



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.960/2013

In the matter between:

CEBILE NOMZAMO SIMELANE

Applicant

and

**MICRO PROVIDENT SWAZILAND/
LETSHEGO FINANCIAL SERVICES
(SWD) PTY LTD**

1st Respondent

THE ACCOUNTANT GENERAL

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Neutral citation:

*Cebile Nomzamo Simelane vs Micro Provident Swaziland /
Letshego Financial Services Swaziland (Pty) Ltd and Two Others
(960/2013) [2015] [SZHC 115] (12th June 2015)*

Coram: MAPHALALA PJ

Heard: 17th March, 2015

Delivered: 12th June, 2015

FOR THE APPLICANT : In absentia

FOR THE 1ST RESPONDENT : Mr. S.V. Mdladla

FOR THE 4th RESPONDENT : Mr. M. Magagula

Introduction

[1] Before court is an Application in the long form by the Applicant Cebile Nomzamo Simelane against the Respondents, **inter alia** the 1st Respondent, Micro Provident (Swaziland/Letshego) and two Others in the following terms:

- “1. That an order be and is hereby issued declaring the 4 (four) agreements entered into by and between the Applicant and 1st Respondent since the 7th March 2007 to 14th September 2010 are null and void.**
- 2. That an order be and is hereby issued declaring that the clause relating to the insurance premium and/or collection fee, as the case may be, in the agreements mentioned in prayer 1 above between the Applicant and the 1st Respondent is wrongful and unlawful.**
- 3. That an order be and is hereby issued directing the 1st Respondent to stop forthwith from deducting the sum of E355.00 from Applicant’s monthly salary which is categorized as insurance premium.**
- 4. That an order be and is issued directing the 1st Respondent to refund all monies deducted from Applicant’s salary classified by 1st Respondent as an insurance premium and/or collection fee.**
- 5. That an order be and is hereby issued directing that the interest fee on the principal debt charged by the 1st Respondent is wrongful and unlawful.**

6. **That an order be and is hereby issued directing the deductions of the sums of E1 820 on a monthly basis from the Applicant's salary by the 2nd Respondent is wrongful and unlawful.**
7. **That an order be and is hereby issued directing the 1st Respondent to pay costs of this application.**
8. **Further and/or alternative relief."**

[2] The Application is founded on the affidavit of the Applicant who has outlined the material facts in support of her Application and filed pertinent annexures thereto.

The opposition

[3] The 1st Respondent opposes the above cited Application and has filed the Opposing Affidavit of one Mbuso Dlamini who is the Chief Executive Officer therein. In the said affidavit has raised a point **in limine** to the following legal proposition:

"The Applicant has dismally failed to meet the requirements for the grant of declarators. The Applicant has failed to allege and prove that she has a right that is being infringed by the contracts and that the Honourable Court must exercise its discretion towards granting the declaratory. These allegations must appear *ex facie* the founding affidavit."

[4] 1st Respondent also filed pertinent annexures to the Opposing Affidavit.

[5] The Applicant then filed a Replying Affidavit in accordance with the Rules of this Court.

The background

[6] The Applicant entered into four (4) written agreements with the 1st Respondent, the first loan agreement was entered into on the 7th March 2007 and the fourth on the 14th September, 2010.

[7] The terms of the various agreements are not in dispute and they appear more fully at paragraph 11-12 of the Founding Affidavit at page 5 and 7.

[8] The basis of the Applicant's Application is mainly contained in paragraphs 15 to 16 of the Founding Affidavit, being that:

8.1 The monthly deduction for her salary under insurance premium is unreasonably high, wrongful and unlawful as it constitutes an affront to the *Insurance Act of 2005*.

8.2 That the other amounts that were collected by the 1st Respondent and classified as collected fee have no basis in law and 1st Respondent had no legal grounds to do so, this the clauses relating to the insurance premium and/or collection fee is wrongful and unlawful.

8.3 That the interest charged by 1st Respondent is on the principal debt is in contravention of the *Money Lending and Credit Finance Act, 1991*.

The arguments of the parties

[9] The matter appeared before me on the 17th March, 2015 where the attorney for the Applicant did not appear and the attorney for the 1st Respondent, Mr. Mdladla were in attendance and Mr Magagula for the 4th Respondent. The court was informed that the attorney for the Applicant was aware that the matter was proceeding but has failed to come before court. The court allowed that the matter to stand down to secure the attendance of the attorney for the Applicant to be called. After some time the court was informed that the attorney for the Applicant could not be located.

[10] At that time the court ordered that the attorneys of the Respondents proceed in advancing their arguments as they both have filed Heads of Arguments. The court also ruled that it will also consider the Heads of Arguments filed by the attorney for the Applicant, Mr. Fakudze.

[11] On the 23rd March, 2015 the attorney for the Applicant wrote a letter to the Registrar of the High Court stating **inter alia** that the matter was erroneously heard by this court in their absence.

[12] I must state that I do not see how the court acted in error in hearing the Respondents after efforts were made to locate the attorney for the Applicant, Mr. Fakudze failed.

[13] In any event, I stated for the record that I intend to consider all the Heads of Arguments filed by the attorneys of the parties including those filed by Mr. Fakudze for the Applicant. Therefore it is in these circumstances that I proceed to outline the summary of the arguments of the attorneys of the parties.

(i) The Applicant's arguments

[14] The attorney for the Applicant, Mr. Fakudze filed comprehensive arguments before this court on the 11th December, 2013 and I shall outline the salient features of these arguments. At paragraphs 2, 3, 4 to 4.1, 4.2 and 4.3 dealt with the “background of” the matter. In paragraph 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 with the topic of “loan agreements”. In paragraphs 15, 16, 17, 18, 19, 20 to 22 dealt with the issue of “interest”. In paragraph 22 cited a **plethora** of decided case including the case of **Pablos Simelane vs Bonisile Magagula and Illovo Sugar Limited, High Court Case No.2005** at page 16. The cases of **Rickson Mawelela vs Mbabane Association of Money Lenders, Appeal Case No.43/1999** and that of **Mandla James Dlamini vs Select Management Services (Pty) Ltd and 2**

Others, High Court Case No.3381/01 unreported at page 12. In **paragraph 23, 24, 25, 26, 27, 28, 29** dealt with the “defence by 1st Respondent.”

[15] The last paragraph dealt with the points **in limine** raised by the Respondent and that an order in terms of the Notice of Motion be granted.

[16] I shall revert to the pertinent arguments of the Applicant as I proceed with this judgment.

(ii) 1st Respondent’s arguments

[17] The attorney for the 1st Respondent also advanced Heads of Arguments and I shall outline in brief for the record. In paragraph 1 dealt with the issue of “prescription” to the legal proposition that the Applicant’s claim in so far as contracts dated 7th March 2007, 15th April 2008 and 1st December 2008 have prescribed. That this is in accordance with section 8 of the Money Lending Act which states that if a borrower of the opinion he has been overcharged, he must recover such payments within three (3) years from date of payment. In paragraph 2 dealt with the issue of “declaration” that the Applicant has failed to meet the requirements for a declaratory order. That this court recognizes two (2) requirements for the grant of a declaratory order:

- (a) **That he is a person in an existing future or contingent right or obligation;**
- (b) **That the Application is a proper one for the exercise of the court's discretion.**

[18] The 1st Respondent then dealt with the principles of the **Law of Contract in South Africa, 2nd Edition** at page 202 on the Principle of Caveat subscriptor at paragraphs 3, 3.1, 3.2 and 3.3 and cited in South African case of **George vs Fairmead (Pty) Ltd 1958(2) SA 465 (A)** at 472.

[19] In paragraphs 4, 4.1, 4.2, 4.3 and 4.4 treated the subject of parole evidence in our law and cited pertinent cases on the subject.

[20] In paragraph 5, 5.1, 5.2 made submissions on the Money Lending and Credit Finance Act citing the provision of section 3(1) (b) thereof.

[21] The next topic covered was that of the Insurance Act citing section 50(1) (a) thereof.

[22] The last topic concerns collection fee in paragraphs 2.1, 7.2 of the Heads of Arguments contending that the Application be dismissed with costs.

(iii) 4th Respondent's arguments

[23] The attorney for the 4th Respondent, Mr. M. Magagula advanced arguments for the 4th Respondent and filed Heads of Arguments for which I am grateful. That the 4th Respondent has no interest in the dispute between the Applicant and the 1st Respondent. That is because a party to the proceedings after being joined as a party. That the 4th Respondent's interest is limited to matters that touch upon the policy of insurance between it and the 1st Respondent.

[24] Mr. Magagula for the 4th Respondent contends that in terms of this policy the 4th Respondent insured the 1st Respondent for any loss raising from the death, disability or retrenchment of any of the borrowers of the 1st Respondent who are covered under the policy.

[25] The attorney for the 4th Respondent advanced various arguments in paragraphs 3, 4, 5, 6, 7, 8, 9, and 10 of his arguments to the legal proposition that properly construed the provisions of section 50 do not find application. That the policy of insurance is one between the 1st and 4th Respondent. Section 50 would only find application where the policy between the Applicant as an insured and 4th Respondent as insurer, which is not in this matter. That **in casu**, the insured is the 1st Respondent and the 4th Respondent is the insurer.

[26] That the policy of insurance itself is not directly challenged by the Applicant in the founding papers nor is the Applicant seeking to invalidate the policy. It is only in the Heads of Arguments that the Applicant's Counsel intimates invalidity of the policy.

[27] Furthermore, that not only is section 50 not applicable in this case but a contract that is not part of the present **lis** cannot be invalidated in those proceedings. That Applicant lacks **locus standi** to invalidate a contract between the 1st and 4th Respondent and in which she is not a party and has no interest.

[28] In paragraph 10 of the said Heads of Arguments the attorney for the 4th Respondent contends that the Application in so far as it relates to possible invalidity of the contract is without merit and should be rejected so is the attempt to interfere with the contractual arrangement in terms of the policy in the form of backdoor orders such as the order for the refund of monies and other orders directly touching on the policy. That these orders cannot be granted in the circumstances of this case owing to the fact that on the papers before court the validity of the policy is not directly an issue. Therefore the Applicant ought to be dismissed with costs.

The court's analysis and conclusions thereon

[29] Having considered the affidavits of the parties and the arguments of the parties I shall first deal with the two points raised as points of law being first, that the Applicant's claim has prescribed as per the provisions of section 8 of the Money Lending and Credit Financing Act of 1991 and secondly that the Applicant has dismally failed to meet the requirements for the grant of declaratory orders. That the Applicant has failed to allege and prove she has a right that is being infringed by the contracts and that this court must exercise its discretion towards granting the declaratory. That these allegations must appear **ex facie** the Founding Affidavit.

[30] If I find against the point **in limine** to proceed with the determination of the merits of the case.

[31] I accordingly proceed along those lines in the following paragraphs.

(i) That Applicant's claim has prescribed in accordance with section 8 of the Money Lending and Credit Financing Act of 1991

[32] According to the 1st Respondent the Applicant's claim in so far as contracts dated 7th March, 15th April 2008 and 1st December 2009 have prescribed. This is in

accordance with section 8 of the Money Lending Act which states that if a borrower opines that he has been overcharged, he must record such payments within three (3) years from date of payment.

[33] I have examined the arguments of the Applicant in the Heads of Arguments of Mr. Fakudze on the operation of section 8 as contended by the 1st Respondent but could not find any answer to the 1st Respondent's attack. Therefore the point **in limine** by the 1st Respondent ought to succeed.

(ii) Declarations

[34] It is contended for the 1st Respondent that the Applicant has failed to meet the requirements for the grant of a declaratory order. That the court recognizes two (2) requirements for the grant of a declaratory as follows:

(a) That he is a person in an existing, future or contingent right or obligation;

(b) That the application is a proper one for the exercise of the court's discretion.

[35] That in the instant case the Applicant has glaringly failed to allege and prove that she is a person interested in an existing, future and contingent right. I have searched the Founding Affidavit of the Applicant and has not shown that she has

any right that is being infringed by the contract. For these reasons I find that 1st Respondent's point ought to succeed.

[36] Having considered the points **in limine** as stated above I now proceed without further ado to consider the merits of the Application on account of the importance that attaches to this dispute for decision.

The merits of the case

[37] Having considered all the arguments of the attorneys of the parties including the Heads of Arguments of the Applicant I have come to the considered view that the argument by the attorney for the 4th Respondent, Mr. Magagula answer the controversy in this case as a whole. Such arguments are outlined in paragraph [21] to [28].

[38] The Applicant contends on the main that the insurance policy is unlawful by reason of it being in contravention of section 50 of the Insurance Act because the Applicant was denied her right to choose the insurer. It is argued for the Applicant that the policy is invalid for non-compliance with the provisions of section 50(2) of the Insurance Act.

[39] In my assessment of the arguments of the parties I agree **in toto** with the submissions of the 4th Respondent that properly construed the provisions of section 50 do not find Application on the facts of this case. This is so because the policy of insurance is one between the 1st and 4th Respondent. Section 50 would only find Application where the policy is between the Applicant as an insured and the 4th Respondent as insurer, which is not the case in this dispute. **In casu** the insured is the 1st Respondent and the 4th Respondent is the insurer.

[40] In my assessment of the affidavits of the parties it would appear to me that the policy of insurance itself is not directly challenged by the Applicant in the founding papers, nor is the Applicant seeking to invalidate the policy. It is only in the Heads of Arguments of the attorney for the Applicant intimates invalidity of the policy.

[41] Furthermore, not only is section 50 not applicable in this case but a contract that is not part of the present **lis** cannot be invalidated in those proceedings. The Applicant lacks **locus standi** to invalidate a contract between the 1st and 4th Respondents and in which she is not a party and has no interest.

[42] All in all, I agree with the arguments of the 4th Respondent that **in casu** that the Application in so far as it relates to possible invalidity of the contract is without merit and the Application on those facts ought to fail.

[43] In the result, for the foregoing reasons the Application fails on both the points **in limine** raised by the Respondents and the merits with costs.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

