



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Civil Case No: 614/13**

**In the matter between**

**FIRST FINANCE COMPANY (PTY) LTD**

**APPLICANT**

**And**

**JABULANI THOMAS HLOPHE**

**RESPONDENT**

Neutral citation: *First Finance Company (Pty) Ltd v Jabulani Thomas Hlophe (614/13) 2014 [SZHC] 146 (17 July 2014)*

**Coram: M. S. SIMELANE J**

**Heard: 11 APRIL 2014**

**Delivered: 17 JULY 2014**

**Summary: Criminal Procedure – Summary Judgment application – Affidavit resisting summary judgment - dispute of facts – In duplum rule – Application dismissed.**

## Judgment

### **SIMELANE J**

[1] Before Court is an application for summary judgment for the payment of the sum of E98 624.24 (Ninety Eight Thousand Six Hundred and Twenty Four Emalangenzi and Twenty Four Cents) being in respect of monies lent and advanced by Plaintiff to the Defendant at the latter's special instance and request. The Plaintiff also prays for interest at the rate of 12% per annum calculated from the date of summons to date of final payment. Plaintiff further prays for costs at attorney and own client including collection commission.

[2] The gravamen of the case for the Plaintiff is that the Defendant failed to make payment of the amount in terms of the loan agreement.

[3] The material terms of the agreement according to the Plaintiff were as follows:-

**“1.1 The plaintiff lent and advanced to the defendant a sum of E40 621.00 for consumption by defendant.**

- 1.2 **The interest payable on the aforesaid loan was the sum of 12% per month calculated from 10<sup>th</sup> February 2010 to date of final payment.**
- 1.3 **The Defendant was obliged to repay the capital amount together with interest over a period of 36 months reckoned from February 2010 to date at final payment.**
- 1.4 **In the event that the defendant failed to pay the monthly instalments as and when same fell due, the plaintiff would be entitled to cancel the agreement forthwith and demand payment of the outstanding balance together with the interest thereon. See clause 7.2 of the agreement.**
- 1.5 **In terms of clause 7.2 of the agreement all costs were to be on the scale as between attorney and own client.”**

[4] The Plaintiff complied with its obligations in terms of the agreement aforementioned, lent and advanced monies to the Defendant in accordance with the agreement.

[5] The Defendant is in breach of the agreement in that he has failed to make payment of the monthly instalments as and when they fell due and in fact, the Defendant made six payments, the last of which was on the 26<sup>th</sup> January 2011. Accordingly, the amount now due owing and payable is the sum of E98 261.24.

[6] The Defendant opposes the application for summary judgment and filed an affidavit resisting the summary judgment. The affidavit is deposed to by the Defendant.

[7] The following defences are raised by the Defendant in the affidavit resisting summary judgment:-

**“1.1 The Defendant denies the amount of E40,621.00 as having been advanced to him. Although the Defendant does not deny the signature on the schedule.**

**1.1.1 In light of this denial, it is submitted that the Plaintiff should provide evidence in the form of a bank transfer of this money deposited into the account of Defendant.**

**2.1 The Defendant further alleges that he only borrowed E79,611.92 in total and from a period of 1<sup>st</sup> August 2003 to February 2007. For those loans a total repayment of E164,134.00 was made.**

**2.2 The Defendant disputes the interest levied by the Plaintiff and found same to be in contravention of the in duplum rule. A sum of E40,612.00 is alleged to have been advanced and has accumulated interest in excess of the capital debt which presently stands at E98,261.24.**

**2.1.1 The Plaintiff in its replying affidavit, (P20) in its own papers changes to state that the loan advanced amounted to E30,918.61.**

**2.1.2 This surely creates a dispute of facts and renders summary judgment inappropriate. Extrinsic evidence would be required to explain the discrepancy in the amounts, even on plaintiff’s own papers.**

**2.1.3 This discrepancy does not warrant the irrevocable shutting of the door on the face of Defendant. The Plaintiff has not presented an unanswerable case.”**

[8] The only question for determination is has the Defendant raised triable issues or disclosed a *bona fide* defence.?

[9] In my view the foregoing averments by the Defendant raise triable issues, namely,

1. What was the actual amount advanced to the Defendant by the Plaintiff more especially in view of the fact that the plaintiffs papers are contradictory on the actual amount advanced?
2. What is the total amount repaid by the Defendant on the loan?
3. How was the interest on the outstanding amount calculated?
4. Does the agreement violate the *in duplum* rule?

[10] These are issues that cannot be resolved on the papers serving before this court. I am inclined to agree with the Defendant that the plaintiff has not presented an unanswerable case. It will thus be tantamount to injustice for the door to be shut in the face of the defendant based on the summary judgment application.

[11] As **Ramodibedi JA** (as he then was) correctly stated in **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/2007** at para [8]:

**“It is well recognized that summary judgment is an extra ordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled.”**

[12] In light of the totality of the foregoing, the application for summary judgment is dismissed with costs.

**M. S. SIMELANE**  
**JUDGE OF THE HIGH COURT**

**For the Applicant** : **Mr Z. D. Jele**  
**For the Respondent** : **Mr M. P. Simelane**