IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 20/2011

In the matter between:-

SWAZILAND DEVELOPMENT FINANCE CORPORATION	**Plaintiff**

and

MZUZU CONSTRUCTION (PTY) LTD	**1st Defendant**
MQONDISI D. NKUMANE	**2nd Defendant**
ALEXINAH T. NKUMANE	**3rd Defendant**
BERTRAM B. STEWART	**4th Defendant**

Neutral citation: Swaziland Development Finance Corporation *v Mzuzu Construction (PTY) Ltd & 3 others (20/2011) [2012] SZHC 117 (6th June 2012)*

Coram: HLOPHE J.

Dates Heard: 08/02/2012

Judgment handed down: 06/06 2012

For the Plaintiff: Mr. Z. D. Jele

For the Defendants: Mr. L. M. Mzizi

Summary

Civil Procedure – Summary Judgment application – When matter ripe for Summary Judgment – When Summary Judgment not to

be granted – Defendant arguing that interest charged above that permissible in terms of the Money Lending And Credit Financing Act of 1991 – When interest considered to be above the provisions of section 3 (1) (b) of Act – Interest not above that permissible in terms of the Act – In the circumstances of the matter there is neither a *bona fide* defence nor a triable issue raised – Application granted with costs.

JUDGMENT

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[1] It is not in dispute between the parties that on or about the 31st August 2006, the Plaintiff and the first Defendant concluded a written loan agreement in terms of which the former loaned and advanced to the latter a sum of E 200 000.00 as working capital for the latter's construction business based at Mankayane, Manzini District.

[2] It is also not disputed that the second to fourth Defendants signed suretyship agreements in favour of the 1st Defendant, confirming that in the event of the latter failing to pay the debt, they would then be liable to repay it.

[3] The loan agreement which is annexure "A" to the particulars of claim, provides inter alia, and per its first schedule, that the loan was repayable in 48 months installments and that the interest was fixed at "Prime plus (+) 4.5% currently 16% per annum." The "currently" on what the interest rate was referred to the time of the signing of the agreement which by common cause was the 31st of August 2006. I mention this to make the point that, interest rates, particularly "prime" changes from time to time as determined by the Central Bank of Swaziland.

[4] Following a failure by the Defendants to repay the loan in the manner agreed the Plaintiff instituted action proceedings against the Defendants seeking among other things payment of what was termed an outstanding balance in the sum of E182 362.41 as at 1st December 2010, together with interest at the rate of Prime plus (+) 4.5% together with costs at attorney and own client scale. These action proceedings were instituted on the 11th January 2011.

[5] The upshot of the claim against the first Defendant was that the latter had failed to repay the debt in the manner agreed and that with effect from June 2009, the first Defendant had failed to pay the agreed monthly installments. Following the failure by the first Defendant to pay the agreed monthly installments, the 2nd to 4th Defendants, who had signed suretyship agreements, became liable as well to pay the outstanding amounts, hence their citation in the proceedings as second to fourth Defendants, respectively.

[6] After the Defendants had entered an appearance to defend, the Plaintiff filed a Summary Judgment application contending that the said appearance had been filed for purposes of delay only and that the Defendants had no *bona fide* or valid defence to the Plaintiff's claim. This court was thus urged to grant Plaintiff the reliefs claimed.

[7] In its affidavit resisting Summary Judgment, the Defendants did not dispute much of the Plaintiff's contentions, particularly that they had breached the agreement through failure to pay the outstanding debt, except to say that the loan agreement they had concluded with the Plaintiff was a nullity because the interest therein claimed was fixed at 16%, which was above the interest rate contemplated by the Money Lending And Credit Financing Act of 1991, in terms of which, according to the Defendants, interest

could not be fixed above 8% per annum such that any interest fixed above 8% per annum was a nullity in terms of the said Act. The Defendants claimed that the interest claimed was excessive and that therefore the amount so claimed was not a correct amount due. By way of comment, it is interesting to note that there is no denial that the first Defendant did receive the amount loaned and advanced. From the Defendant's foregoing contentions, one wonders if the Defendants are realistic in expecting an order of court that does not compel them to pay what they at least acknowledge to have received. I say this because I am not seeing a tender of what they at least acknowledge to be owing.

[8] I must point out at this stage that the Defendants as I understand them do not say that they have paid Plaintiff the full amount or even what they considered to be a full amount except what they claimed was an exorbitant interest without particularizing how. I understand them to be saying that whereas there is some money they still owe Plaintiff, it is not the amount he claims. In any event, they contend, because of the exorbitant interest they contend Plaintiff has levied, the loan agreement, is in terms of the Money Lending And Credit Financing Act of 1991, null and void.

[9] Summary Judgment applications have been a subject of numerous judgments of this court and the Supreme Court, in which courts it has been acknowledged that it is an extra ordinary remedy which has to be granted in the clearest of cases because of its potential in shutting out a litigant from having the matter determined in a trial after all the evidence would have been led.

[10] In ***Musa Magongo v First National Bank Swaziland, Appeal case no. 38/1999*** it was acknowledged that Summary Judgment was a stringent and extra ordinary remedy. This it was stated

necessitated that courts be slow in shutting the door to a Defendant if a reasonable possibility existed that an injustice may be done if Judgment was granted.

[11] In ***Materdolorosa High School v RMJ Stationery (PTY) Ltd, Appeal case no. 3/2005***, the foregoing was echoed in even stranger terms to the effect that the court will refuse to close the door on the face of a litigant where a reasonable possibility exists that an injustice may be done.

[12] The issue for determination in this matter is therefore whether or not there does exist a reasonable possibility that an injustice may be done. This possibility can be established, in my view, only if the Defendants are able to show that they have a *bona fide* defence or that there has been disclosed a matter which it would be unjust not to determine through a trial which is to say, there has been disclosed a triable issue.

[13] According to the Defendants the loan agreement is void *ab initio* and therefore unenforceable because it offends against the Money Lending And Credit Financing Act of 1991. It is then contended that it should for this reason be referred to trial for that court to determine its validity and enforceability, the legality of the interest charged by Plaintiff as well as whether the sum allegedly owed is proper. There seems in my view to be a strange proposition in this approach. If it is true that the agreement was void *ab initio*, it would be unnecessary in my view to refer such a matter to trial because there would be no triable issue, but the application would have to be dismissed on the basis of the claim being a nullity.

[14] The Defendants contend in the manner they do because according to them, the interest charged by the Plaintiff was termed in the

loan agreement as 16% per annum which is above the 8% it should not exceed in terms of section 3 (1) (b) of the Money Lending And Credit Financing Act of 1991.

[15] In support of their position they have adopted, Defendants' Counsel has referred me to the Judgment of ***Reckson Mawelela v MB Money Lenders Association – Civil Appeal case no.43/1999.*** In short it is contended by the Defendants that this Judgment, confirms that no interest above 8% of the amount loaned (capital debt) can be recovered and that since the Plaintiff was in the present matter claiming 16% interest, it had fallen foul of the Act.

[16] Before dealing with the merit of the argument raised *vis- a vis* the Money Lending And Credit Financing Act of 1991, I must make it clear that my reading of the first schedule to the loan agreement does not support what is contended by the Plaintiff to be the rate of interest chargeable. It does not in fact provide that the interest is 16% as alleged but it states that the interest is fixed at Prime plus (+) 4.5%, which was Currently (or then) fixed at 16% per annum. In other words the 16% reflected there on was a result of the Prime rate of interest as fixed by the Central Bank at the time together with interest fixed at the rate of 4.5% (which is not above 8% of prime) being added to it. In other words, depending on what the Prime interest rate would be fixed at by the Central Bank, it could be more or less than 16 percent at a given time although at the conclusion of the agreement the prime rate was fixed at 11.5%, which made it to lend at 16% after 4.5% had been added to it.

[17] I therefore have no hesitation to find that the interest rate was not fixed at 16% per annum as alleged but at Prime plus (+) 4.5% which because of the fact that prime was based at 11.5%, the

interest chargeable was at 16%. I now have to turn to the question whether the Act out laws an interest of 16% per annum as alleged by the Defendants.

[18] The Act provides as follows in section 3 (1) (b):-

> *"3 (1)(b) Where in respect of any money–lending or credit transaction the Principal debt exceeds E 500.00 or such amount as may be prescribed from time to time, no lender, shall charge an annual interest rate of more than 8 percentage points, or such amount as may be prescribed from time to time, above the rate of discounts, rediscounts and advances announced from time to time by the Central Bank under section 38 of the Central Bank of Swaziland Order, 1974."*

[19] Before I even address the question whether or not the interest claimed is legal it seems to me that one needs to determine whether or not the section of the Money Lending And Credit Financing Act referred to above does in fact provide as the Defendants contend it does which is to say – does it prohibit the levying of interest above 8% of the Capital Debt as contended by the Defendants?.

[20] In my understanding the section does not provide for what the Defendants contends it does. In fact it prohibits 8% interest above the rate of "discounts, rediscounts and advances" announced from time to time by the Central Bank under section 38 of the Central Bank of Swaziland Order 1974. I understand the rate of discounts rediscounts and advances to refer to what is known as prime rate.

[21] Section 38 of the Central Bank of Swaziland Order 1974 provides as follows:-

> *"The Bank shall determine and publicly announce from time to time its rates for discounts, rediscounts and advances, and may determine differential rates and ceilings for various classes of transactions or maturities".*

[22] This section therefore empowers the Central Bank to prescribe from time to time interest rates for discounts, rediscounts and advances, and as stated above, this is often referred to as prime rate.

[23] It is therefore not correct that the interest fixed at any particular time cannot exceed 8% of the capital debt as alleged. It however cannot exceed 8% above the rate of interest discounts, rediscounts and advances, fixed by the Central Bank. This rate I have found is what is referred to as Prime. The interest charged by the Plaintiff was therefore not 8% above prime but 4.5% above prime – if that is the case it cannot in my view be faulted.

[24] I have no hesitation that Defendants contended defence is based on a misreading of the relevant section of the Money Lending And Credit Financing Act of 1991.

[25] Consequently in so far as the Defendants do not dispute obtaining a loan from the Plaintiff as well as signing an agreement that provided for interest of 4.5% above prime which at the time added up to 16% and in so far as they have not shown that the amount now claimed has exceeded that of the lawful interest, I cannot find that the Plaintiff has violated the Money Lending And Credit Financing Act 1991. In fact their contention that the interest now claimed exceeds the lawful chargeable interest amounts to a bare denial and cannot therefore be taken to be a *bona fide* or valid defence. As this was

the heart of the Defendants' contended defence, their resistance to the grant of summary judgment cannot stand considering my finding that same is founded on a misreading of the section concerned.

[26] It was argued before me that the Judgment of the Court of Appeal in ***Reckson Mawelela v MB Money Lenders Association Appeal case no 43/1999*** confirmed that no interest above 8% of the capital shall be chargeable. I have read and re-read the concerned Judgment but cannot find the specific paragraph where the court so decreed, except that the argument seemed not to be challenged that interest could not exceed 8% upon whose correctness or otherwise the Supreme Court never commented. Should I be wrong in this regard the aggrieved party is at liberty to take the matter to that court for such pronouncement. It is for this reason I cannot personally refer this matte to the Supreme Court as I was urged to do.

[27] It suffices for me to express a view that the circumstances in the ***Reckson Mawelela v MB Money Lenders Association*** case referred to above were different from those of the matter at hand as the interest therein was fixed at 30% per month and there was no mention of the prescribed rate of discounts rediscounts and advances (prime rate) as fixed by the Central Bank. I have no doubt in such a case there would be no faulting the Court of Appeal as the interest claimed was patently illegal. It worsens the situation that the court itself expressed frustration at not being assisted by the Respondents' Counsel therein.

[28] In the circumstances I make the following order:-

28.1 The Summary Judgment application be and is hereby granted as prayed; which however excludes the payment of collection commission.

Delivered in open Court on this the …… day of June 2012.

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N. J. HLOPHE

JUDGE