



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Civil Case No. 968/11

In the matter between

NEDBANK SWAZILAND LIMITED

PLAINTIFF

and

LLYOYD NKOSINATHI MZIZI

DEFENDANT

Neutral citation

**Nedbank Swaziland Limited vs Lloyd Nkosinathi
Mzizi (968/11) 3 September [2013] SZHC 190**

Coram:

Ota J.

Heard:

19 August 2013

Delivered:

3 September 2013

Summary:

Civil procedure: summary judgment; defendant's affidavit raising preliminary issue that rendered litigation premature; application struck out with an option to re-list.

OTA J.

[1] The Plaintiff sued out combined summons against the Defendant for the following reliefs:-

1. Payment of the sum of E6,977.81 (Six Thousand Nine Hundred and Seventy Seven Emalangeneni Eighty One Cents).
2. Interest thereon at the rate of 9% per annum a tempore morae.
3. Costs of suit at attorney clients scale.

[2] The Defendant entered a notice of intention to defend. Thereafter, the Plaintiff launched a summary judgment application for the same reliefs claimed in its combined summons.

[3] The Plaintiff's case as per its particular of claim is that on or about the 27th day of October, 2008 and at Manzini, it entered into a valid loan agreement with the Defendant; which agreement is exhibited in these proceedings as annexure A.

[4] The Plaintiff averred that the material terms of the loan agreement are that

1. The Plaintiff loans the Defendant the sum of E15,000.00 (Fifteen Thousand Emalangi).
2. The loan be for personal purposes.
3. The interest rate be calculated at prime plus 10% per annum.
4. The repayment of the loan be for a period of thirty six (36) months and instalments of a minimum of E450.00 (Four Hundred and Fifty Emalangi).
5. That any amount owing to the Plaintiff which are not paid on the due date shall bear penalty interest at Plaintiff's prime lending rate from time to time, from the due date until the date of receipt of such amounts by Plaintiff.
6. Should a breach of these terms occur, and such breach is incapable of remedy or the Defendant fails to remedy such breach within fourteen (14) days of the dispatch of a notice by Plaintiff calling upon the Defendant to remedy the breach, the Plaintiff shall be entitled without prejudice to any or other rights it may have to:-
 - (a) Claim immediately repayment of all amounts owing to it under the loan agreement, whether due or not together with penalty interest.

(b) All costs and expenses incurred by Plaintiff which may be incurred in connection with the enforcement or preservation of any rights under the facilities, including, without limiting the generality thereof; legal costs shall be on an attorney and own client scale.

(c) The Defendant varies all rights under the prescription law of the Kingdom of Swaziland.

[5] The Plaintiff further averred that in honour of the terms and conditions of the agreement between the parties, it advanced the sum of E15,000.00 (Fifteen Thousand Emalangeni) to the Defendant.

[6] That the Defendant is in material breach of the loan agreement by his failure to fulfill his obligation to pay monthly installments, consequently, as at 3rd March 2011, the Defendant's account was in arrears of an outstanding amount of E2,431.52 (Two Thousand Four Hundred and Thirty One Emalangeni Fifty Two Cents) as shown in annexure B. Therefore, as at 3rd March 2011 the Defendant was indebted to the Plaintiff in the total amount of E6,977.81 (Six Thousand Nine Hundred and Seventy Seven Emalangeni

Eighty One Cents) as more fully appears from the bank balance statement annexure C.

[7] It is imperative that I point out at this juncture that when this matter was heard on the 19th August, 2013, learned counsel for the Plaintiff Mr Mabuza, applied for the summons to be amended to reflect the amount of E12.792.06 which is the amount purported to be owing by the Defendant to the Plaintiff by the said 19th August 2013, in terms of the statement of balance of the Defendant of that date, which Mr Mabuza urged in the course of the hearing.

[8] The Defendant who is an admitted attorney of this Court and who appeared in his own stead was opposed to this amendment.

[9] I will not concern myself with the amendment sought nor with the merits of the summary judgment application. This is because in his affidavit resisting summary judgment which the Defendant filed in compliance with Rule 32 of the High Court Rules, he raised a preliminary issue which in my view questions the competence of the whole of these proceedings.

[10] In paragraph 5.3 of his affidavit the Defendant avers that the Plaintiff essentially put the carte before the horse in commencing these proceedings.

To this end he stated as follows:-

“Secondly, may I state that the Plaintiff is in breach of the loan agreement I have with it. In terms of clause 13.2 of the said agreement Plaintiff is obligated to notify me of any breach of the agreement and to give me 14 days to rectify such breach prior to commencing the present proceedings. The Plaintiff has never served me with the said notice nor has it posted same to my domicillium as per clause 19 of the said agreement. I therefore submit that the Plaintiff has essentially put the carte before the horse”.

[11] It is common cause that the parties *in casu* are bound by the loan agreement annexure A.

[12] The *ipsissima verba* of clause 13.2 and 13.2.1 thereof is as follows:-

“13.2 Should a breach occur, and such breach is incapable of remedy or the Borrower fails to remedy such breach within 14 days of the dispatch of a notice by Nedbank calling upon the Borrower to remedy the breach Nedbank shall be entitled, without prejudice to any other rights it may have;

13.2.1 To claim immediately repayment of all amount owing to it under the facilities, whether due or not together with penalty interest as set out above;-----”.

[14] The central issue for determination that has arisen is: Did the Plaintiff dispatch notice to the Defendant as required by clause 13.2 before commencing the proceedings? The Plaintiff contends that it did and in its replying affidavit has urged notices, annexures N1 and N2 purportedly sent to the Defendant in honour of clause 13.2 prior to litigation. These are undoubtedly notices of demand purportedly sent to the Defendant by the Plaintiff.

[15] The problem however is that these notices as contained in N1 and N2 respectively though addressed to the Defendant, however bear the following address

**“P.O. Box 407
Hlathikhulu
5401”**

[16] The Defendant contends that this address is not his domicilium in terms of the agreement. Therefore, no notice was sent to him and he did not receive any such notice.

[17] A careful reading of the loan agreement to which the parties are bound will show much force in the Defendant's contention. I say this because clause 18-19.3 of the agreement say the following:-

“18 Domicillium

The Borrower chooses as its domicillum citandi et executandi for all purposes under the facilities, the address to which the offer is directed and, if such address is a postal box, then its registered office or principal place of business. Such domicillum may be changed within the Kingdom of Swaziland upon 14 days written notice to Nedbank.

19 Notices

Any Notice sent by one party to the other shall be deemed to have been received, if sent to the other party's domicillum.

19.1 By hand, on the date of delivery.

19.2 By prepaid post, 7 days after the date of posting.

19.3 By telex or telefacsimile, on the business day following transmission”. (emphasis mine)

[18] It is common cause that the address to which the Defendant's offer is directed in terms of clause 18 is as follows:-

**“P.O. Box 533
Manzini”**

[19] In terms of clause 18 ante, since this is a postal address then the Defendant's domicillium should be his registered office or principal place of business.

[20] According to clause 19, a notice will be deemed to have been received if sent to such domicillium in any of the ways detailed in sub-clauses 19.1 – 19.3.

[21] It is obvious and apparent that the address to which the notices contained in N1 and N2 were sent which I detailed in para [15] above, is not the address of offer to the Defendant.

[22] Since that is also a postal address, there is no evidence to show that it is the registered address or principal place of business of the Defendant to constitute such domicillium in terms of clause 18. Notice will be deemed to have been received if effected at such domicillium as per sub-clauses 19.1 – 19.3.

[23] In view of the fact that the address that appears on N1 and N2 respectively is not the address of offer neither is there any evidence to shown that it is the Defendant's domicillium, the Defendant cannot in the circumstances be deemed to have received the said notices as contemplated by clause 19. It is for the Plaintiff to then show proof of service of the notice on the Defendant to enable the Court reach a concluded opinion that the Defendant was indeed served, received and had notice of the demand in compliance with the terms of the agreement. The Defendant did not have to urge any further affidavit disputing annexures N1 and N2 as contended by Mr Mabuza. By launching N1 and N2 the Plaintiff joined issues with the Defendant and it was for the Plaintiff to then take the further step of demonstrating evidence of such service. It failed to do so.

[24] The issue of the demands allegedly made by way of telephone calls to the Defendant as alluded to in annexure N2 will not also suffice. This is because notice by way of telephone calls will not serve the desired purpose as this mode of notice does not form a part and parcel of the terms of the agreement between the parties.

[25] It appears to me that the mode of service of the notice of demand in pursuit of clause 13.2 was in violation of the agreement. This therefore amount to no service. The Plaintiff in the circumstances failed to comply with the condition precedent to the commencement of proceedings as prescribed by clause 13.2.

[26] The inexorable conclusion is that these proceedings are premature and are accordingly struck of the roll with an option to relist.

[27] Costs to follow the event.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THEDAY OF 2013**

OTA J.

JUDGE OF THE HIGH COURT

For the Plaintiff:

N.V. Mabuza

Defendant in person