



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 3924/09

In the matter between

**SWAZILAND DEVELOPMENT FINANCE
CORPORATION (FINCORP)**

PLAINTIFF

And

MICAH MALINDANE MAKHUBU

DEFENDANT

Neutral citation: *Swaziland Development Finance Corporation
(Fincorp) v Micah Malindane Makhubu (3924/09)*
[2013] SZHC 284 (3 September 2013)

Coram: **OTA J**

Heard: **21 August 2013**

Delivered: **3 September 2013**

Summary: **Summary judgment application; points in limine
dismissed; no defence on the merits of plaintiff's**

**claim; no triable issue or bona fide defence raise;
summary judgment granted.**

OTA J

Judgment

[1] By an amended application for summary judgment the Plaintiff sought the following reliefs:

- “1. Payment of the total sum of E6,495.65 (Six Thousand Four Hundred and Ninety Five Emalangenani Sixty Five Cents).**
- 2. Interest at the rate of 14.5% per annum;**
- 3. Collection commission**
- 4. Costs of suit at attorney and client scale.”**

[2] As a prelude to this decision, it is imperative for me to note that on the 15th of August 2013, Counsel for both parties, Messrs S.V Mdladla and Associates for the Plaintiff and Mr Lloyd Mzizi for the Defendant appeared before me for setting. On that date this matter was set down on the 19th of August 2013 for argument at 9.30am. Mr Mzizi was put to terms to file the Defendant’s heads of argument before that day.

[3] On the 19th of August 2013, Mr N.V Mabuza from Mdladla and Associates appeared for the Plaintiff and Mr Mzizi appeared for the Defendant. Mr Mzizi who had failed to file the Defendant's heads of argument as ordered by the Court, sought an adjournment to the following day 20th August 2013 to enable him file the said heads of argument which he undertook to file before close of business on 19th August 2013. When called upon by the Court to proffer oral argument, Mr Mzizi intimated that he was not in a position to do so. He submitted that he had misplaced his case file in the matter and was thus ill prepared to proceed with the case. He entreated the Court for an adjournment to the 20th of August 2013, and undertook to reconstruct his file from the Court file to enable him proceed with the matter on that day.

[4] Mr Mabuza's objection to such an adjournment was overruled. This was in the interest of substantial justice and in recognition of the fact that there is no prejudice that could be suffered by the Plaintiff in these circumstances that cannot be adequately compensated for by an award of costs. I therefore postponed the matter to the 20th of August

2013 for argument at 11am and gave the Plaintiff wasted costs for the day.

[5] In spite of this indulgence, Mr Mzizi not only failed to file the Defendant's heads of argument as he undertook, but he also absented himself from the proceedings as set down on 20th August 2013, without any reasons. I must say that counsel has been extremely discourteous to the Court. Be that as it may, I proceeded with this matter in defence counsel's absence, in view of the fact that the Defendant had duly filed an affidavit resisting this summary judgment application which is the paramount consideration in these proceedings as mandated by law.

[6] Now, the gravamen of the Plaintiff's case as per its declaration is that on or about the 1st day of February 2007, the Plaintiff and Defendant entered into a written loan contract in which the Plaintiff agreed to advance the sum of E6,495-00 to the Defendant. The Defendant in turn agreed to pay interest to the Plaintiff on the outstanding balance of the initial capital sum at the agreed rate of 14% per annum. That the Defendant further agreed to pay the Plaintiff's usual customary

charges/commission whilst acknowledging the Plaintiff's right to adjust same from time to time.

[7] That the Defendant undertook to pay the initial capital sum together with interest thereon upon demand; that the Defendant agreed to make monthly repayment installments over a period of twelve (12) months and that if the Plaintiff institutes any legal action against the Defendant, the Defendant will be liable to pay all legal fees and related costs and all the fees are to be calculated on attorney /client scale.

[8] The Plaintiff further averred that it duly and timeously complied with all its obligations in terms of the said loan agreement and in particular duly advanced the capital sum to the Defendant. However, Defendant defaulted in payment of the installments due and as of the 4th of February 2008, had been in arrears in the sum of E4,089-38, and as a result of interest that has accrued Defendant remains in breach of the contract with an outstanding balance of E6,495-65 which the Plaintiff claims.

[9] The overwhelming judicial concensus is that summary judgment is a very drastic and stringent measure, because it shuts the door of justice in the face of a Defendant. It is thus a procedure that must be followed cautiously to avoid a miscarriage of justice.

[10] Rule 32 of the rules of this Court in recognition of this self same fact, enjoins a Defendant wishing to contest summary judgment to file an affidavit resisting same and for the Court to scrutinize the said affidavit to ascertain if it demonstrates any triable issue (s) or *bona fide* defence. Once the said affidavit exhibits a triable issue(s) or *bona fide* defence, the Court must refuse summary judgment and allow the Defendant defend the action. See **Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07, Swaziland Development and Savings Bank t/a Swazi Bank v Neville Rene Houareau Civil Case No. 1545/2011, MTN V ZBK Services and Another Civil Case No. 3279/11.**

[11] To raise triable issue(s) or a *bona fide* defence, the Defendant's affidavit is required to condesend upon particulars by urging material particulars of his defence to the Plaintiff's claim which are fit to

disable summary judgment. Whilst the Defendant is not required to set out his whole defence with mathematical precision at this stage, the law however demands that he sets out sufficient particulars of the defence that would enable the Court discern an issue fit for trial or a *bona fide* defence emerging at the trial.

[12] What then is the crux of the Defendant's affidavit resisting summary judgment? Let me first interpolate here to observe that there are two affidavits resisting summary judgment in the record of these proceedings. One appears on pages 3 to 4 of the book and is dated the 2nd of July 2010. The other appears on pages 11 to 15 of the book and is dated the 25th of March 2010. The reason for these two affidavits resisting summary judgment is not far fetched as I will demonstrate anon in this judgment.

[13] Suffice it to say for the moment that the relevant affidavit for the amended application for summary judgment is the affidavit dated 2nd July 2010 which appears on pages 3 to 4 of the book. This is the affidavit that holds sway in this application. The relevant portions of this affidavit are paragraphs 4 to 4.3 which I hereby recite in extenso:-

“4 I wish to raise the following points of law with regard to the Application

- a. I am advised and humbly submit that the Plaintiff’s application is bad in law in that the application for summary judgment is sub judice and has not been finalized by the Court, The reaction I state this is because there was an application that was made by the Plaintiff dated the 10th March 2010 and same has not been determined and finalized by the Honourable Court, Furthermore, this application has not been withdrawn by the Plaintiff.**

- b. I am advised and humbly submit that the Application is irregular and bad in law in that it has been instituted despite the fact that I was not served with a declaration of the matter to enable me to know how the Plaintiffs cause of action arises.**

- c. I am advised and humbly submit that I am prejudiced in resisting the Plaintiff’s application as I have not had occasion to determine how I am indebted to the Plaintiff in the amount claimed. This is due to the fact that I have not been served with a Declaration in this matter”.**

[14] It is important that I observe that the Defendant did not condescend upon any material particulars of his defence to the Plaintiff’s claim,

rather he sought to defeat the entire summary judgment by the foregoing points raised *in limine*.

[15] In my view these points taken *in limine* are crisp legal points which can be easily determined on the papers filed of record in this summary judgment application. I had occasion to adumbrate on this selfsame issue in the case of **MTN V ZBK Services and Another (supra) para [36]** where I said the following:-

“I have decided to settle this legal question thrown up. This is because I consider it a crisp legal point in the circumstances, that can be disposed of in this summary judgment application. In choosing to embark on this exercise, I am guided by the pronouncement of Kennemeyer J, in Lovemore v White 1978 (3) 260-61 wherein he declared as follows:-

‘Obviously if there is a factual dispute or if a triable and arguable issue has been raised as a defence, summary judgment should not be granted. However when the defence involves a legal point which is argued on behalf of both parties when the application is heard, I can see no reason why summary judgment should be refused because the legal point in issue is a difficult one. The point has to be determined at some time and the judge who hears it at the end of the trial or on an exception to the plea is in no better position to determine the issue than is the judge who hears the application for summary judgment itself--- ‘where a case can be decided on a crisp---law point’ there is no

reason at all why the point should not be determined in an application for summary judgment”.

[16] Now, a resolution of these legal points viz. (1) the summary judgment application is sub-judice and (2) the Defendant was not served with a Declaration, as prescribed by Rule 32, invite a chronicle of the history of this case.

[17] The record shows that the Plaintiff sued out simple summons against the Defendant claiming for the sum of E6,495-65, on the 9th of November 2009 going by the Registrar’s stamp that appears on that process (see pages 30-32 of the book).

[18] The Plaintiff’s Declaration (pages 26 to 29 of the record) by the Registrar’s stamp was filed on 10th February, 2010, served and received by attorneys for the Defendant, Lloyd Mzizi attorneys on 10th February 2010 (see page 29 of the book). Thereafter, the Plaintiff launched an application for summary judgment which sounds in the following terms:-

- “1. Payment of the total sum of E177,198-82 (One Hundred and Seventy Seven Thousand one Hundred and Ninety Eight Emalangenzi Eight Two Cents).**
- 2. Interest on the sum of E177,198-82 at the rate of 15.5% per annum.**
- 3. Costs of suit**
- 4. Further and/or alternative relief”**

This summary judgment application was served and received by Defendant’s attorneys on 11th day of March 2010.(see page 16 to 19 of the book)

[19] In the wake of this summary judgment application, the Defendant filed the affidavit resisting summary judgment dated 25th March 2010, which appears on pages 11 to 15 of the book.

[20] In that affidavit the Defendant categorically contended that he was never served with summons or a declaration in which the Plaintiff claimed from him the sum of E177,198-82.

[21] When this matter was heard Mr Mabuza who appeared for the Plaintiff submitted that the sum of E177,198-82 claimed in that

summary judgment application was an honest mistake by the Plaintiff which necessitated an amendment to its processes

[22] The Plaintiff embarked on the process of the said amendment. To this end on the 27th of May 2010, it filed a notice to amend summary judgment application which was served and received by Defendant's attorneys on the same 27th day of May 2010. (pages 9 to 10 of the book).

[23] It is convenient for me to recite the said Notice to amend which is as follows:

“BE PLEASED TO TAKE NOTICE THAT the Plaintiff intends to amend its summary judgment Application by:

1.

Removing the entire contents of prayer 1 and inserting the following words and figures “payment of the total sum of E6,495-65 (Six Thousand Four Hundred and Ninety Five Emalangeni Sixty Five Cents)

2.

Removing the contents of prayer 2 and inserting the following, ‘interest on the sum of E6,495-65 at the rate of 14.5% per annum.

3.

By adding the words ‘at the rate of attorney and client’ at the end of prayer 3

4.

By adding a prayer 4 to read ‘collection commission’ and making further and/or alternative relief prayer 5.

TAKE FURTHER NOTICE THAT if no objection to the intended amendment is filed within 3 (three) days of date hereof, the Application will be amended accordingly”

[24] It does not appear that there was ever an objection to the Notice to amend the application for summary judgment. At least none enures in these proceedings. Consequently, on the 16th of June 2010 the Plaintiff launched the amended application for summary judgment presently under consideration, which was duly served and received by the Defendant’s attorneys on an even date. I have hereinbefore regurgitated the content of this process in paragraph [1] ante. It bears no repetition. It is in respect of this amended summary judgment application that the Defendant filed the affidavit resisting summary judgment which is presently under scrutiny.

[25] It appears to me therefore from the resume detailed above, that the points taken *in limine* by the Defendant cannot see the light of day.

This is because he was served with the Declaration through his attorneys of records as I have already demonstrated. It is elementary for me to note that this is proper service under the law. Similarly, the contention that this application is *sub judice* cannot also lie. The present summary judgment application is an amendment to the previous one which amendment clearly superceded and extinguished the previous application. I'll thus dismiss the points *in limine* as unmeritorious.

[26] As the case lies, there is nothing left in the path of the Plaintiff and the summary judgment it seeks. This is because and as I have already observed herein, the Defendant failed to advance any particulars in defence to the Plaintiff's claim on the merits to enable the Court perceive an issue fit for trial or a *bona fide* defence. The Defendant as is obvious and apparent has no defence to the Plaintiff's claim. He is merely a cantankerous litigant and his notice of intention to defend is nothing more than a mischievous stratagem geared at stultifying the Plaintiff's early dance of victory. This mischief is also clearly borne out of the frivolous points taken *in limine*; Defendant's failure to file heads of argument and his Counsel's absence from these proceedings.

[27] In these circumstances, the summary judgment application succeeds.

I grant the following orders:-

1. Payment of the total sum of E6.495-65 (Six Thousand Four Hundred and Ninety Five Emalangeni Sixty Five Cents).
2. Interest at the rate of 14.5% per annum.
3. Collection commission
4. Costs of suit at attorney and client scale;

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

**OTA J
JUDGE OF THE HIGH COURT**

For the Plaintiff: N.V Mabuza

For the Defendant: N. Mzizi