IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL APPLIC.4021/07

In the matter between:

SWAZILAND DEVELOPMENT FINANCIAL CORPORATION

And

VERMAAK JACOBUS STEPHANUS

Date of hearing: 30 January, 2009 Date of Judgment: 3 March, 2009

Mr. Attorney Z.D. Jele for the Plaintiff

Mr. Attorney S.M. Masuku for the Defendant

Plaintiff

Defendant

JUDGMENT

MASUKU J.

[1] The question for determination revolves around the propriety of granting summary judgment in favour of the Plaintiff against the Defendant.

[2 The set of circumstances in which the application for summary judgment arises is the following: - The Plaintiff and the Defendant

signed a written agreement of loan on 3 January, 2006 in Mbabane. The capital amount loaned to the Defendant by the Plaintiff was E671.150.00, which was to be applied as bridging finance for a sugar cane farming venture. The said amount was to be repaid with interest at the rate of 15.5% per annum within 1 (one) year of the date of the loan. The loan agreement was subject to some other conditions that I need not advert to for purposes of the current enquiry.

[3] By combined summons dated 6 November, 2007 the Plaintiff sued the Defendant for recovery of an amount of E544.336.00, interest thereon at the agreed rate and costs. It was averred by the Plaintiff that the Defendant defaulted in complying with the terms covenanted in the loan agreement. Having received the summons, the Defendant filed a notice to defend which in turn prompted the Plaintiff to move the application for summary judgment.

[4] Having read the papers filed of record, save for an argument raised by Mr. Masuku, to which I shall advert in the course of the judgment, I am of the opinion that in the formal sense, the Plaintiff has complied with the requirements set out in Rule 32. The major, if not the only critical question to determine is whether from the contents of the affidavit resisting summary judgment filed by the Defendant, a *bona fide* defence is thereby disclosed rendering the summary judgment improper to grant in the circumstances.

[5]Before I can answer that all important question, I find it apposite to first consider the principles that have developed and crystallized over the years and which provide guidance to the Courts in dealing

with the application in question. There appears to be some universality about these principles and to illustrate the point, I will, for purposes of this judgment, make reference to a decision, on this point by the Courts of the Republic of Botswana, where the provisions relating to summary judgment are substantially similar to those in our jurisdiction.

[6] In *Economy Investments v First National Bank of Botswana Ltd* [1996] B.L.R. 828 (C.A.) at 83 A, Tebbutt J.A. (as he then was) said:-

> "It has been repeated over and over that summary judgment is an extra-ordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial... It is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has an unanswerable case; in more recent cases that test has been expressed as going too far. In *Du Setto's* case *(supra),* this Court came to a similar conclusion and I repeated that review in *Fashion Enterprises (Pty) Ltd v Image Botswana (Pty) Ltd [1994] B.L.R. 288 C.A.* As set out in *De Setto's* case at page 285 H, the purpose of summary judgment is well known. It is aimed at a defendant who, although he has no *bona fide* defence to an action brought against him, nevertheless gives notice to defend solely in order to delay the grant of a judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him. However, even though the plaintiff need, not have an unanswerable case, it is clear that before a Court will close its doors finally to a defendant, it must take care to see to it that the Plaintiffs claim in unimpeachable. Because of the drastic consequences of an order granting summary judgment, the courts must be astute to ensure that the procedure is not

> abused by a plaintiff who may either to secure, by the procedure, a judgment against a defendant when he knows full well that he would ordinarily not be able to obtain such a judgment without trial or who may use the procedure as a means of embarking upon a fishing expedition to try to ascertain prematurely what a defendant's defence is and to commit him to it by having him testify to it on oath."

[7] Regarding what the duty of a defendant against whom the possibility of granting summary judgment hangs precariously, Korsah J.A. stated the following in *Busy Five Enterprises (Pty) Ltd v Marsh and Another [2005] 1 B.L.R. 51* (C.A.) at 56 G:

> "In resisting an application for summary judgment the Defendant does not have to establish a cast iron defence. It is sufficient if what he alleges to be true may be capable of being proved at the trial and if so proved would constitute a defence to the plaintiffs claim."

[8] With the guidance offered by these judgments, it is now opportune to look at the issues raised by the Defendant *in casu* and to consider, in the light of the above authorities whether the defences he has raised qualify him from averting the consequences of summary judgment.

[9] A reading of the affidavit resisting summary judgment suggests that there are two defences raised by the Defendant. The first is that it is alleged that the amount claimed is disputed as much as it is unclear how the accrued interest of E60, 989.65 was computed. I also understood Mr. Masuku, during argument, to allege that the amount claimed in the particulars of claim is at variance with that reflected in the statement attached to the summons. The second, which is not

really a defence but a procedural attack on the papers was that the loan agreement annexed to the papers and marked "A" did not contain clause 8.2, 8.3 and 8.4 on which the claim is in large measure, predicated.

[10] Commencing with the argument to the effect that the amount claimed in the particulars of claim is at variance with that in the annexures thereto, Mr. Jele dealt with that complaint competently in argument. He took the Court through the annexures to the summons and the alleged disparity was clearly disproved I am satisfied that this argument cannot succeed because a close reading of the annexures shows that there is no disparity at all. This technical defence, if I can refer to it as such cannot avail the Defendant. It is hereby dismissed.

[11] I now turn to question relating to the non attachment of certain parts of the agreement and upon which the claim is based. Mr. Masuku contends that the claim in issue is primarily predicated on an agreement, the relevant portions of which are annexed. In this case, however, the Defendants contends that although the claim is predicated on clause 8.2, 8.3 and 8.4 of the agreement, the relevant page containing these clauses was omitted. He placed reliance for his submission on Rule 18 (6) of this Court's Rules.

[12] Rule 18 (6) reads as follows:-

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or the part relied on in the pleading shall be

annexed."

It is common cause that the portion of the agreement embodying the terms referred to above, was not annexed and according to Mr. Jele, this was out of nothing more than inadvertence on the part of his office. Because of the omission, which it appears to be, the Defendant submitted that the application for summary judgment, apart from everything else, ought to fail. Is such a contention meritorious?

[13] I should mention, before answering the above question that Rule 32 (3) (c) provides that the application for summary judgment, the affidavit in support thereof and any annexures thereto shall be delivered to the defendant not less than ten court days before the date of the hearing of the application for summary judgment. It is a provision that is certainly couched in peremptory terms. In the instant case, however, there were no documents annexed to the application for summary judgment. This sub-rule is inapplicable to the instant case. I have made reference to it for the reason that its provisions in part appear identical to the latter portion of Rule 18 (6) above. There is, in the instant case, no complaint that the provisions of Rule 32 (3) (c) were not complied with by the Plaintiff.

[14] I now turn to consider whether Mr. Masuku's contention that the common cause failure to attach the relevant portion of the agreement should serve a sufficient basis upon which the application must be dismissed. Mr. Masuku, in his heads of argument, placed reliance on *Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D & CLD)

at 919 F-H, where Fannin J. stated:-

> "...It is necessary to approach the Rule, the object of the provision that a copy of the liquid document must be annexed to the affidavit is to ensure that a Defendant against whom the extra-ordinary and stringent remedy of summary judgment is sought should be allowed at least to see a copy of a document which forms a vitally important part of the case which is being made against him."

What must be pointed out is that the Rule which was interpreted by the Court in the above case dealt with the mandatory requirement for liquid documents upon which a claim is based, necessarily to be attached to the affidavit in support of summary judgment. There is no similar provisions in our Rules. A copy of a contract or a portion thereof and upon which a claim is based is not and can never be a liquid document. Furthermore, the complaint, as I mention later in this judgment is based on Rule 18 (6) not Rule 32. It would also appear to me that our Rule 18 has an in-built mechanism for dealing with its contravention, a point I advert to later in this judgment.

[15] It would appear to me that in the above *Credcor (op cit)* case, the Court was dealing with a Rule the equivalent of which we do not have. Rule 18, in my view, and upon which reliance is placed by Mr. Masuku, must be considered in a different light, particularly because of Rule 18 (12), which provides the following:-

> "If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to

act in accordance with rule 30."

> Rule 30, it must be recalled, deals with an irregular step or proceeding and further provides that the party acting in terms thereof, may not seek refuge thereunder if he or she has taken a further step notwithstanding that it had become aware of the irregularity. See proviso to Rule 30 (1).

[16] It would appear to me that Rule 18 (12) provides a mechanism by which a party who contends that the provisions of Rule 18 have not been followed, can seek the step or proceeding same to be set aside as irregular. It is evident that the Defendant did not avail himself of the relief provided thereunder. The issue was raised in the affidavit as a technical defence but does not go so far as to show that there is a *bona fide* defence.

[17] I am of the view that this argument in the instant case should not avail the Defendant for the reason that it did not at the appropriate time, attack the proceedings under Rule 30 or any other rule for that matter. More importantly, in this profession, sharp practice should be avoided. Where, as in the instant case, one page has inadvertently been omitted by the opposite party, courtesy demands that you bring to their attention the oversight and grant them an opportunity to rectify same. It is totally against the best traditions of the Legal profession to keep anomalies such as these within one's chest and wait to let them loose in ambush style at a critical stage such as this when on all accounts there is no triable issue raised. In point of fact, in the *Credcor* case *(supra),* it had been drawn to the Plaintiffs attention, that the liquid documents on which

the claim was predicated had not been annexed but the

Plaintiffs attorney did not remedy the defect notwithstanding the notice.

[18] Furthermore, in the instant case, the Defendant does not deny having entered into the contract in question and does not appear to say that the said provisions did not form part of the contract in question. To refuse summary judgment in the peculiar circumstances of this case would, in my view, be an unnecessary exercise of sterile formalism. I should, at the same time, not be construed as granting licence to Plaintiffs to adopt a lackadaisical approach to pleading in the knowledge that the Court will gloss over such inadequacies. It must be repeated that summary judgment is stringent and further constitutes a diminution in the Defendant's rights to be heard hence the need to strictly ensure that there is substantial compliance with all procedural and substantive law matters. Those who do otherwise should not be surprised if the door of summary judgment is closed to them and they are sent back to the drawing board for a flawless repeat performance if need be.

[19]I should mention that Mr. Masuku's further argument was that in the absence of the relevant annexures embodying the clauses referred to earlier, the Plaintiff could not verify the cause of action in terms of Rule 32. He also seemed to contend in his heads of argument that the entire agreement should have been annexed. Rule 18 (6), quoted earlier, provides a full answer to the latter contention. It is not necessary, in every case to file the entire document on which the claim is based.

[20] It must be recalled that a party's case is made in the pleadings. Although a Plaintiff should, according to Rule 18 (6) annex a copy of the written contract, if relied upon, one cannot successfully argue that no cause of action has been made out simply because part of the documents relied upon have not been annexed.

[21] The last leg of the defence raised by the Defendant relates to him stating that it is not clear as to how the amount of interest was computed. Again, this does not show that the Defendant has a *bona fide* defence to the Plaintiffs claim. In *National Motor Co. Ltd v Dlamini Moses* 1987 - 95 (4) SLR 124 at 128 - 129, Dunn J. quoted Megarry V.C. in *The Lady Anne Tennant v Associated Newspaper Group Ltd* (1979) FSR 298, where it was stated:

> "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately, or together, amount to sufficient reason for refusing to enter judgment for the plaintiff.
>
> You do not get leave to defend by putting forward a case that is all surmise and micawberism."

[22] At page 129 (a), Dunn J. further quoted The Supreme Court Practice, where the learned authors say:-

> "In all cases, sufficient facts and particulars must be given to show that there is a triable issue."

In the instant case, it would appear to me that the general allegation that it is not clear how the interest was computed is devoid of facts

and particulars sufficient to have the matter referred to trial. It would appear to me that the Defendant is, as stated by Megarry V.C. (op *cit),* alleging obscurities regarding the interest, with the hope that something may emerge during the trial if leave be granted. This does not appear to me to be sufficient basis for granting the Defendant leave. It is my considered opinion that he has not satisfied the requisite test.

[23] In *Swaziland Brewers Ltd v Simplex (Pty) Ltd & Another* 1982 - 86 SLR (I) 243 (HC) Will C.J. cited with approval various cases dealing with a defendant who wants to use his avowed ignorance of the amount owing as a defence to summary judgment. Relying on *Western Province Hardware and Timber Co. (Pty) Ltd v Fletcher* [1971] PHF 77, the learned Chief Justice quoted the following excerpt from Diemont J:-

> "What he (defendant) says in effect is that he does not know what he owes the Plaintiff. He says further that mistakes have been made in the past, accounts have been incorrect and he has been overcharged on certain items. In a word, he voices his suspicions, but further than that he cannot take the matter. That is not good enough...where a defendant does not elect to give security and compel Plaintiff to go into the merits of the case, but merely files an affidavit in which he indicates that he does not know whether or not he owes the full sum, or part of it, it seems to me that there is no good ground for exercising my discretion in defendant's favour."

[24] The Defendant's position in the instant case appears to be some what similar to that stated above for all that the Defendant says is that he is not certain as to how interest was computed by the

Plaintiff. He wants the Court to refer the case to trial only on that score. He does not say why he thinks the computation is wrong and how it should be calculated (not to say that the latter would necessarily constitute a good basis for denying the Plaintiff summary judgment). The case made by the Defendant on this score does not, in my judgment, qualify for dismissing the

Plaintiffs application. It would appear to me that this is nothing but a dilatory stratagem designed to frustrate the Plaintiff in the early enjoyment of the fruits of the judgment.

[25] Having regard to entire matrix of the case at hand, I am of the opinion that this is a proper case in which summary judgment ought to be granted. None of the purported defences by the Defendant meet muster. I therefore grant the following orders: -

25.1 Summary Judgment in the sum of E544.366.50 be and is hereby entered against the Defendant.

25.2 Interest on the aforesaid sum of E544.366.50 be and is hereby granted at the rate of 15.5% from 3 January, 2006 to date of final payment.

25.3 The Defendant is ordered to pay costs at scale between attorney and client.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 3rd DAY OF MARCH, 2009.

T.S MASUKU

JUDGE

Messrs. Robinson Bertram for the Plaintiff

Messrs. Maphanga, Howe, Masuku & Nsibande Attorneys for the Defendant.