



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO.: 173/2018

In the matter between:

BHEKITHEMBA MBONGELENI NKOSI

APPLICANT/PLAINTIFF

And

**HANCY INVESTMENTS (PTY) LTD
RESPONDENT/DEFENDANT**

Neutral Citation:

*Bhekithemba Mbongeleni Nkosi vs.
Hancy Investments (Proprietary) Ltd
(173/18) [2019] SZHC 112 21st June 2019*

Coram:

MLANGENI J.

Heard:

13th June 2019

Delivered:

21st June 2019

Flynote: Civil Procedure – action for debt in respect of unpaid loan, together with interest and costs – Plaintiff applying for summary judgement.

Claim based on an alleged oral agreement whereby Plaintiff advanced Defendant with a sum of E150, 000.00 in three instalments, interest payable at 18 per cent per annum.

Defendant admitting a major portion of the principal debt but alleging that it was paid back to the Plaintiff and totally denying the lesser portion

Held: Oral loan agreements, with interest allegedly payable thereon, if disputed, cannot be resolved on affidavit.

Held, further: On the facts the defendant had raised a triable issue, hence summary judgment application dismissed with costs.

JUDGMENT

[1] Given the prodigious amount of jurisprudence that has been churned out on summary judgement, in this jurisdiction and beyond, one would be forgiven for thinking that the matters that finally come through for legal argument are those with reasonably good prospects of success. Sadly, it is not like that. Even more sadly, this could well be a reflection of excessive tolerance on the part of our courts, in the sense that even if counsel realizes that the matter is dead, he or she wants the pronouncement in order to believe that the matter is truly dead.

[2] In this matter the Plaintiff claims an amount of E327, 860.51, together with interest and costs. The amount, according to the particulars of claim, is in respect of a principal debt of E150, 000.00. This amount, goes the particulars, was lent to the Defendant upon its instance and request and was advanced in three instalments of E100, 000.00, E30, 000.00 and E20, 000.00 respectively. The source of the E100, 000.00 was a South African banking institution, where the Plaintiff alleges that he obtained a loan in that amount, for the use and benefit of the Defendant in its business operations in Eswatini. This arrangement raises curiosity, more especially in that it is alleged to have been verbal. According to the Plaintiff, interest was payable on the principal amount at the rate of 18 per cent per annum, that being the rate that was payable by the Plaintiff to the South African banking institution.

[3] The Plaintiff's claim, even before one considers the Defendant's answer to the summary judgment application, is fraught with problems.

3.1 There is no indication how the amount of E327, 860.51 is arrived at. Presumably, the amount has swollen due to interest, but there is nothing that unimpeachably demonstrates that the application of 18% interest over the specific period of time brings about the total of E327, 860.51 as at date of issue of summons. Although the Plaintiff in reply refers to annexure "**BMN4**" I have not seen such annexure. The document at page 31 of the Book is of no assistance as it does not show how much of the principal amount was owing on those itemized dates, hence the amount of interest charged is not verifiable.

3.2 *Ex facie* the Plaintiff's papers, the figure of E50, 000.00 that was advanced to the Defendant after the amount of E100, 000.00 did

not come from the South African banking institution, so the 18 per cent interest would not necessarily apply to the amount of E50, 000.00.

3.3 Annexure **“BMN1”**, which is attached to the application for summary judgment¹, shows a transaction in the form of internet payment dated 23rd July 2012 to one **“Sipho Thwala Loan.”**² It is described as a loan. If this is the basis of part of the claim, the insuperable difficulty is that the Defendant in this matter is not Sipho Thwala, it is a corporate entity known as Hancy Investments (Proprietary) Limited. Sipho Thwala is not cited at all, not even as a surety.

[4] Once summary judgement is opposed on such facts, as it is in this matter, it is difficult to understand the basis of persisting in the application.

[5] In opposition to the application for summary judgment the defendant has filed an extensive affidavit which, I daresay, is too prolix for its intended purpose. The Defendant denies that it ever sought a loan of E100, 000.00 from a South African banking institution through the Plaintiff, alleging that it has adequate access to such facilities in this country. As if to make mockery of the Plaintiff, the defendant’s deponent has this to say:-

“I actually fail to appreciate how the Plaintiff’s mind even contrives what he states in his particulars of claim. How could the Defendant, a company registered and

¹ Pages 15 and 16 of the Book of Pleadings.

² At page 16 of the Book

incorporated in Swaziland, contract with the Plaintiff (in his person) to obtain a loan for the former in a foreign country and institution.....”³.

- [6] In its opposing affidavit the Defendant further avers that at some point in time the deponent, in his personal capacity (his name is Siphon Sabelo Thwala) did at some point in time borrow an amount of E100,000.00 from the Plaintiff and further avers, inexorably, that he repaid this amount in cash to the Plaintiff **“during the same year and whilst we were in South Africa where I was conducting my routine business errands.”⁴**
- [7] The Defendant’s response to the claim in respect of the amount of E50,000.00 introduces an almost hilarious dimension to this *lis*. The Defendant is in the catering business and alleges that it was approached by the Plaintiff for a quotation to supply food and refreshments for a thanksgiving ceremony that the Plaintiff intended to host in future in this Kingdom. The Defendant, goes the story, obliged and made a verbal estimate of what it would cost – an amount of E50,000.00 for an approximate number of three hundred guests.
- [8] It is alleged by the defendant that it was pursuant to this quotation that the Plaintiff made an advance payment of E50,000.00 to the defendant in two instalments of E30,000.00 and E20,000.00 respectively. At a later stage the Plaintiff changed his mind about hosting the function and wanted his money back, and this amount was

³ At page 21, para 9

⁴ At page 22, para 13

repaid to him **“in full on or about August 2016.”**⁵ It is of significance that the Plaintiff alleges in his particulars of claim that the defendant paid him an amount of E50, 000.00 **“around August 2016”**⁶. Such is the story between the Plaintiff and the defendant’s director and deponent, who have **“close personal relations”**⁷. They make business dealings sound like a game of trivia.

[9] In its reply, the Plaintiff has not taken its case any further. It reiterates that it paid E100, 000.00 to Sipho Thwala, defendant’s deponent, but it does not address the defendant’s specific allegation that the money was re-paid in cash in South Africa. But even if this aspect was denied, the result of that would be to create a triable issue⁸ which can effectively be dealt with through oral evidence in a trial.

[10] It has been stated in numerous authorities that for a Plaintiff to succeed in an application for summary judgment it must have an unanswerable claim⁹ against the defendant. Oral agreements involving money and interest payable thereon, if disputed, can never be resolved on affidavit. For instance, the defendant’s deponent avers that the E100, 000.00 was repaid in cash, in South Africa. It is only through oral evidence that this allegation can be tested.

[11] In the case of *MATER DOLOROSA HIGH SCHOOL v RJM STATIONERY (PTY) LTD*¹⁰ it was stated that **“if the defendant raises an issue**

⁵ At page 24, para 23

⁶ At page 6 para 7

⁷ At page 22, para 14.

⁸ Per *Kunene v Mdziniso* (1011) [2016] SZHC 40

⁹ Some Authorities hold that “unanswerable claim” could well be going too far.

¹⁰ Appeal Case No. 3/2005

that is relevant to the validity of the whole or part of the Plaintiffs claim, the court cannot deny him the opportunity of having such an issue tried.” It is on the basis of the foregoing that summary judgment cannot be granted in this matter.

[12] I therefore make the following orders:-

12.1 Summary judgment is dismissed.

12.2 Plaintiff to pay the costs of the summary judgment application.

12.3 Defendant is granted leave to defend the matter and is to file its plea within a period of seven court days from date of judgment.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For The Applicant/Plaintiff:

Mr. Motsa

For The Defendant/Respondent:

Mr. Mhlanga

