, this is what in effect he means when he refers to a mere defence).

[3] The 4th Defendant despite having filed a notice of intention to defend, has not responded at all to the application for summary judgement.

[4] The first defendant did not file any notice to defend the action and judgement by default was accordingly granted against it by this court on the 29 February, 2008 and therefore its liability or otherwise is not directly relevant in this application.

[5] The four respondents in this application are all attorneys and were at all times material herein Directors of and shareholders in the first Defendant. On or about the 5th July 2005 and at Manzini, all four respondents signed and executed individual deeds of suretyship whereby they bound and interposed themselves as sureties and co-principal debtors in solidum in favour of the plaintiff for the due, proper and timeous payment of all monies which the first defendant may then or thereafter owe to the plaintiff. In short, each agreed to be personally liable to the plaintiff in the same manner, nature or extent to which the first defendant might be liable at any given time. It was a blank cheque.

[6] The amount under (A) above pertains to a sum of E314,000.00 lent and advanced by the plaintiff to the first defendant on the 29th September, 2005 and the amount claimed under (B) relates to an overdraft facility granted to the first defendant by the plaintiff on the same date. The initial limit on the overdraft service was a sum of E35,000.00 which could and was in fact varied from time to time by the plaintiff at its discretion. The two amounts claimed are the balances owing on the respective accounts as on the 7th January, 2008.

[7] The third claim, is in respect of a hire purchase agreement concluded between the plaintiff and the first defendant on the 31st

August 2005 whereby the plaintiff sold and delivered an Isuzu Motor Vehicle to the first defendant. One of the material terms of the Hire-Purchase agreement was that ownership in the motor vehicle would remain vested in the plaintiff until the first defendant had discharged all its obligations under the agreement.

[8] Save for the overdraft facility, monthly (repayment) installments were fixed for each account. The overdraft account (being the amount by which the account is actually withdrawn plus interest hereon) - was repayable on demand.

[9] The plaintiff avers that the respondents are in default of their respective obligations under all three agreements (as sureties and co principal) debtors inasmuch as the first defendant has failed to make timeous and regular repayments in respect of the three claims. As stated above, this has not been denied by the first defendant and judgement by default has been granted against it.

[10] Most, if not all of the relevant agreements herein were in writing and have been filed in these proceedings. Amongst such documents is a resolution of a meeting of the Board of Directors of the first defendant wherein the Board advised the plaintiff that "any of the aforementioned two (2) Directors will sign at any given time". This resolution was made on the 20th June 2005 about three months before the plaintiff lent and advanced the monies in question to the 1st defendant. This was about two (2) weeks before each of the

Respondents executed the suretyship agreement in favour of the plaintiff.

[11] The second defendant has sought to deny liability towards the plaintiff by alleging that;

> "At the time [I] executed the Deed of Surety I was aware that the first defendant intended to solicit a loan from the plaintiff for an amount which was yet to be discussed and agreed upon by the Directors of the first defendant including myself during a board meeting. Ever since the execution of the Deed of

suretyship the Board of Directors have never met to discuss the loan or acquisition of any banking facility from the plaintiff. Further, I was not aware that there were any summons or judgement issued against the first Defendant for any indebtedness to the plaintiff."

The third defendant has thrown his lot with the second defendant. I shall deal with this issue later in the judgement.

[12] The fifth defendant admits the substance of the plaintiff's case but puts in issue the amounts due to the plaintiff. She avers that the amounts due to the plaintiff have been wrongly and incorrectly calculated by the plaintiff. She argues further that the amount sought under each claim is unascertainable on the papers and therefore these are not liquidated amounts in money and therefore not appropriate for summary judgement application proceedings. I refer to her affidavit resisting summary judgement where she states as follows:

"6.3 from the onset of the agreement, when the first Defendant drew cheques against the loan, Plaintiff debited the overdraft, which shared the same account with the loan.

6.4 since the cheques were supposed to be drawn on the loan account they naturally exceeded the overdraft and in terms of clause 4.2 the [first] defendant was charged interest at punitive scale from the onset and this error on plaintiff's part was communicated to them, but they, ...kept promising to rectify same to no avail.

6.5 the attempts to correct such an error continued to no avail until [first] defendant approached plaintiff's Headquarters for intervention. It was then that a certain Dean Adams came to Manzini to address the issue.

6.6 Attention was brought to plaintiff that the cheques were being withdrawn from the overdraft account which is essentially a short term loan hence accruing extremely high daily interest as opposed to the fixed interest charged on medium term loans.

6.7 It was only until the 8th March, 2006 that the plaintiff decided to split the medium term loan account from the overdraft account, the balance outstanding being E420 672.85 ...by transferring to the loan account the sum of E314,000.00 ...leaving an outstanding balance of E106 672.85 ...in the overdraft account. ...

6.8 The (first) defendant queried how the E106 672.85 ... could be the amount outstanding when it was calculated including an unjustified punitive interest rate, which was not [first] defendant's fault."

[13] The above allegations of wrongly combining the two accounts and thus applying the incorrect and higher rate of interest on the medium term loan account are admitted or conceded by the plaintiff, who however states that this error was corrected in the following manner: First, a credit was passed in the sum of E6 556.38 being the amount of interest by which the loan account had been overcharged. I note again here that this amount was also queried or disputed by the first defendant who argued inter alia that:

> "6.9(c) The daily interest accrued on the sum in excess of E400,000-00 was chargeable over a period of more than two (2) years.
>
> 6.9(d) The daily interest as exhibited in annexure 'B'is way in excess of the reversed amount hence the complaint and request for justification of the interest reversed."

[14] In response to the last query by the first defendant, the plaintiff concedes in its replying affidavit that the initial credit passed by it in favour of the first defendant was indeed less than it should have been. The plaintiff states that it "has recalculated the extent of the overcharge ...[and] determined that the total extent of the overcharge amounts to E10

373.40 ...[and therefore] the first defendant is entitled to a further credit in an amount of E3817.20 [and] consents to the reduction of the amount referred to in prayer 1.1 of the Declaration from E129 939.35 to E126 122.33". The plaintiff concludes its replying affidavit by saying :

"5.3.1 The incorrect calculation of interest by the plaintiff relied upon by the fifth Defendant

5.3.1.1 Affects only the calculation of debt A (the claim relating to the overdraft current account); and

5.3.1.2 has no effect upon the claim for the recovery of debt B (the claim arising from the loan agreement)".

[15] It has to be remembered that the claim for the payment of a sum of E400, 059.71 which is claim A herein is in respect of the loan agreement, the capital or advance of which was a sum of E314,000.00 (as pleaded in paragraphs 10.1 to 14.2 of the plaintiff's

Declaration). This is the medium term loan account. It is this loan account that had interest thereon incorrectly charged at a rate that was applicable to the overdraft account. It is this account therefore that had to be adjusted or needs adjustment and correction. It is clear from the papers herein and in particular annexure Z to the plaintiff's replying affidavit that the plaintiff has submitted a purported corrected or adjusted Bank statement relating to the overdraft account. The purported adjustments made to the overdraft Bank account have distorted that statement and as things stand at the moment I am unable to determine or say what is the correct amount owed in respect of either the loan account or overdraft account. Perhaps the bank should have split the accounts and restored the respective original balances and created a fresh record in respect of each account showing the appropriate credits and debits from inception. Whilst this exercise may

have been rather cumbersome for the plaintiff, it would I think, have presented a clearer record than we have at present.

[16] I cannot, with respect, accept that a Bank may tinker with its client's bank account as in the present case without any justifiable explanation being given to the customer. It smacks of arbitrariness in my view. The plaintiff, it has been noted, has in its replying affidavit, not motivated the corrections it sought to make based on the first defendant's complaints. This is true of both adjustments. One would have expected that any such correction or adjustment, especially where such is made following a complaint by a bank customer as in the present case, would have been motivated or explained to such customer, in detail.

[17] When the two accounts were eventually split by the plaintiff and a balance of E314 000.00 restored to the loan account, this amount constituted the original sum loaned and advanced to the first defendant. The apparent view held by the plaintiff that this amount is not affected or tainted by the incorrect interest levied by it is not, in my view, entirely correct. It ignores the fact that there were installment repayments that had already been made by the first defendant and these were apparently not credited to that account but to the combined account. This follows from the very act of restoring the full amount advanced to the first defendant to the loan account.

[18] Even apart from the strictures of summary judgement or the special circumstances under which summary judgement may be granted, I do not think that in the circumstances of this matter, the plaintiff would be entitled to the relief it seeks based on the state of its accounts on the accounts

under consideration herein. Some further adjustments thereto, I suspect, have to be made.

[19] The fifth Defendant has, in my judgement demonstrated that this is not a proper matter for summary judgement and that she has a bona fide defence to the two claims herein.

[20] On the third claim which is based on the Hire Purchase agreement, the third respondent^ contends herself by saying that:

> "...there are certain repayments of the said purchase loan which do not appear on the statement of account marked H to plaintiff's papers hence the certificate marked I is incorrect. ... I also deny that the plaintiff is entitled to the claimed sum of E58 609.02 ...together with the return of the motor vehicle because the motor vehicle was never sold in a public auction hence there is no way of knowing how much is outstanding as it is only determined as being the difference between the sworn appraisers valuation and selling price at auction."

The fifth defendant has not stated the extent of or the amounts that she alleges were made as installment repayments in respect of this claim. She has not stated how many of such payments were made and when they were made. She has not annexed any document in support of her allegation in this regard. She has not stated that she has any proof of such payments that were made but which were not credited or reflected in the relevant account. Hers is a bald allegation only and this is not sufficient to resist or deflect an application for summary judgement. If such a bare allegation were to be acceptable, it would be virtually impossible to successfully apply for summary judgement.

[21] Because of this conclusion - based as it is on the issues raised by the 5th Defendant - it is not necessary for me to consider the issues raised by

the 2nd and 3rd Defendants and I express no opinion thereon. When all is said and done the plaintiff has failed to establish how much is owed to it by any of the defendants in respect of claims A and B.

[22] In the result summary judgement is refused in respect of claims A & B and is allowed in respect of claim C. Costs are to be costs in the action.

Mamba J