



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 134/2010**

**In the matter between:**

**REGISTRAR OF INSURANCE AND  
RETIREMENT FUNDS**

**PLAINTIFF**

**And**

**GCEBILE MABUZA**

**DEFENDANT**

**Neutral Citation : Registrar of Insurance & Retirement Funds and  
Gcebile  
Mabuza (134/2010) [2019] SZHC 64 (25 JUNE 2019)**

**Coram : MABUZA – PJ**

**Heard : 04/10/17; 05/02/2018**

**Delivered : 25 JUNE 2019**

## SUMMARY

**Civil Law:** *Plaintiff's claim against Defendant is for loan payments it made on behalf of the Defendant and moneys allegedly misappropriated by Defendant – The Defendant opposes this claim.*

**Held:** *That the Plaintiff had only proved the amount of E71,597.16 and failed to prove the balance of E71,453.13 as well as the amount of E6,323.25.*

**Held:** *Judgment for the Plaintiff in the sum of E71,597.16 plus half the costs of suit.*

## JUDGMENT

### **MABUZA -PJ**

[1] The Plaintiff is the office of the Registrar of Insurance and Retirement Funds, a statutory body duly incorporated and established in terms of the Insurance and Retirement Funds Acts and with its principal place of business at Public Service Pension Fund Building Mhlambanyatsi Road, Mbabane.

[2] The Defendant is Gcebile Mabuza, an adult Swazi spinster, c/o Madau and Simelane Attorneys, 2<sup>nd</sup> Floor, Mlonyeni Building, Dzeliwe Street, Mbabane Swaziland.

[3] The Plaintiff issued summons against the Defendant wherein it claimed:

- (a) Payment of the sum of E149,373.54.
- (b) Interest thereupon at the rate of 9% per annum.
- (c) Costs of suit.
- (d) Such further and/or alternative relief.

[4] Under case no. 134/2010, three (3) different actions have been instituted, two (2) of which were instituted by the Plaintiff and one (1) by the Defendant. Both the Plaintiff and Defendant instituted application proceedings wherein on one hand the Plaintiff sought an Order freezing the Defendant's Pension benefits. On the other hand, the Defendant launched an application wherein she sought an Order unfreezing the Pension benefits.

[5] The application proceedings came before Maphalala P.J. as he then was, on the 14<sup>th</sup> April 2016 for arguments and judgment was delivered on the 29<sup>th</sup> April 2016, wherein the Court dismissed both applications and referred the matter to oral evidence, hence the present trial.

- [6] The issue for determination is whether the Defendant is indebted to the Plaintiff for the sum of E149,373.54 (One hundred and forty nine thousand three hundred and seventy three Emalangeneni fifty four cents).
- [7] The claim is opposed by the Defendant.
- [8] The Defendant is a former employee of the Plaintiff having been employed from 2007 to 2009 when her services were terminated. The Plaintiff is now called Financial Services Regulatory Authority. She was employed as the Plaintiff's Human Resource Manager until her services were terminated.
- [9] The amount claimed is made up as follows: The sum of E143,050.29 (One hundred and forty three thousand and fifty Emalangeneni twenty nine cents) in respect of a loan, which remained outstanding at the time that the Respondents services were terminated; and the sum of E6323.25 (Six thousand three hundred and twenty three Emalangeneni twenty five cents) in respect of moneys allegedly misappropriated or unaccounted for.
- [10] It alleged by the Plaintiff that while the Defendant was still in its employ during 2007, the parties entered into an Employer Guaranteed Personal Loan

scheme agreement, in terms of which the Plaintiff stood surety against a loan advanced to the Defendant by Swaziland Building Society. One of the terms thereof was that should the employment relationship inter parties be terminated prior to the loan being liquidated, the Plaintiff would have to pay up the remainder of the loan that remained unpaid and thereafter go against the Defendant to recover its monies.

[11] As earlier pointed out the claim is defended by the Defendant. She did not file a plea, her defence is set out in her affidavit resisting summary judgment dated 5 February 2010. It also appears from her oral evidence.

[12] The Plaintiff's only witness was Gugu Makhanya (PW1). She stated under oath that she was employed by the Plaintiff as General Manager – Finance and Corporate Services.

[13] PW1 testified that she was employed by the Financial Services Regulatory Authority formerly the Registrar of Insurance and Retirement Funds (the Plaintiff). She is the General Manager, Finance and Corporate Services. She has been in the employ of the Plaintiff since May 2007. She knew the Defendant who used to be employed by the Plaintiff as Human Resources

and Administration officer, reporting directly to PW1. That the Defendant was dismissed during 2009. That the Defendant went through an internal disciplinary process for allegedly stealing money from the Plaintiff and the verdict of that process was dismissal.

[14] She testified that when the Plaintiff was established during 2007, it took a decision to consolidate employee loans. To that end the Plaintiff entered into an agreement with the Swaziland Building Society (the SBS) to consolidate employee loans. The employees who were all new then, took advantage of that scheme and the Defendant was one of the employees who benefitted from that consolidation.

[15] The agreement between the Plaintiff and the SBS provided that the Plaintiff would secure all loans advanced by the SBS to the Plaintiff's employees. And once employee leaves the employ of the Plaintiff, the Plaintiff would pay off all outstanding amounts to SBS and recover from the employee. The document embodying the said agreement is Annexure "A" and is entitled Employer Guaranteed Personal Loan Scheme Agreement".

[16] When the Defendant's services were terminated her loan with SBS had a Balance of E143,050.29 (One hundred and forty three thousand and fifty Emalangeni twenty nine cents) which amount the Plaintiff paid off and now seeks payment from the Defendant. The Defendant through her lawyers is said to have signed and sent to the Plaintiff an acknowledgment of debt (Exhibit A) in respect of the said amount together with an additional amount of E6,323.25 (Six thousand three hundred and twenty three Emalangeni twenty five cents) thereby binding herself to repay these amounts which together totalled the sum of E149,373.54 (One hundred and forty nine thousand three hundred and seventy three Emalangeni fifty four cents).

[17] PW1 testified that the Defendant misappropriated the amount of E6,323.25, which was money that the Defendant was entrusted with by the Plaintiff. This is the money that gave rise to the Defendant's dismissal.

[18] The Defendant denied through cross-examination that the signature on the acknowledgement of debt was hers.

[19] The Court noted that there is a deed of suretyship filed at pages 15 and 16 of the Book of Pleadings but it is incomplete in the sense that the details of the

debtor are not disclosed nor the amount purportedly advanced to the debtor. On page 16, Gcebile Mabuza signs as the second witness and not as the recipient. On page 17 is a document which should have been completed by the recipient of funds but it is not completed nor signed. There are initials that appear on the bottom right hand corner but it is not clear why they are there and what they were meant to witness

[20] Nevertheless PW1 further testified that when the Defendant left her employment, the Plaintiff continued paying her instalments at the SBS between 2009 and 2012. During 2012, the Plaintiff decided to settle the outstanding balance in full. She stated that when the Plaintiff entered into the agreement with the SBS, it had a surety account with the SBS and the Plaintiff instructed the SBS to take the outstanding balance from that account.

[21] PW1 was the person who wrote and signed the letter (Annexure A1) instructing the SBS to transfer funds from the surety account and clear all balances of the employees affected. She wrote on the 31 July 2012 as follows:

**“31 July 2012**



**The Manager  
Swaziland Building Society  
P.O. Box 300  
Mbabane**

**INSTRUCTIONS TO TRANSFER FUNDS FROM SPECIAL SAVINGS  
ACCOUNT - 016684732**

**You are hereby instructed to transfer funds from our Special Savings account no. 016684732 to clear all balances in the following RIRF guaranteed loan accounts:**

<b><u>Account number</u></b>	<b><u>Name of Account</u></b>
<b>442</b>	<b>Mabuza Nonhlanhla</b>
<b>443</b>	<b>Simelane Nomsa</b>
<b>445</b>	<b>Mabuza Zwelisha</b>

**Kind regards**

**Gugu Makhanya  
MANAGER FINANCE CORPORATE”  
SERVICES**

**Sandile Dlamini  
REGISTRAR OF INSURANCE &  
RETIREMENT FUNDS”**

Nonhlanhla is the Defendant’s other name and this fact was never denied nor put in issue by the Defendant.

[22] The Court noted that the Defendant’s account No. 442 is included in these instructions. The letter is signed by PW1 and Mr. S. Dlamini, the Registrar of the Plaintiff. The letter appears on page 125 of the Book of Pleadings. At page 126 is a statement (Annexure A2) dated 3 July 2012 which is for the period 1/6/2011 – 30/6/2012. It has a list of employees on the guaranteed

loan scheme and reflects outstanding amounts to their accounts. Included in the statement is the Defendant with an outstanding balance of E71,597.16 (Seventy one thousand five hundred and ninety seven sixteen cents). This amount is further reflected in Annexure “A3” on page 127 which reads:

<u>Account Number</u>	<u>Name of Account</u>	<u>Balance as at 30/6/12</u>
442	Mabuza Nonhlanhla	71,597.16
443	Simelane Nomsa	31,567.78
445	Mabuza Zwelisha	<u>48.30</u>
		<b><u>103,213.24</u></b>

[23] PW1 added that the Defendant has not paid any of the amounts claimed from her nor has she advised the Plaintiff why she has not paid even though it appears that she is gainfully employed in South Africa.

[24] PW1 was cross-examined by Mr. Gamedze and he elicited the fact that PW1 misunderstood the contents of the Power of Attorney signed by the Defendant in favour of her erstwhile lawyers as referred to moneys owed by the Defendant to Plaintiff. This was not the case. PW1 also admitted that the signature on the acknowledgment of debt that appears on pages 34 to 36 was not the Defendant’s.

[25] PW1 further agreed that Annexure A (page 58) was a template and did not state the amount of money that had been loaned to the Defendant. And that because there was no application form for the loan, the Court would have to use the bank statement. According to PW1, even Annexure B (page 60) was a template proving that the employer (Plaintiff) had an employer guarantee payment agreement with the bank.

[26] The Plaintiff closed its case after the cross-examination of PW1. Thereafter defence opened its case by calling the Defendant, Miss Gcebile Mabuza (DW1).

[27] DW1 testified that she was employed by the Plaintiff from 2007 to 2009. She was the Plaintiff's Human Resource Manager. Her services were terminated during 2009. She testified about the events that led to her dismissal. She stated that E6323.25 went missing after she had carried out some shopping in preparation for a board meeting by the Plaintiff. She was dismissed for the loss of this money. She was taken through a disciplinary hearing and was found guilty. She took the matter on appeal and she lost.

[28] She further testified that when PW1 gave her the letter terminating her services PW1 also gave her an acknowledgment of debt to sign. The amount therein was the sum of E149,373.54 which included E143,050.29 and E6323.25. She says that she refused to sign the acknowledgment of debt and told PW1 that she did not owe the Plaintiff any money. PW1 then explained to her that the larger amount was in respect of a debt to Swaziland Building Society and the smaller amount was part of the shopping money. The Defendant even after this explanation still refused to sign the acknowledgment of debt.

[29] DW1 also told the Court that she moved an application before this Court against the Financial Services Regulatory Authority Provident Fund 1<sup>st</sup> Respondent (case No. 184/10) wherein she claimed *inter alia* pension moneys due to her. She instructed her erstwhile attorneys to lodge the claim on her behalf. She even took the matter to CMAC where it was unresolved even though she was challenged on cross-examination that this was untrue.

[30] She wanted the Court to order the 1<sup>st</sup> Respondent to pay her pension money. Apparently the 1<sup>st</sup> Respondent held onto the money in order to satisfy the

moneys the Plaintiff says that the Defendant owed to it. The Defendant also wanted the Court to order costs against the 1<sup>st</sup> Respondent.

[31] She was cross-examined by Mr. Mamba for the Plaintiff. She disclosed that she had a loan with the SBS for which she had made an application and signed all the relevant documents. She had also agreed that the repayments be deducted by her employer. However she further denied that the affidavit resisting summary judgment on page 24 of the Book was drawn up with her input and even though she did not authorize the lawyer to draw it up, she admitted the signature thereon to be hers in respect of a different matter and not the present one. She says that she reported the matter to the law society as she believed it was fraud.

[32] DW1 stated that she had a personal loan with the SBS that the Plaintiff did not stand surety for. She was shown a bank statement pertaining to be hers which reflected various debits and credits but because it was not discovered Mr. Gamedze successfully challenged its admission and it was withdrawn.

[33] She was asked that since she had taken an independent loan why she did not raise that as a defence and annex the loan agreement. Her response was that

the loan agreement was not part of the Plaintiffs claim and was not relevant herein. It was put to her that the Plaintiff acting in terms of the employer loan scheme agreement paid up the amount of E143,050.29 to the SBS which amount remains owing by herself.

[34] Her response was that was not true as her loan was insured by her credit life insurance policy which she had taken out with the SBS which guaranteed that in the event that she died or lost her employment, it would pay up. She opined that, that was how the Plaintiff had got hold of her Swaziland Building Society bank statement because her erstwhile employer did not know about her account. She was concerned about how the Plaintiff had obtained the statement without her consent or court order. She believed that the Plaintiff had fraudulently obtained the statement. She bemoaned the fact that the Plaintiff could not produce proof of payment.

[35] It was put to her that she was indebted to the Plaintiff in the sum of E6,323.25 being in respect of moneys not accounted for by herself from the petty cash. Her reply was that it was not true because in as much as she could not account for it, she did not steal it.

[36] It was put to her that she was indebted to the Plaintiff in the amount of E149,373.54 which was made up of the arrear loan and the petty cash. She denied this and stated that she does not owe the Plaintiff anything nor did she steal any money. Instead it was the Plaintiff that owed her.

[37] When she was re-examined she read into the record her defence from her affidavit in the book of pleadings at page 80 of the Book namely that she had sourced a personal loan from the SBS and for which the Plaintiff had confirmed her ability to repay the loan as she was gainfully employed by it. After re-examination, the defence closed its case.

[38] It is my finding that the Plaintiff has proved the amount of E71, 597.16 (Seventy one thousand five hundred and ninety seven Emalangeneni sixteen cents) as reflected in Annexure A3 discussed in paragraph 22 supra. The Plaintiff has failed to prove the rest of that claim.

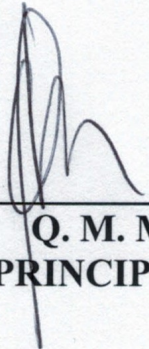
[39] In respect of the amount of E6,323.25 the Plaintiff has failed to meet the required standard of proof. The Plaintiff has relied solely on the evidence of PW1 and failed to lead evidence from the chairpersons of the disciplinary

hearings in order to prove that the Defendant was indeed found guilty as charged.

In the circumstances this claim fails and it is so ordered.

[40] In the event I make the following order:

- (a) The Defendant is ordered to pay to the Plaintiff the sum of E71,597.16 (Seventy one thousand five hundred and ninety seven Emalangeni sixteen cents).
- (b) Interest thereon at the rate of 9% per annum.
- (c) Half the costs of suit.



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Crim. Case N

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**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Plaintiff : Mr. T. Mamba  
For the Defendant : Mr. B. Gamedze