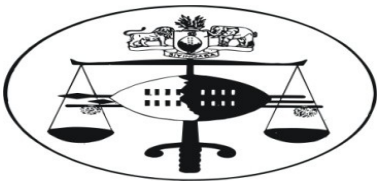


IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 1626/2015**

In the matter between:

PETROS MASITHELA NXUMALO Plaintiff

And

STANDARD BANK SWAZILAND (PTY) LTD Defendant

Neutral citation	**:**	***Petros Masithela Nxumalo v Standard Bank Swaziland (1626/2015) [2020] SZHC 86 (8th May, 2020)***
Coram	**:**	**M. Dlamini J**
Heard	**:**	**15th April, 2020**
Delivered	**:**	**8th May, 2020**
Pleadings	**:**	***Attorneys must only plead material facts establishing a causa and leave matters of evidence for trial.[4]***

Lex acquilia **:** ***Plaintiff must prove wrongfulness; intention (culpa); legal duty on the part of the defendant or infringement of plaintiff's right, reasonable foreseeability of the loss and causation.[12]***

Summary: The plaintiff, on a delictual claim, asserted that he surrendered his life-policy not knowing that he would get a minimum sum instead of the full cover. Had defendant not misplaced his life policy document, he would have appreciated such a loss to himself. He claimed the balance between the surrender sum received and the full cover sum, alleging defendant was negligent. In its plea, defendant denied any negligence in as much as it accepted that the said document was misplaced at its instance.

The Parties

[1] The plaintiff is an adult liSwati. He resides at Nkambeni area, district of Manzini.

[2] The defendant is a financial institution duly incorporated and registered in terms of the financial laws of the Kingdom. Its principal place of business is situate at Mbabane, district of Hhohho.

Particulars of Claim

[3] The plaintiff alleged that having been under the employ of defendant, it registered in 1993 with Old Mutual for a life cover and investment

policies to the total tune of E2 041 654.00. In 1998, plaintiff ceded both his life cover and investment policy to defendant as a mortgage for a house loan. Plaintiff then stated:

> *"6. The plaintiff serviced the loan until 2013 when he decided to approach the Swaziland Building Society for it to clear the balance of the loan with Defendant.*
>
> *7. When the loan was cleared through the loan from the Swaziland Building Society, the security interest on the policy was never cancelled resulting with the policy document not being returned to the Plaintiff. The Defendant eventually cancelled the session over the collateral on the 23rd October, 2014 but the policy document was never returned as it was said to have been misplaced.*
>
> *8. When the cession over the collateral was cancelled in the 28th October 2014, the Plaintiff was no longer working for the Defendant as he had resigned in December 2013 with the view to engage in commercial farming. A copy of the indemnity document is annexed hereto and marked as 'B'.*
>
> *9. Towards the end of 2014, the Plaintiff's business encountered financial problems necessitating its recapitalization. When the Plaintiff approached the Defendant for his policy document for purposes of checking what his benefits were pertaining to financial*

gain, he was informed that the document would not be located.

10. *As a consequence of the non-location of the policy document, the Plaintiff could not get financing from financial institutions forcing him to surrender the policy to Old Mutual as he could not pay the premiums.*

11. *As a result of the loss of the policy document due to the Defendant's negligence, Plaintiff suffered damaged in the sum of E1 953 654.00 being the difference between the amount assured and the E88 000.00 received when surrendering the policy.*

12. *From June 2014 to June 2017 which was the year of its maturity, the policy was attracting 15% annual increase which was added on the assured amount of E2 041 654.00.*

13. *Despite due and legal demand, the Defendant has failed to pay the above sums of money"*[1] (underlined is evidence and not particulars)

Pleadings

[4] I must mention that the manner the Particulars of Claim have been drafted is not in compliance with the Rules of this court. Attorneys

[1] **Page 4 paragraphs 6,7,8,9,10,11,12 and 13 of book of pleadings**

drafting pleadings must adhere to the Rules. As reflected under sub-title, "Particulars of Claim" above, the plaintiff pleaded evidence as well. This obviously has burden the pleadings unnecessarily. Attorneys must only plead material facts establishing a *causa* and leave matters of evidence for trial. I have under sub-title "Particulars of Claim" underlined what I consider to be evidence and not Particulars of Claim. Again, Counsel must apply their minds in drafting pleadings lets they open unnecessary objections which may attract costs against themselves or their clients.

Defendant's plea

[5] The defendant, admitting plaintiff's tendering his policy as security for the loan, pleaded:

> *"4.*
>
> ***AD PARAGRAPHS 9 & 10***
>
> *4.1 It is correct that the document could not be located but it is denied that by it not being located the Plaintiff could not ascertain his policy value with Old Mutual who issued the policy or be given a copy of same. The said information was at the time no longer with the Defendant as he had cancelled his interest over the same;*
>
> *4.2 It is denied that Plaintiff could not get a loan because the policy had been lost and he is put to the proof thereof;"*[2]

[2] **Page 18 para 4.1 and 4.2 of the book of pleadings**

Preliminary matters

[6] On the date of hearing, the plaintiffs' attorney appeared in chambers at his request. He submitted that the defendant's attorney had advised him that he would not appear in court due to the covid-19 pandemic. The court referred Counsel to the Chief Justice's directive No.2 of 2020. This directive was addressed not only to judges but all practising attorneys in the Kingdom. It partly reads as follows:

> *"The Chief Justice acting in terms of Section 139(5) and 142 of the Constitution issues the following further directive in compliance with the declaration of the National Emergency pursuant to the devastating effects of the Coronavirus-COVID 19:*
>
> 1. *All Civil, Criminal and Labour matters will continue being heard in all courts in the country.*
>
> 2. *Only persons with a direct and substantial interest in a matter inclusive of Legal Practitioners, Litigants, and Accused persons, witnesses, court support staff and media practitioners will be permitted to attend court hearing to the extent that they do not exceed fifty (50) people at a session."*

[7] On this, the matter was called in an open court. The time was 1110 hours. The defendant and its Counsel were not before court. The plaintiff opened its case by testifying under oath.

Adjudication

[8] In order not to burden this judgement, it is appropriate that I embark on determination of this matter without first capturing the *viva voce* evidence of plaintiff.

Issue

[9] Has the plaintiff established a pecuniary loss due to defendant's conduct? I think the first question should be, has the plaintiff established a *causa*?

Legal principles

[10] The plaintiff's claim is based on the law of delict (obligation). It is premised on the notion that "*the wrongdoer has a personal* (as opposed to contractual) *duty to compensate the victim for the harm done and, vice versa the victim has a personal right to claim reparation of harm done from the wrongdoer.*"[3]

[3] **Van der Walt Midgley, "Delict – Principles and Cases" Vol 1 2nd Ed 1997 Lexis Nexis**

[11] The plaintiff's delictual claim is also based not on personal or property loss but pure economic loss as he claims the difference between the maturity value and the surrender amount.

[12] A number of elements must be established by the plaintiff to establish negligence on the part of the defendant. Plaintiff must prove wrongfulness; intention (*culpa*); legal duty on the part of the defendant or infringement of plaintiff's right, reasonable foreseeability of the loss and causation.

Determination

[13] The plaintiff testified under oath in establishing his cause of action which was defined as negligence. He was employed by the defendant from 1991 until 2013 when he decided to resign in order to pursue his business. In 1993, he registered a life and investment policy with Old Mutual whose premiums escalated by 15% per annum. In 1994, he mortgaged his policy with defendant as security for a house loan. When he resigned in 2013, he transferred his loan to Building Society and he was able to source further loans in order to commence his business. However, in the following year, 2014, he faced financial challenges. He approached Nedbank for a loan.

[14] Nedbank demanded a collateral. Nedbank agreed to accept his policy as security. He went to defendant for his policy document in order to

attach it to his Nedbank loan application. He was advised by defendant that the document was lost. He then proceeded to Old Mutual to obtain another document. Old Mutual advised him that they could not reproduce a second document. They however, gave him a printout of his policy reflecting the value of both the life cover and investment policy. He then proceeded in his testimony:

> *"Thereafter they (Old Mutual) told me that they could not give me any help as the cession was not cancelled with Standard Bank. I went to Standard Bank to get the policy. They never gave me the policy."*

[15] He immediately testified further:

> *"I spoke with Old Mutual saying I needed finances. What should I do?"*

[16] He stated of the response:

> *"They said I should surrender my policy. They sent me a surrender application in which I signed and sent it to them."*

[17] He was thereafter paid the sum of E88 020, 15. He immediately divulged under oath:

"I asked where the other payment was forthcoming as I expected them to pay me E2 041 654.00, that is the total of the life cover and the capital provider."

[18] On this question, he was advised that he had breached the contract in that by surrendering the policy, he was forfeiting the life cover investment. He immediately stated:

"I then opened this case as it was due to Standard Bank's negligence that I was not able to see these terms and conditions."

[19] He expatiated on this point;

"I would not have surrendered the policy if I knew I would have lost my investment."

[20] He explained that the loss he suffered was the difference between the amount he received and what he ought to have received. He referred the court to page 3 of the book of pleadings *viz*, his Particulars of Claim and testified that the life cover's full term was 2027 and not 2017 as reflected in his Particulars. It was a typographic error to insert 2017. He ended his testimony by praying that the court finds defendant liable for the loss he suffered.

[21] Now the basis for the plaintiff's claim is that had defendant not misplaced his policy document, he would have noted the condition to surrender which was that a lesser sum would be paid over instead of the full cover. With the greatest of respect to use the words of **Phipson**[4], plaintiff's *causa* is of *"incredible or romancing character,"* such that it is not worth a defence by the defendant. The reasons are clear as follows:

- Firstly, the policy document was as a result of Old Mutual and himself. It was therefore handed to him by Old Mutual with all the conditions and terms. When he signed the document, he must have been aware of the conditions attached to the policy. As I pointed out during the hearing, when plaintiff handed the policy document to the defendant, those conditions and terms of surrender were present in the said policy document. He must in all fairness have known about them. It is not as if the terms of surrender were drawn between defendant and Old Mutual, in the absence or without plaintiff's attention. They were in fact drawn between plaintiff and Old Mutual. He clearly was aware of them.

- Secondly, even if it can be said that he was not aware of them, Plaintiff ought to have taken advice from Old Mutual on the outcome of a surrender. This information was readily accessible to plaintiff even without the policy document. He chose not. He cannot therefore lay the blame at the doorstep of defendant. Worse still, he testified that he was advised by Old

[4] evidence 10th Ed. para 1542

Mutual to surrender the policy. Why he decided to receive partial advice, is a poser best left to plaintiff to answer. His claim must fall on the failure to establish the first element of wrongfulness from the onset.

- What exacerbates plaintiff's claim as clumsy is that he lamented the difference between the sum received under surrender and that of the life full cover. He demanded that he ought to have received the sum he would have received had the life cover ran its full course and that is according to his oral evidence 2027. The first question is, how did he expect such payment when he surrendered the policy in the year 2014? Common logic suggests that the policy's turnover is depended on plaintiff paying premiums. Obvious, he had not paid the premiums for the subsequent year's post 2014 to 2027. How then could he testify?

> "*Thereafter I received E88 020.15. I asked (Old Mutual) when was the other payment forthcoming as I expected them to pay me E2 041 654.00 i.e. total of life cover and capital provider.*"

[22] Does money grow on trees? Yes, if one engages in commercial farming. In the *case in casu* the answer is an absolute, "No." I must pause to highlight that litigants must appreciate the dichotomy between insurances entities and pyramid schemes. Old Mutual is an insurance entity. It therefore invests premiums in order to pay returns

on them. They are unlike pyramid schemes where Peter is robbed to pay Paul. The plaintiff ought to be placed in a better position as he was a banker by profession in this regard. If Old Mutual could not pay plaintiff E2 041 654.00 for the reason that his life cover policy had not run its full course (not matured) or put different, he had not paid the subsequent years' premiums, similarly defendant cannot be held liable to pay plaintiff for money he never invested even if for a second we would hold defendant was liable for misplacing the policy document. In other words plaintiff suffered no damages by defendant misplacing the policy document.

[23] I appreciate that plaintiff asserted during his oral evidence that he could not have surrendered his policy had he been aware that he would lose his end of cover sum. The act of surrender on its own suggests that the insured is entitled to what he has invested over that period and not what he ought to have invested over the full cover of the policy. It does not call for a zealous prophet to tell that with due respect. In brief, plaintiff's action must fall on failure to establish causation as an element of *lex aquila*.

[24] Then there is the second aspect which turns on plaintiff's *causa* justifying a dismissal. It is that the plaintiff based his cause of action in his Particulars of Claim on the allegations that:

> "*10. As a consequence of the non-location of the policy document, the Plaintiff could not get financing from*

financial institutions forcing him to surrender the policy to Old Mutual as he could not pay the premiums."[5]

[25] This is different from what he asserted in his oral evidence. In his *viva voce* evidence, he testified that he suffered damages because had he been aware of the condition that if he surrendered his policy, he would lose the full cover amount, he would not have surrendered it. Learned Counsel for plaintiff neatly summed it as follows in his heads of arguments:

> *"The plaintiff has testified that; had he been aware of the terms and conditions of the surrender clause he would not have surrendered his policies."*[6]

[26] It is a cardinal rule of law of evidence that a party who pleads one cause and asserts another stands to have his action dismissed. This is based on the fact that the defendant must be made fully aware of the case it would meet in court. This is done by means of pleadings. It would be a travesty of justice to the defendant to come to court prepared for one case only to be taken by surprise in court as he has to answer to a case different from the pleadings.

Costs

[5] Para 10 of page 4 of book of pleadings
[6] Page 4 para 4.4 in heads of arguments

[27] I pondered if I should mulct the plaintiff with costs. I say this because as I have demonstrated above, the *viva voce* evidence of plaintiff does not in law establish a cause of action. His claim is incompetent in law. Then the next question is why did defendant plead to an incompetent legal claim? The answer lies in the plaintiff's Particulars of Claim. As already demonstrated above, plaintiff's oral evidence does not establish a cause of action. I have already pointed out at the differences between plaintiff's *causa* in his Particulars of Claim and oral evidence. Why the difference?

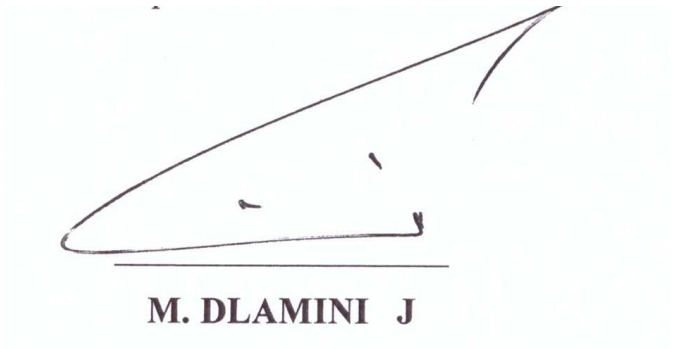
[28] The court could tell that the change of position by plaintiff was precipitated by defendant's plea to the effect that plaintiff did not need the policy document in order to obtain a loan facility as he had said in his pleadings that he failed to source further loans for his farming business due to the missing policy document at the instance of defendant. It is then that plaintiff decided to take a twist and testify on a legally incompetent *causa.* Otherwise, it is the courts view that had he based his claim on what he testified upon *viva voce*, the defendant would have excepted to his Particulars. By changing his *causa,* no doubt the plaintiff put the defendant into unnecessary litigation costs and wasted the court's valuable time in the process. He must bear the blunt by paying costs to the defendant. He cannot be allowed to build his case as it goes along the process of litigation, as it were.

Orders

[29] In the final analysis, I enter the following orders:

29.1 Plaintiff's cause of action is dismissed;

29.2 Plaintiff is ordered to pay costs of suit to the defendant.



For the Plaintiff **:** S. Madzinane of S.C. Dlamini & Company

For the Defendant **:** No appearance at 1110 hours.