

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CIV. TRIAL NO. 483/09**

**In the matter between:**

**SWAZILAND BUILDING SOCIETY**

**Plaintiff**

**AND**

**JOHANNES MANDLA NDLANGAMANDLA**

**Defendant**

**Date of hearing: 2 March, 2011**

**Date of judgment: 2 March, 2011**

**Mr. Attorney E.J. Henwood for the Plaintiff**

**Mr. Attorney N.M. Manana for the Defendant**

***EX TEMPORE JUDGMENT***

**MASUKU J.**

[1] The plaintiff in this matter is a financial institution which is a body corporate properly incorporated in terms of its own statute and trading as Swaziland Building Society at Mdada Street Mbabane.

[2] The defendant in this matter is a Swazi male adult who chose his *domicilium citandi* at Lot 377 situate in Nhlangano township extension 3 in the district of Swaziland.

[3] Presently serving before Court is a claim for summary judgment in which the plaintiff claims from the defendant payments of a sum of E294 825.36, interest thereon at a rate of 13.5% per annum calculated from the date of summons to the date of payment, and an order declaring the fixed property being Lot 377 situate at Nhlangano township extension 3 in the Shiselweni district, Swaziland and mortgaged by mortgage bond No. 655/05 and 49/06 respectively to be declared executable and costs of suit at the attorney and own client scale including collection commission.

[4] The claim arises from loans which were extended by the plaintiff to the defendant in the sums of E200 000 and E100 000 respectively. The terms on which the loans were granted are fully set out in the pleadings. Presently serving before Court is a claim for summary judgment as indicated before. Two issues arise for determination by the Court.

[5] Mr. Manana for the defendant in the first instance challenged the propriety of the affidavit in support of summary judgment, claiming that same is defective for the reason that it does not fully state the grounds upon which the claim is based. He predicated his attack on the provisions of Rule 32(3) (a). The said rule reads as follows:-

"An application under sub Rule 1 should be made on notice to the defendant accompanied by an affidavit verifying the facts on which the claim or the part of the claim to which the applicant relates is based and stating that in the deponent's belief there is no defence to that claim or the part as the case may be and such affidavit may in addition set out any evidence for the claim."

[6] In a contra argument, Mr. Henwood, submitted that in this instance there is no need for the plaintiff to again set out in the affidavit the facts which will have been fully ventilated in the declaration or the combined summons as the case may be.

[7] In support of his arguments he relied on the work by the learned authors Herbstein and van Winsen entitled, The Civil Practice of the Supreme Court of South Africa 4<sup>th</sup> Edition, particularly at page 439 where the learned author state and I quote :-

"It is unnecessary in the affidavit to repeat the cause of action as set out in the summons but where the summons does not show a complete cause of action the verifying affidavit can amplify what is stated in the summons."

[8] Having looked at the affidavit in support of summary judgment, I am of the view that there is no substance to the first point raised by Mr. Manana for the reason that, that affidavit is fully compliant with the provisions of the Rules aforesaid as amplified by the learned authors as I have indicated. More particularly, I am of the view that the particulars of claim fully set out a cause of action which would have not necessitated that the plaintiff in this case amplify its case in the affidavit in support of summary judgment. I therefor find that this point is without merit, and I proceed to consider the second leg of the enquiry, being whether the defendant did in the affidavit resisting summary judgment raise a *bona fide* defence.

[9] Summary judgment as it has often been stated, is a very stringent remedy for the reason that it closes the door in final fashion in the face of a defendant. In the case of *Swaziland Development Financial Corporation v Ferina Jacobas Stephen* Civil 4021/07, I quoted with

approval the case of *Economy Investment v First National Bank of Botswana Limited* [1996] BLR 828, where Tebbutt J.A., as he then, was said the following regarding the stringent remedy of summary judgment at page 838 B - F:-

"It has been repeated over and over that summary judgment is an extraordinary, 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 this view in *Fashion Enterprises (Pty) Ltd v Image Botswana (Pty) Ltd* [1994]B.L.R. 288 C.A. As set out in *Du Setto's case* at page 285H; 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 files a 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 door finally to a defendant it must take care to see to it that the plaintiff's claim is 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 wish 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."

[12] Having regard to the defendant's affidavit resisting summary judgment, the question to be asked is whether that affidavit sets out a defence or a triable issue which *prima facie* carries a prospect of success at trial. The responsibility of defendant faced with an application for summary judgment was fully set out in the *Du Setto* case (*supra*) which I have made mention of in the previous judgment. It is the case of *Du Setto (Sunnyside II) v Financial Services Company of Botswana* [1994] BLR 274. At page 287 Tebbutt J.A. stated the following as to the responsibility of defendant faced with the prospect of a summary judgment;

"Those cases lay down that the defendant must satisfy the court that he has a defence which if proved would constitute an answer to the claim and that he is advancing it honestly. He must disclose what his defence is and set out the material facts upon which it is based and while he need not deal exhaustively with the facts and evidence relied upon to substantiate his defence or with the detail or precision required of a pleading, he must set them out with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence or not. The allegations in the affidavit must not be bald, vague or sketchy. What is required is that the defence be not set out badly, vaguely or laconically? That the court, with due regard to all the circumstances receives the impression that the

defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have. The affidavit must not lack 'forthrightness as well as the particularity that a candid disclosure of a defence should embody'... It has also been held that 'if the statements of fact are equivocal or ambiguous or contradictory or fail to canvass matters essential to the defence raised then the affidavit does not comply with the rule'... It is not an onerous task to file an affidavit which meets the requirements of the Rule. On the contrary, it is a simple matter where a *bona fide* defence is available to a defendant. If he does not do so, the court will be entitled to grant summary judgment and not only where the plaintiffs case is an unanswerable one."

[14] The defendant's affidavit resisting summary judgment is to be found at pages 71 - 73 of the book of pleadings. One thing that should be noted about the affidavit is that the defendant does not deny that he failed to pay the loans in terms of the agreement. At paragraph 4.1 of the affidavit, this is what the defendant says:-

"I was elected as a member of Parliament and my previous employer stopped paying my salary through which I was servicing the loan."

At 4.2 he states;-

"Acceptable arrangements were made by the parties pursuant to a meeting which was to the effect that I would stabilise the account once my salary as a member of parliament was forthcoming."

At paragraph 5.1 he says;-

"I have since started servicing the loan after paragraph 4.2 above came into existence."

[15] The question becomes, do the allegations raised by the defendant in this matter meet the threshold? I am of the view and firmly so that that is not the case. In the first instance, it is clear that the defendant acknowledges that he stopped paying the instalments in line with the agreement that had been reached. He then seeks to say he then made suitable arrangements in terms of which he would be given a reprieve and would be allowed to pay once his salary as a Member of Parliament was forthcoming.

What is scanty or missing in these allegations are;-

1. The date on which this arrangement was made;
2. Whether it was oral or in writing;
3. Who were the parties to the arrangement; and
4. The particular terms of that arrangement



[16] It is worth remembering that the plaintiff relies on a written agreement which has a non variation clause. It is therefore necessary for the defendant in the instant case, to state all the particulars that I have mentioned above in order to see how they stand against the agreement which was signed.

[17] Furthermore, the defendant alleges that he has since started servicing the loan. He gives no particulars or evidence of the fact that he has started servicing the loan and this must be viewed in contradistinction to the affidavit in reply filed by the plaintiff indicating that the defendant is in fact not servicing the loan.

[18] The question that comes up which requires an answer, is whether the affidavit that has been filed by the defendant, viewed as a whole, meets the standards namely that it sets out a triable case which *prima facie* raises a defence or whether it constitutes a *bona fide* defence. I am of the view that it does neither and in the instant case, there is no basis upon which I can find that the defendant has raised a triable issue which *prima facie* raised a defence that can be ventilated at trial.

[19] In the premises I am of the view that this is a proper case in which to grant summary judgment as prayed. I therefor issue the following order:-

19.1. The defendant is to pay the sum of E294 925.36 at an interest rate of 13.5% per annum calculated from the date of summons to the date of payment.

19.2. An order declaring the fixed property being Lot No.337 situate in the Nhlanguano township extension 3 in the Shiselweni district, Swaziland, mortgaged by mortgage bond No. 655 or 49/06 to be executable.

19.3. Costs of suit on the attorney and client scale including collection commission.

**DONE IN OPEN COURT IN MBABANE ON THIS THE 2<sup>nd</sup> DAY OF MARCH, 2011.**

**T.S. MASUKU**

**JUSTICE OF THE HIGH COURT**

**Messrs. Cloete/Henwood/Dlamini Associates for the Plaintiff**

**Messrs. B.S. Dlamini and Associates for the Defendant.**