

IN THE HIGH COURT OF ESWATINI**JUDGMENT****HELD AT MBABANE****CASE No. 182/18**

In the matter between

**MPB INVESTMENTS (PTY) LTD t/a SUNRISE HOLDINGS
MASOTJA DLAMINI****1st Applicant
2nd Applicant**

And

SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY**Respondent****Neutral citation:** MPB Investments (Pty) Ltd t/a Sunrise Holdings and Another VS Swaziland Industrial Development Company (182/2018) [2018] SZHC 223 (05 December 2018)**Coram** : **MAMBA J.****Heard** : **23 November 2018****Delivered** : **05 December 2018**

[1] *Civil Law and Procedure - urgent and ex parte application - insufficient reasons for matter to be heard ex parte. - Applicant not legally represented or a lay person. Court at large to condone noncompliance with rules - Rule 27*

[2] *Civil Law and Procedure - Law of Contract - loan agreement - applicant liable to pay monthly instalment of E100,000.00 and failing to do so. A Breach of Loan Agreement.*

- [1] This is an urgent application wherein the Applicants seek the following order:
- '2. Directing the respondent herein to forthwith release a sum of E60,000.00 ... to the applicants within five hours of the service of this order to 1st applicant's account held under Standard Bank, Mbabane branch Acc. No 9110003567268.
 3. Calling upon the respondent to show cause why it should not pay the costs of this application.
 4. That paragraph 2 of this order operate as an interim order with immediate effect pending a return date to be fixed by this Honourable Court.'
- [2] This application was filed and set down to be heard *ex parte* on 22 November 2018 and was accompanied by a certificate of urgency duly signed and executed by an attorney of this court; otherwise the second applicant who is not an admitted attorney of the court, represented both applicants. He is a Director of the first applicant and he submitted that he is duly authorised to act for the first applicant in these proceedings.
- [3] The application was filed with the Registrar of this Court on 22 November 2018 and set down for hearing at 2.30 in the afternoon on that date.
- [4] In the certificate of urgency, the grounds of urgency are stated as follows:
- '2. The first applicant is due to pay its wages by close of business today (22nd November 2018) having failed to pay the same on the 20th November 2018.

3. The first applicant is [a] going concern that has to operate and survive on the payment from Royal Swaziland Sugar Corporation (RSSC) as same fully appears on the affidavit.
4. Should the matter take its normal course the first applicant stands to suffer irreparable harm in that its business will have been closed by the time the matter is heard. This is due to the fact that the first applicant is a going concern without which it cannot operate its business without the funds currently withheld by the respondent.

There is also an allegation that the cane cutters employed by the first applicant may resort to violence against the second applicant and the property of RSSC, if they are not paid on 22 November 2018.

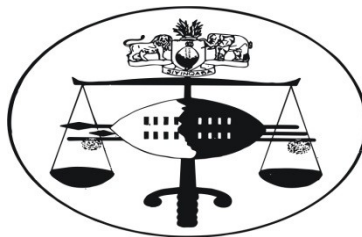
- [5] The applicants aver that on or about the 3rd day of July 2018 and at or near Mbabane, the respondent, at the request of the first applicant, granted a loan of E500,000.00 to the first applicant for ‘a start-up capital for a cane cutting project with the Royal Swaziland Sugar Corporation (RSSC).’ The full amount of the loan plus interest was to be repaid by 31 December 2018.
- [6] It was a further term of the loan agreement that the loan would be repaid in monthly instalments of E100,000.00. A further term of the agreement was that all payments due to the first applicant from RSSC, would be paid into the respondent’s Bank Account; presumably from which monies the respondent would deduct its monthly repayment instalments of E100,000.00. Again, presumably, if there was any credit balance left, this would be made available to the first applicant for its own use.

- [7] The applicants state that on 31 October 2018, ‘the first applicant wrote a letter to the respondent applying for flexibility regarding the repayment of the loan which in any event must have been repaid in full by the 31st December 2018.’ In short, the applicants sought to vary the terms of the written loan agreement. There was no response from the respondent on this request. The first applicant wrote yet another letter on the 19 November this time demanding a response to its letter of the 31st day of October 2018. In this letter, the first applicant pointed out that it need money to pay its workers on 20 November 2018 and therefore ‘... there was an urgent need for the money and such flexibility as pleaded for in its said letter.’
- [8] On 21 November 2018, the respondent’s business manager informed the applicants that the respondent would not be releasing any money to the applicants. The reason for this stance, the applicants say, was that the respondent feared that the applicants would not be in a position to repay the full loan (and interest) on the appointed or agreed date.
- [9] The applicants aver in these papers that what is important regarding the loan agreement is that the loan must be fully paid on the due date. The monthly instalments repayments are irrelevant, they say. The applicant’s aver that;

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The arrangement between first applicant and respondent that the loan amount would be liquidated in monthly instalments of E100.000.00 is a logistical issue between first applicant and the respondent and does not vary the contract between the parties’

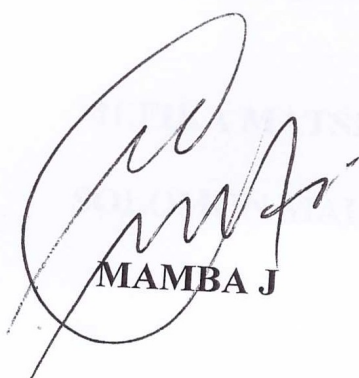
[10] When the matter first served before me on 22 November 2018 I pointed out to the



second applicant that the application could not be successfully heard ex parte in view of the rather drastic order sought and the fact that the cause of action had arisen more than a month ago yet the applicants had decided to approach this court at the eleventh hour. In view of the fact that the second applicant is not a legally trained person and not au fait with the rules of this court, I did not find it proper to refuse the application altogether on account of its inadequacies. I ordered that the papers must be served on the respondent and the matter be postponed to the next day. This court may condone a failure to comply with the dictates of any of the rules of court; per rule 27 of the rules.

[11] In response, the respondent avers that it was a material term of the loan agreement that the loan would be repaid in monthly instalments of E100,000.00 with effect from 30 July 2018. The applicants have failed to honour this term of the agreement inasmuch as the monies being deposited by RSSC have not been enough or sufficient to cater for the monthly instalments. For instance, on 15 November 2018, only E84,467.27 was received from RSSC. Besides this shortfall, earlier on on 8 November 2018, RSSC had advised the respondent that it has received ‘a court order directing it to deduct from the applicant’s proceeds a sum of E95,000.00 from September 2018 to December 2018’ (See annexure PG 7).

- [12] The respondent avers that the respondent is not liable to pay any monies to the applicants. Instead, the applicants are in breach of the loan agreement inasmuch as they have failed to pay the monthly instalments in full or as agreed.
- [13] The applicants did not find it necessary to reply to the respondent's opposing affidavit. The contents therein are, for purposes of this application, true and correct.
- [14] From the above facts, it is plain to me that the applicants are in breach of the terms of the loan agreement. They have failed to pay the monthly instalments as agreed. The monies being paid by RSSC into the respondent's bank account has, on a monthly basis, been insufficient to meet the monthly instalments. The respondent holds no extra money standing to the credit of the applicants, which it would be liable to remit to the latter.
- [15] For the foregoing, the application is dismissed with costs.



MAMBA J

For the Applicants :The Second Applicant

For the Respondent: Mr Mntungwa

