



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 4022/2010**

**In the matter between:**

**SWAZILAND DEVELOPMENT  
FINANCE CORPORATION**

**PLAINTIFF**

**AND**

**JOSEPH SHABANGU t/a  
EKUTHULENI GENERAL DEALER**

**DEFENDANT**

**Neutral Citation: Swaziland Development Finance Corporation v  
Joseph Shabangu t/a Ekuthuleni General Dealer**

**Coram: OTA J**

**Heard: 16<sup>th</sup> February 2012**

**Delivered: 22<sup>nd</sup> February 2012**

**Summary: Summary judgment application in terms of Rules 32  
of the High Court Rules Defendant's Affidavit raised  
triable issues. Summary judgment application  
dismissed. Costs awarded.**

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**JUDGMENT**

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The Plaintiff sued out combined summons against the Defendant which it followed up with a Notice of Application for summary judgment, upon these terms:-

1. Payment of the sum of E258,225-80
2. Interest on the aforesaid amount at the rate of 15.5% calculated from the date of summons to the date of final payment.
3. Costs on the scale as between Attorney and own client.
4. Further and/or alternative relief.

Now, the facts upon which the Plaintiff contends this application are as depicted in its particulars of claim which are as follows:-

That the Plaintiffs claim is based on monies lent and advanced in terms of a written agreement concluded between the parties, as evidenced by annexure A. That the amount lent was the sum of E200,000 (Two Hundred

Thousand Emalangi). That the interest to be charged on this amount was to be 14.5% per annum. That the Defendant was obliged to repay the loan amount through monthly instalments of E6 000-00 per month. That in the event the Defendant failed to pay any of the instalments or committed any other breach, the Plaintiff would be entitled to cancel the agreement and demand payment of the balance owing. The Plaintiff further alleged that in terms of the loan agreement, the parties agreed that the agreement constituted the full terms of the contract and that no variation or additions was of any force and effect.

Now, it is apposite for me at this juncture to recount the oft quoted caution, that the remedy afforded via summary judgment is an extraordinary and a very stringent one, in that it permits judgment to be given without a plenary trial of the action. It is thus the judicial accord, that extreme caution must attend the handling of this procedure, because of its drastic characteristics, to avoid a miscarriage of justice. A

restatement of this principle in courts of this country, has rendered them sacrosanct. The cases are legion. They include but are not limited to the following:- **National Motor Company Ltd V Moses Dlamini 1987-1988 (4) SLR 124, Musa Magongo V First National Bank (Swaziland) Appeal Case 38/1999, Mater Dolorosa High School V RJM Stationery (Pty) Ltd Appeal case NO. 2/2005, Zanele Zwane V Lewis Stores (Pty) Ltd t/a Best Electric Civil Appeal 22/2007, CS Group of Companies V Construction Associates (Pty) Ltd Appeal Case No. 41/2008. See also the text:- The civil Practice of The Supreme Court of South Africa, 4<sup>th</sup> Edition by Herbstein an Van Winsen.**

Now, it is in a bid to aid the court in this exercise of caution advocated, that Rule 32 (4) (a) of the Rules of this Court requires the Defendant to satisfy the court through his affidavit that

“-----there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof”.

The Court thus has a duty to scrutinize the Affidavit resisting summary judgment to ascertain, if there is any triable issue raised therein, to compel it to allow the Defendant to proceed to trial.

In casu, it is on record that the Defendant filed an Affidavit of 3 paragraphs resisting this summary judgment application (see pages 25 to 27 of the book)

The only question left to be determined, is:- Does the Defendant's Affidavit raise any triable issues? The facts upon which the Defendant resists this application are detailed in paragraph 2.8 to 2.12 and 3 of his Affidavit as follows:-

*“2.8 I wish to state that indeed I entered into an agreement with the Plaintiff in the sums alleged in the pleadings. It*

*was indeed initially agreed between the parties that repayment was to be made in terms of the agreement.*

*2.9 However, through passage of time and through negotiations, the repayment terms were changed such that now I was required to pay monthly instalment of E25 000-00 (Twenty Five Thousand Emalangeni) loans I had with the Plaintiff. The loans included business loans accounts number LMJ 040036 and LMJ 040242.*

*2.10 It is my humble submission that I have been religiously paying the revised monthly instalments as aforesaid. I beg leave to refer to annexures “ JSS1, JSS2, JSS3 and JSS4 being proof of payment.*

*2.11 I am not indebted to the Plaintiff in the amount alleged as I have been paying as per the proof of payment.*

*2.12 Moreover, I wish to state that the agreement to change the terms of payment were made amicably between the parties after negotiations. I have not missed payment and as such I am not in default. In any event, we have agreed with the Plaintiff that I should source finance to pay the debt in full and I am in the process of securing same. I beg leave to refer to annexures (“JSS5, JSS6, JSS7, JSS8, JSS9 and JSS10) being letters exchanged between the parties.*

*Therefore, it is my humble submission that I am not indebted to the Plaintiff in the amount alleged or any amount at all in the circumstances. The application for summary judgment should be dismissed with costs.”*

It is worthy of note that the Defendant attached further annexures, namely SJ1, SJ2 and SJ3 to his heads of argument. I hold the view that such annexures by the rules, ought to have been conveyed to Court via a further affidavit or supplementary affidavit, after leave to file same had been duly sought from the court and granted. However, notwithstanding the way and manner these annexures appeared in these proceedings, I am however inclined to countenance them, as I deem them paramount to the just decision of this application.

Now, after a careful consideration of the facts contained in the Defendant's affidavit as I have detailed ante, as well as all the annexures that ensue in these proceedings, it

appears to me that the Defendant indeed raised triable issues that must convey him to the realm of trial. The issues that have most agitated my mind are - what is the agreement that binds the parties? Was the original agreement varied? If it was, what are the terms of the variation? How much is actually outstanding on this transaction in view of the allegations of payments and annexures evidencing same?

These are issues to my mind which can only be resolved in a trial after they have been exploded via oral evidence.

In the light of the totality of the foregoing, I am disclined to grant this summary judgment application. It accordingly fails. On these premises, I make the following orders.

- 1) That this summary judgment application be and is hereby dismissed.
- 2) That the parties herein be and are hereby referred to trial.



- 3) That the Defendant be and is hereby ordered to deliver a plea within 14 days from date hereof.
- 4) That the matter be and is hereby referred to the Registrar for the allocation of a trial date.
- 5) Costs in the cause.

For the Plaintiff:

Mr Z. Jele

For the Defendant:

Mr O. Nzima

DELIVERED IN THE OPEN COURT IN MBABANE ON THIS  
THE.....DAY OF.....2012

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**OTA J**

**JUDGE OF THE HIGH COURT**