



IN THE HIGH COURT OF SWAZILAND

Case No: 2008/09

In the appeal between:

NEDBANK (SWAZILAND LIMITED) APPLICANT

AND

**DOCTOR LUKHELE
JOSHUA SHONGWE
MANDLA NXUMALO**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral citation: *Nedbank (Swaziland) Limited vs Doctor Lukhele & 2 Others*
(361/2013) [2013] SZHC170 (9 August 2013)

CORAM: M.C.B. MAPHALALA, JA

Summary

Application for summary judgment - requirements of the remedy discussed as reflected in Rule 32 of the High Court Rules as well as judicial precedent - application granted on the basis that the defendants have no *bona fide* defence to the claim.

**JUDGMENT
9 AUGUST 2013**

[1] The plaintiff alleges that on the 6th February 2006, at Mbabane, it concluded a loan contract with the Wheel Centre which was represented by the third Defendant; and, that in terms of the contract, the plaintiff undertook to lend and advance monies to the third defendant on a bank overdraft account.

[2] The material terms of the agreement were the following: Firstly, that the plaintiff would honour the cheques and other instructions of the Wheel Centre (Pty) Ltd to an amount of E130 000.00 (one hundred and thirty thousand emalangeni) for the purpose of providing working capital. Secondly, that the plaintiff would be entitled to charge the Wheel Centre (Pty) Ltd with interest compounded monthly on the daily balance outstanding from time to time at the current bank overdraft interest rate prevailing from time to time plus a further 3.5% per annum, which for the relevant period was 18%, being prime rate of 14% plus 3.5 %. Thirdly, that the plaintiff would be entitled to debit the Wheel Centre (Pty) Ltd's overdraft account with advances, bank charges, interest and other charges in accordance with ordinary banking practice. Fourthly, that the plaintiff would be entitled to apply an availment interest at the rate of 6% per annum above the foregoing rate of 18% in respect of any unauthorised excess over the arrange limit of E130 000.00 (one hundred and thirty thousand emalangeni). Fifthly, that the balance on the overdraft account will be payable on demand. Lastly, that in the event of the Wheel Centre (Pty) Ltd being unable to repay on demand the said amount advanced in terms of the said overdraft facility, then the plaintiff would be entitled to claim immediate repayment of all monies owing to it under the facility together with penalty interest as set out above.

[3] The plaintiff alleges further that the balance on the bank overdraft account on 1st April 2009 was the sum of E170 279.72 (one hundred and seventy thousand two hundred and seventy nine emalangeni seventy two cents) as more fully appears from the Certificate of Balance and Statement annexed to the summons.

[4] The plaintiff contends that on the 21st August 2007, the Wheel Centre (Pty) Ltd was placed into liquidation and as such, in terms of section 117 of the Companies Act, the plaintiff is not entitled without leave of Court, to institute legal proceedings against the Wheel Centre (Pty) Ltd. A copy of the said Order for liquidation is annexed to the summons. He further contends that despite demand, the wheel Centre (Pty) Ltd and / or the Liquidator of the Wheel Centre (Pty) Ltd has failed, neglected and/or refused to pay the said sum of E170 279.72 (one hundred and seventy thousand two hundred and seventy nine emalangeni seventy two cents).

[5] The plaintiff further contends that on the 6th February 2006, it concluded a second written contract with the defendant in terms of which the plaintiff would lend and advance E331 958.00 (three hundred and thirty one thousand nine hundred and fifty eight emalangeni) to the Wheel Centre to finance the purchase of a workshop and office equipment. It was agreed that the amount outstanding would attract interest at the plaintiff's prime overdraft rate from time to time plus 3% per annum. The plaintiff argues that since its current prime overdraft interest rate is 14%, this means the interest rate applicable to the current loan is 18% per annum. It was further agreed that the amount outstanding would be repayable in equal monthly instalments of E5

455.40 (five thousand four hundred and fifty five emalangeneni forty cents) over a period of sixty months. As security for the loan, the first, second and third defendants would execute Deeds of suretyship in favour of the plaintiff.

[6] The contract further provided that the Wheel Centre (Pty) Ltd would be acting in breach of the contract if it committed an act of insolvency, fail to conduct its normal line of business in an ordinary and regular manner, commit a breach of the terms of the contract including regular payment of the instalment or if the Wheel Centre (Pty) Ltd is placed into voluntary or compulsory liquidation or judicial management.

[7] The contract also provides that in the event the Wheel Centre committed a breach of the contract, the plaintiff would be entitled to claim immediate payment of all amount due including interest, penalty and legal costs on the scale as between attorney and own client; and appropriate any amount standing to the credit of the Wheel Centre in the plaintiff's books of account in reduction of the amounts due. The contract further provided that a certificate signed by any manager of the plaintiff would be prima facie proof of the amount outstanding; and, that all costs and expenses incurred by the plaintiff in the enforcement of its rights under the contract would be borne by the defendants and/or Wheel Centre (Pty) Ltd on the scale as between attorney and own client including collection commission.

[8] The plaintiff contends that the Wheel Centre (Pty) Ltd remains in liquidation, and, that it has failed to make payment of the amount due in terms of the contract; and, as at 1st April 2009, it was indebted to the plaintiff in the sum of E241 168.29 (two hundred and forty one thousand one hundred and sixty eight emalangeneni twenty nine cents). It was argued that the Wheel Centre (Pty) Ltd was in breach of contract to the extent that it was placed in liquidation as well as its failure to make payment to the plaintiff.

[9] The plaintiff contends that on the 20th February 2006 the first, second and third defendants executed written Deeds of suretyship in terms of which they bound themselves jointly and severally as sureties and co-principal debtors in solidum with the Wheel Centre (Pty) Ltd for the repayment on demand of all monies due by the Wheel Centre (Pty) Ltd to the plaintiff. In addition they renounced the benefits of the legal exceptions '*non numeratae pecuniae, non causa debiti, errore calculi, no value received, senetuscon-cultum velleianun, de authentica si qua mulier, beneficium ordinis sen excussionis et divisionis*'; and that the full force, meaning and effect of which the first, second and third defendants declared themselves to be fully acquainted.

[10] The plaintiff also contends that the defendants acknowledged and accepted that no variation of the suretyship agreement shall be of any force or effect unless reduced into writing and signed for by both the plaintiff and the defendants. It was argued that the defendants acknowledged and accepted that the suretyship constituted the whole

agreement between the parties and that no conditions precedent suspending its operation were in effect and that no warranties, promises or representations have been made or given by the plaintiff to entice the defendants to execute the Deeds of Suretyship. The plaintiff argues that the defendants are liable jointly and severally with the Wheel Centre (Pty) Ltd in the sum of E170 279.72 (one hundred and seventy thousand two hundred and seventy nine emalangeni seventy two cents) in respect of the bank overdraft account, E241 168.29 (two hundred and forty one thousand one hundred and sixty eight emalangeni twenty nine cents) in respect of the second claim together with interest, costs of suit on the scale as between attorney and own client as well as collection commission.

[11] Pursuant to the receipt of the combined summons, the defendants filed a Notice of Intention to Defend the action. Subsequently, the plaintiff filed an application for Summary Judgment on the basis that the defendants have no *bona fide* defence to the amount claimed. The plaintiff contends that the Notice of Intention to Defend has been filed solely for purposes of delaying the final outcome of the Action.

[12] The defendants have filed an Affidavit Resting Summary Judgment. In *limine* they argue that the Summons is excipable on the basis that the written agreement has not been annexed to the summons. To that extent it is argued that the summons does not comply with Rule 18 (6) of the High Court Rules. Secondly, the defendants argue in *limine* that there is a non-joinder of the Wheel Centre (Pty) Ltd notwithstanding that it is an interested party. It is argued that the Wheel Centre (Pty) Ltd was discharged

from provisional liquidation on the 21st August 2008, and, that it is still trading at Cooper Centre in Mbabane. It is further contended that the discharge occurred pursuant to an Agreement of Compromise concluded with all its creditors including the plaintiff. The defendants further contend that pursuant to an agreement to restructure the banking facilities with the plaintiff, it has been able to make the agreed payments of monthly instalments of E10 000.00 (ten thousand emalangeni) to the plaintiff; and, that the plaintiff accepts such payments. To that extent the defendants plead that the plaintiff should be stopped from seeking to enforce the initial contract.

[13] The defendants further contend that the plaintiff has not yet cancelled the restructured banking facilities offered to the Wheel Centre (Pty) Ltd pursuant to the Compromise Agreement. The defendants further argue that the plaintiff undertook to pursue recovery of assets which are part of the subject-matter of the banking facilities which were misappropriated by the Deputy Sheriff; and, that the value of those assets has the effect of decreasing the indebtedness of the Wheel Centre (Pty) Ltd with the plaintiff. They argue that it is apparent on the papers that the plaintiff has not taken into account the value of these assets in computing the amount outstanding.

[14] The alleged Compromise Agreement is attached to the record as annexure 'JS2'; it is a letter written by the plaintiff dated 30th September 2008 and addressed to the Directors of the Wheel Centre (Pty) Ltd as well as to the liquidator of the Wheel Centre (Pty) Ltd. The letter was for the attention of the first defendant; and, it is entitled 'Restructuring of Banking Facilities'. The letter reads in part:

“We refer to our meeting of 29th September 2008 and wish to record the following:

- It would appear that the Deputy Sheriff misappropriated some assets owned by the bank and held under two Lease Agreements in our books. To that end, your offices are requested to furnish us with a schedule of the missing assets in order to pursue recovery thereof.**
- Whilst we are tracing the missing assets, you will be servicing the overdraft at the rate of E E10 000.00 (ten thousand emalangeni) per month and thereafter start serving the lease at the same rate. The repayment amount will be subject to periodic increases depending upon the cash flow Ingcongwane (PTY) Ltd from where the repayments will be sourced.**
- We will stop charging interest forthwith with the aim to having the debt liquidated in a period of +/-48 months.”**

[15] The plaintiff has filed a replying affidavit pursuant to the Affidavit Resisting Summary Judgment. In *limine* the plaintiff contends that annexure ‘A’ as attached to the summons constitutes the written contract between the parties, and, that it was duly signed by both the Wheel Centre and the plaintiff on the 6th February 2006. Consequently, the plaintiff rejected the defendants’ point in *limine* that the summons is excipiable on the ground that the written contract is not annexed to the summons.

[16] The plaintiff further disputes, in *limine*, the non-joinder of the Wheel Centre (Pty) Ltd on the basis that the defendants signed the Deeds of Suretyship binding

themselves as being jointly and severally liable to the plaintiff as co-principal debtors to the plaintiff in solidum liability. It was argued that the Deeds of Suretyship entitle the plaintiff to proceed against either of the defendants who would in turn have recourse to the other defendants if he has discharged the debt with the plaintiff.

[17] The plaintiff also contends that the defendants did not inform the Wheel Centre (Pty) Ltd that it has been discharged from its provisional liquidation. It is further argued that from the date on which the company was provisionally liquidated, it has never carried on its normal business and that it is unable or failing to pay its debts notwithstanding the indulgence of 'Restructuring of Bank Facilities'. The plaintiff further denies that the company is operating at Cooper Centre since there is no such business belonging to the Wheel Centre(Pty) Ltd at the said premises.

[18] On the merits the plaintiff reiterates that the defendants do not have a *bona fide* defence to the action. The plaintiff further contends that the Court Order discharging the Wheel Centre from provisional liquidation was never brought to its attention. The plaintiff insists that even if the company was discharged from its provisional liquidation, it is still unable to pay its debts. The plaintiff denies that the letter restructuring the bank facilities of the company constitutes a contract, but that on the contrary, it is merely an indulgence; and, that the company paid a few monthly instalments and then stopped, as an indication that it is failing to pay its debts.

[19] Whilst the plaintiff admits undertaking to pursue recovery of the assets alleged to have been misappropriated by the Deputy Sheriff, it argues that such initiative was done in good faith to protect its interest on the properties. The plaintiff accused the Wheel Centre

(Pty) Ltd of negligence and irresponsibility in failing to take steps to recover the assets which were in its possession. Similarly, the plaintiff denies as alleged by the defendants, that there exists a litany of disputes of fact in the matter which cannot be resolved on the affidavits; however, the defendants have not disclosed the nature of the disputes of fact alleged.

[20] The defendants do not deny that they signed the Deeds of Suretyship and bound themselves as co-principal debtors with the Wheel Centre (Pty) Ltd. In addition the defendants have failed to place sufficient material facts before this Court to demonstrate that they have a bona fide defence to the plaintiff's claim. Moreover, they do not deny their indebtedness to the plaintiff as alleged or at all; they only allege that the plaintiff has concluded an Agreement of Compromise with the company in terms of which their banking facilities were restricted, and, that on the basis of that Agreement, the plaintiff is entitled to enforce the initial agreement.

[21] However, there is evidence that the so-called Compromise Agreement was merely an indulgence; and, that notwithstanding the restructuring of the banking facilities, the company made a few monthly instalments and then stopped. There is no evidence that the assets misappropriated from the company by the Deputy Sheriff have been recovered for purposes of reducing the debt or that the company is still conducting its business. It is apparent on the evidence before this Court that the defendants have no *bona fide* defence to plaintiff's claim.

[22] The purpose of the Summary Judgment procedure is to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. See Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South*

Africa, 4th edition, Van Winsen et al, Juta Publishers, 1997 at pages 435-436. Rule 32 of the Rules of this Court deals with summary judgment; and sub rule (4) provides the following:

“32. (4) (a) Unless on the hearing of an application under sub-rule (1) either the Court dismisses the application or the defendant satisfies the Court with respect to the claim , or the part of the claim, to which the application relates that there is an issue or question in dispute which ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”

[23] It is apparent from the evidence that the defendant has failed to show not only that he has a bona fide defence but 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 of the claim. *Corbett JA* in the case of *Maharaj v. Barclays National Bank* 1976 (1) SA 418 (A) at 426 states the following:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed, the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and

good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word ‘fully’ connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.”

[24] In *Fathoos Investments (Pty) Ltd and Two Others v. Misi Adams Ali* Civil Appeal No. 49/2012, I had this to say at para 35.1, 36 and 37:

“35.1 The *Maharaj* case (supra) was approved and applied by the Court of Appeal of Swaziland, as it then was, in the case of *Variety Investments (Pty) Ltd v. Motsa* 1982-1986 SLR 77 (CA) at 80 A-E; the Court held that the judgment in the *Maharaj* case correctly reflects the law in this country.

36. Over a long period of time, our Courts have consistently regarded the summary judgment procedure as stringent and extraordinary since it allegedly closes the doors of the Court to the defendant and permits a judgment to be given without a trial. However, the Supreme Court of Appeal of South Africa has shifted from that original position for the better and limited its focus in ensuring that a defendant with a triable issue is not shut out; in addition, whether or not the defendant has a *bona fide* defence to the action. This development is welcome since it has the capacity to nourish, enhance and improve our jurisprudence for the better.

37. This trend is apparent in the case of *Maharaj* (supra) as well as that of *Joob Joob Investments (Pty) Ltd v. Stocks Mavundla Zek Joint Venture* 2009 (5) SA (1) SCA at para 32-33; in the latter case *Navsa JA* stated the following:

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his day in Court. After almost a century of successful applications in our Courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our Courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out....

Having regard to its purpose and its proper application, summary judgment proceedings only hold terror and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule as set out with customary clarity and elegance by *Corbett JA* in the *Maharaj* case at 425 G- 426 E.”

[25] In the case of *Lindiwe Dlamini v. Mxolisi Matsebula* Civil Case No. 2496/2011 (HC) at para 24, I had occasion to say the following with regard to Summary Judgment proceedings:

“24. This remedy is available to a party who can satisfy the requirements set out in Rule 32; it enables a party to obtain judgment without the necessity of going to trial as long as he can show that the defendant has no *bona fide* defence to the claim. Admittedly, this remedy is extra-ordinary, stringent and very drastic because it denies the defendant the opportunity to present his defence during the trial; it is for this reason that Courts have declared that it must be granted only on those cases where the plaintiff has a clear and unanswerable case.”

[28] Accordingly, the application for summary judgment is granted with costs on the scale as between Attorney and own client including collection commission and interest as prayed for in the Notice of Application.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant
For Respondent

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