



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Civil Case No. 988/11

In the matter between

**SWAZILAND DEVELOPMENT FINANCE
CORPORATION (FINCORP)**

PLAINTIFF

and

**MLUNGISI ORAL MABILA T/A RITEHAUL
CYNTHIA LINDIWE NGOZO – MABILA**

1ST DEFENDANT

2ND DEFENDANT

Neutral citation

*Swaziland Development Finance Corporation
(Fincorp) vs Mlungisi Oral Mabila t/a Ritehaul and
another (988/11) 3 September [2013]SZHC 191*

Coram:

Ota J.

Heard:

23 August 2013

Delivered:

3 September 2013

Summary:

**Summary judgment: principles thereof; affidavit
resisting summary judgment raising no triable
issue; application granted.**

OTA J.

[1] This is a summary judgment application in which the Plaintiff contends for the following reliefs:-

1. Payment of the total sum of E55,449.62 (Fifty Five Thousand Four Hundred and Forty Nine Emalangi Sixty Two Cents).
2. Interest thereon at the rate of prime +4.5% per annum a tempore morae.
3. Collection commission.
4. Costs of suit at attorney client scale.
5. Further and /or alternative relief.

[2] The Plaintiff's case as detailed in its declaration, is that on or about the 18th of December 2008, it entered into a written loan agreement with the Defendants as evidenced by annexure A. The Plaintiff recounted the material and express terms of the agreement in paragraph 6 of its declaration as follows:-

“6.1 Plaintiff loans and advances the 1st Defendant the amount of E53,300.00 (Fifty Three Thousand Three Hundred Emalangi);

- 6.2 the repayment period of the said loan would be twenty four (24) months;
- 6.3 the interest rate would be prime + 4.5% currently 19.5% per annum;
- 6.4 the principal sum loaned and interest would be payable in monthly instalments of E2,900.00 (Two Thousand Nine Hundred Emalangeni);
- 6.5 the loan purpose would be for trucking;
- 6.6 the 1st Defendant would breach the loan agreement if he failed to pay any amounts owing to Plaintiff on due date;
- 6.7 in the event of breach of the agreement the Plaintiff without prejudice to any other rights it may have, (sic) to cancel the agreement without notice to the Defendants and upon such cancellation the total amount due for the loan would become due and payable by the Defendants with immediate effect;
- 6.8 in the event the Plaintiff having to institute legal proceedings against the Defendants, the Defendants will be liable to pay all legal and related costs including collection commission and fees calculated on an attorney and own client scale (kindly refer to clause 8 of the loan agreement marked 'A' Supra)"

[3] The Plaintiff averred that it timeously and duly fulfilled all its contractual obligations and advanced the sum of E53,300.00 Emalangeni to the 1st Defendant.

- [4] It is further the Plaintiff's case that on 24th March 2010 and at Mbabane the 2nd Defendant acting in person entered into a deed of suretyship with the Plaintiff for the due performance of the 1st Defendant's contractual obligations as evidenced by annexure D. In annexure D the 2nd Defendant bound herself in solidum with the 1st Defendant and further renounced benefit of all legal exceptions that can be raised or pleaded by a surety.
- [5] Plaintiff further contended that the Defendants breached the loan agreement by their failure to pay the monthly instalments as and when they fall due. Consequently, as at 28th February 2011 the Defendants' account stood in arrears in the sum of E21,982.23 as shown in annexure B, bringing the total amount due together with interest on the same date to the sum of E55,449.62 claimed, as evidenced by annexure C.
- [6] Now, it is expedient right at the outset of this inquiry for me to recount the entrenched principle that must guide the Court when considering a summary judgment application. This principle is that summary judgment is of an extra-ordinary and stringent character, in that it closes the door of justice in the face of a Defendant without a plenary trial of the action. Therefore, the need to approach it with trepidation to avoid a miscarriage of justice. This

principle finds overwhelming judicial expression within this jurisdiction as demonstrated by the cases of **Musa Magongo vs First National Bank of Swaziland Ltd Appeal Case No. 38/1999** and **Swaziland Industrial Development Company Limited vs Process Automated Traffic Management (Pty) Ltd and Another Civil Case No. 4468/08** respectively urged by the Plaintiff and Defendant in their respective heads of argument. See also **Zanele Zwane vs Lewis Stores Civil Appeal Case No. 22/2007**, **MTN Swaziland vs ZBK Services and Another Civil Case No. 3279/11**.

[7] The need for this caution can also be extrapolated from the elaborate procedure laid down by Rule 32 of the Rules of the High Court, which mandates a Defendant who wishes to oppose summary judgment to file an affidavit resisting same and enjoins the Court to scrutinize the said affidavit to see whether there is an issue fit to be tried or whether there should be a trial of the action for any other reason. Once the Court comes to the conclusion that a triable issue or *bona fide* defence is raised, it should refuse summary judgment and allow the case proceed to trial.

[8] The judicial accord is that inasmuch as the Defendant is not required to set forth his whole defence at this stage of the proceedings, he is however

required to condescend upon particulars by setting out sufficient material facts in his defence to convince the Court that indeed a *bona fide* defence will emerge at the trial.

- [9] As **DUNN AJ** stated in **Bank of Credit and Commerce International (Swaziland) Ltd v Swaziland Consolidated Investment Corporation Ltd and Another 1982 – 1986 SLR 406 (HC)** at p.407.

“It is not enough for the defendant to simply allege that he has a bona fide defence to the plaintiff’s action. He must allege the facts upon which he relies to establish his defence. When this has been done, it is for the Court to decide whether such facts, if proved would in Law constitute a defence to the plaintiff’s claim and also whether they satisfy the Court that the defendant alleging such facts is acting bona fide”.

See **Dulux Printers (Pty) Ltd v Apollo Services (Pty) Ltd Appeal Case No. 72/12 para [17]**.

- [10] It is on record that the 1st Defendant filed an affidavit resisting this summary judgment. The only question worth consideration is, Does the 1st Defendant’s affidavit disclose any triable issue (s) or *bona fide* defence sufficient to defeat summary judgment?

[11] The 1st Defendant in its affidavit averred that it has a *bona fide* defence to the Plaintiff's claim, which defence it set forth in paragraphs 3 – 7 thereof. Let me now test the allegations in these paragraphs of the 1st Defendant's affidavit against the rigours of the Rule 32 application to ascertain whether there is any substance in the 1st Defendant's cries that it has a *bona fide* defence.

[12] para “3 **Whilst the 1st Defendant admits that it had entered into a loan agreement with the Plaintiff but denies that it is indebted to the Plaintiff in the sum of E55,449.62.”**

[13] This is a bare denial and will not suffice. See **National Motor Company Ltd v Moses Dlamini Civil Case No. 1363/1993.**

[14] para “4 **I aver that the first loan taken on the 18th December 2008 was settled since its duration was for 24 months. I do not understand why the same had to be included in this action.”**

[15] The record of this case shows that the 1st Defendant had entered into a loan agreement with the Plaintiff on the 18th of December 2008. The Defendants subsequently approached the Plaintiff with a view to reschedule their payment. This was what led to the subsequent loan agreement of 24th March

2010 which was for a duration of 24 months and which obviously subsumed the agreement of 18th December 2010.

[16] It seems to me that there is much force in the Plaintiff's contention that the 1st Defendant's allegation in paragraph [4] of its affidavit to the effect that the first loan taken on 18th December 2008 was settled, does not satisfy the requisites of such defence. I hold the firm view that 1st defendant was obliged to exhibit documentary evidence in proof of such payment to enable the Court perceive a triable issue. The allegation as it stands is tantamount to a bare allegation in general terms and raises no triable issue.

[17] A similar situation presented in the case of **Dulux Printers (Pty) Ltd vs Apollo Services (Pty) Ltd (Supra)**. In that case, in dismissing an appeal against the judgment of the High Court granting summary judgment to the Respondent, the Supreme Court held as follows:-

“[12] It is apparent from the Affidavit Resisting Summary Judgment that the appellant doesn't deny concluding the contract with the respondent. The appellant doesn't deny receiving the goods but claims to have paid the purchase price in full. However, no documentary evidence is annexed to the affidavit proving payment of the purchase price.

[13] At paragraph 13 of the affidavit resisting summary judgment states the following:-

‘While admitting that plaintiff may have, during the said period, sold items to it, defendant pleads specifically that the plaintiff was paid and in full for any and such services as it provided to the defendant. The defendant therefore denies being indebted to the plaintiff in the sum sought or at all’.

[14] The affidavit clearly does not raise any triable issue to warrant the refusal of summary judgment-----”.

[18] It is beyond dispute that the antecedents of **Dulux Printers (supra)** are on all fours with that in this case. **Dulux Printers** therefore holds sway in these circumstances

[19] para “5 **The Plaintiff has not even annexed a certificate of balance to prove my indebtedness. It has not shown how much I have paid in liquidation of the debt.”**

[20] I agree entirely with Mr Mabuza when he submitted in paragraphs [5.3] of the Plaintiff’s heads of argument, that the above contention not only flies in the face of 1st Defendant’s allegation of settlement in paragraphs [4] and [6]

of it's affidavit respectively, but it does not constitute a defence or a triable issue.

[21] I say this because this allegation clearly fails to answer the Plaintiff's case that the 1st Defendant owes it the amount of E53,300.00 claimed in respect of which the Plaintiff has exhibited annexure C, the 1st Defendant's account statement held in it's institution showing a breakdown of the said indebtedness. Annexure C which dates from 19/12/2008 to 07/02/2011 shows a total balance of E55,449.62 owing in the 1st Defendant's account. The 1st Defendant has not denied that annexure C is its account statement. It has not contested the total balance or any of the amounts reflected in annexure C as untrue. The 1st Defendant has merely contented itself with alleging that the Plaintiff has not urged a certificate of balance. This contention will not suffice as a triable issue in the face of annexure C.

[22] In any case, when this matter was heard, Mr Mabuza sought to urge the certificate of balance from the bar. This was opposed by learned defence counsel Ms Matsebula. I am inclined to agree with Mr Mabuza that this objection to the certificate of balance does not hold any water. This is because I see no prejudice that the 1st Defendant will suffer by reason of its

appearance at this stage of the proceedings, especially in the face of annexure C which encapsulates basically the same figures spanning over the same period of time as the certificate of balance.

[23] para “6 **I submit that am not indebted to the Plaintiff as I duly settled my debt”.**

[24] I have already noted that this is a bare allegation in general terms that will not suffice.

[25] para “7 **The Plaintiff has applied the wrong rate of interest +4.5% is not 19.5% at present. There is clearly a need to enter into debatement of accounts herein as I might be due a refund”.**

[26] The foregoing allegation must again extinguish in the cradle. This is because the parties specifically covenanted in annexure A as appears on page 19 of the book of pleadings, that the interest rate of +4.5% is currently 19.5% per annum. The 1st Defendant cannot now seek to resile from the express terms of the agreement which bind the parties by the contention in paragraph [7] above.

[27] As the case lies the 1st Defendant's affidavit has failed to raise any triable issue or *bona fide* defence that would emasculate summary judgment.

[28] Furthermore, I agree with Mr. Mabuza that 2nd Defendant's failure to file an affidavit resisting this summary judgment application is a *sine qua non* to the grant of same.

[29] In the circumstances, this application has merits. It succeeds.

[30] I grant summary judgment against the 1st and 2nd Defendants jointly and severally as follows:-

1. Payment of the total sum of E55,559.62.
2. Interest thereon at the rate of prime +4.5% per annum at tempore morae.
3. Collection commission.
4. Costs of suit at attorney client scale.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE.....DAY OF2013**

**OTA J.
JUDGE OF THE HIGH COURT**

For the Plaintiff:

N.V. Mabuza

For the Defendants:

S. Matsebula