IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 691/2019

In the matter between:

ESWATINI DEVELOPMENT & SAVINGS BANK **Plaintiff**

And

AYR PROPERTY COMPANY (PTY) LTD **1st Defendant**

DUBE SIBONANGAYE ELEANOR **2nd Defendant**

DUBE ENOCK NONO **3rd Defendant**

Neutral citation: *Eswatini Development & Savings Bank v AYR Property Company (Pty) Ltd & Two Others (691/2019) [2019] SZHC 135 (1 September 2021)*

CORAM : T. DLAMINI J

Delivered : 1 September 2021

[1] Civil Law – Summary judgment – Principles thereof
[2] Civil Practice and Procedure – Application for summary judgment – Requirements in terms of Rule 34(4) (a)

Summary
Plaintiff and first defendant concluded a finance facility agreement for the purchase of a farm for a dairy project – The second and third defendants signed surety agreements with the plaintiff and bound themselves as sureties and co-principal debtors with the first defendant – The project did not perform well and the first defendant could not make the monthly repayment instalments

as agreed – Short payments were made in some months whilst no payments were made in other months – The default in making the monthly repayments as agreed resulted in summons being issued by the plaintiff – The defendants filed a notice to defend the action and the plaintiff filed an application for summary judgment – Defendants opposed the application and filed an affidavit resisting summary judgment, to which the plaintiff filed a replying affidavit.

Held - *That the issues raised by the defendants do not warrant a trial of those issues, or that for some other reason the plaintiff's claim or part thereof ought to be referred to trial – Defendants have therefore failed to disclose their defence to the claim – Summary judgment granted.*

JUDGMENT

The application

[1] Serving before court is an application for summary judgment in the sum of **five million sixty-two thousand five hundred and thirty-seven emalangeni and forty-four cents (E5, 062, 537.44)**. The money is in respect of a Finance Facility Agreement (hereinafter referred to as the loan agreement) entered into between the plaintiff and the first defendant for the purchase of a farm for undertaking a dairy project business.

The Parties

[2] The plaintiff is Eswatini Development and Savings Bank, a bank established and incorporated in terms of King's Order in Council No.43 of 1973. The first defendant is a company registered and incorporated in terms of the company laws of the Kingdom of Eswatini, carrying on business in the Manzini District. The second defendant is a surety and co-principal debtor with the first defendant in respect of the loan agreement. The third defendant

is a director of the first defendant. He is also a surety and co-principal debtor with the first defendant.

Background

[3] The plaintiff sued out summons against the defendants seeking an order confirming cancellation of the loan agreement it concluded with the first defendant; payment of the sum of **E5, 062, 537.44** plus interest of 12.45% a *tempore morae*; declaration of the immovable property mortgaged in favour of the plaintiff executable; declaration of movable assets hypothecated in favour of the plaintiff executable, and costs of suit at attorney and client scale.

[4] The papers before court show that in January 2017 the plaintiff and first defendant concluded and signed a loan agreement in terms of which the first defendant was loaned an amount of **four million three hundred and twenty-three thousand five hundred and ninety-eight emalangeni and seventy-four cents (E4, 323, 598.74**. In terms of clause 3 of the agreement, interest was agreed at **12.7% per annum** (made up of prime lending rate plus 2.2%). It was also agreed that interest shall be calculated on the daily balance of the amount of the loan, plus interest thereon outstanding from time to time.

[5] The repayment terms were that the loan capital together with interest thereon shall be repaid in installments of **sixty-four thousand eight hundred and thirty-five emalangeni and twenty-nine cents (E64, 835.29)**.

[6] The second and third defendants bound themselves as sureties and co-principal debtors with the first defendant for the repayment of the loaned amount.

Plaintiff's case

[7] According to the particulars of claim, the first defendant is in material breach of the loan agreement in that it failed to attend to the repayment of the loan capital sum together with interest thereon as agreed between the parties. From inception of the loan agreement the first defendant has made short payments or no payment at all towards the repayment of the capital sum. The loan account is in arrears of **one million one hundred and twenty-two thousand seven hundred and twenty-six emalangeni and eighty-nine cents (E1, 122, 726.89)**. The outstanding loan balance is the sum of **three million nine hundred and thirty-nine thousand eight hundred and ten emalangeni and fifty-five cents (E3, 939, 810.55)**. The total amount due, owing and payable is the sum of **five million sixty-two thousand five hundred and thirty-seven emalangeni and forty-four cents (E5, 062, 537.44)**.

[8] A letter of demand (annexure "E5") dated 19 March 2019 was addressed to the first defendant advising that the matter has been referred to the legal department for legal action. The first defendant was however still invited to approach the plaintiff's credit department to make arrangement for settlement of the loan within fourteen days of receipt of the letter. It appears, in my opinion, that the default continued, hence the summons were issued against the defendants.

[9] The defendants filed a notice to defend the action. In response, the plaintiff applied for summary judgment, an application which the defendants resisted by filing an affidavit resisting the summary judgment application.

Defendants' case

[10] In resisting the summary judgment, the defendants raised six issues, *viz*., that the loan agreement violates the Money Lending and Credit Financing Act of 1991 in that the total interest charged on the capital amount per annum is in excess of what the plaintiff is allowed to charge, therefore the interest contravenes the law; that the plaintiff has not disclosed the amount which the first defendant has repaid towards the repayment of the loan; that the main reason the business undertaking failed is because of the advice from the plaintiff, which advice was in direct contrast with advice given by Eswatini Dairy Board; that the defendants have tried to engage the plaintiff on a number of instances to negotiate a variation of the agreement but the plaintiff has refused to negotiate; that defendants have acquired an insurance policy cover of **five million emalangeni (E5, 000, 000.00)** to be ceded to the plaintiff to ensure that sufficient security is provided; and that the loan agreement was never provided to the defendants and their encounter with it was when the summons were served, hence defendants contend that they were kept in the dark about the material provisions of the agreement.

Applicable law

[11] Summary judgment is available to a plaintiff with a clear case to enable it or him obtain prompt enforcement of a claim against a defendant who has no real defence to the claim. **See: Herbstein & Van Winsen "The Civil Practice of the High Courts of South Africa", 5th ed., Vol. 1, p.516**. The

remedy is "*designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence.*" **See: Tee & Jay Woodworks v Eureka DIY Solutions (Pty) Ltd (27/2011) [2011] SZSC 32 (30 November 2011)**. The purpose "*is to enable the plaintiff to obtain final judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or is unable to raise a triable issue which ought to be tried.*" **See: Tsabedze v Standard Bank of Swaziland (4/2006) [2006] SZSC 2 (01 May 2006)**.

[12] **Rule 32** of the Rules of this Court provides for summary judgment procedure. The Rule provides, *inter alia*, what is quoted below:

> *(1) Where in an action to which this rule applies and a combined summons has been served on a defendant or a declaration has been delivered to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to court for summary judgment against that defendant.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) (a) Unless on the hearing of an application under sub-rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*
>
> *(b) The court may order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any claim in reconvention made or raised by the defendant in the action.*

[13] In interpreting the above quoted rule, our courts have held that in order to defend a summary judgment application, the defendant must satisfy the court

that there is an issue or question in dispute which ought to be tried or for some other reason there ought to be a trial of the claim. **See: Tsabedze v Standard Bank of Swaziland (supra); Swaziland Development & Savings Bank v Phineas Butter Nkambule (129/2015) [2018] SZHC 123 (12 June 2018); Sinkhwa Semaswati Ltd t/a Mister Bread Bakery & Confectionary v PSB Enterprises, High Court Civil Case No. 3839/2009 (unreported)**.

The issues

[14] In opposition to the summary judgment application, the defendants raised issues which are set out in paragraph [10] above. Their first defence is that the loan agreement is not in conformity with the **Money Lending and Credit Financing Act 3/1991** (hereinafter referred to as "the Act"). They assert that interest is charged at prime lending rate plus 2.2 % per annum to be compounded half yearly. The interest is calculated on the daily balance of the amount of the loan, plus any interest thereon outstanding from time to time. The total interest charged on the capital sum per annum is in excess of what the plaintiff is allowed to charge, contend the defendants.

[15] I wish to first point out that the court has not been referred to any specific provision of the Act that is being violated. However, section 3 of the Act provides that where the principal debt in respect of a money-lending agreement is in excess of **five hundred emalangeni (E500.00)**, the lender is to charge an annual interest rate of not more than 8 percentage points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time by the Central Bank under section 38 of the Central Bank of Swaziland Order,

1974. *In casu*, the plaintiff, in terms of clause 3.1 of the Finance Facility Agreement, charged an annual interest rate of 2.2 % above the prime lending rate issued by the Central bank totaling 12.7% per annum. In my view, this is not above the interest stipulated by s.3 of the Act, and therefore does not contravene the provision.

[16] Generally, an affidavit opposing a summary judgment application must disclose facts as may be deemed sufficient to enable the defendant to defend. Per **Ota J**, whilst *the defendant need not deal exhaustively with the facts and evidence relied upon to substantiate his claim, he must at least disclose the material facts upon which it is based with sufficient particularity and completeness, to enable the court to decide whether the affidavit discloses a bona fide defence.*" **Semaswati t/a Bread Bakery & Confectionery v Fiago Enterprises (Pty) Ltd (3361/2009) [2011] SZHC 77 (23 February 2011)**.

[17] Section 7 of the Act provides that where a borrower fails to pay an amount owed by him when such amount becomes due, "*the lender shall be entitled to recover from him in respect of the finance charges an additional amount which shall be calculated by reference to the total amount due but which is unpaid, the annual finance charge rate at which the finance charges were initially levied on the principal debt and, as the case may be, the period during which the default continues or the period for which payment is deferred*." (own emphasis)

[18] The defendant has failed to disclose the material facts with particularity and completeness upon which it asserts that the interest charged on the capital

sum is in excess of what the plaintiff is allowed to charge in terms of the Act. This is relevant and material because s.7 of the Act allows the lender, in the event of default by the borrower, to charge additional amounts to be calculated by reference to the amount due but unpaid, the annual finance charges levied on the principal debt, and the period during which the default continues. The plaintiff correctly submitted, in my opinion, that the defendants failed to state the extent of the non-conformity with the Act, if there is any. The assertion they make, in my view and in the words of **Ota J**., lie in the realm of speculation and conjecture. On that basis, it does not repel the summary judgment application as it lacks particularity and completeness.

[19] The defendants also asserted in defence that the plaintiff failed to disclose a total sum of **four hundred and fifty thousand emalangeni (E450, 000.00)** which the defendants have so far (May 2019) paid towards the repayment of the loan. This averment is not denied by the plaintiff. Instead, the plaintiff states that this is itself an admission that the defendants have materially and continuously breached the loan agreement. This is so because the defendants ought to have paid in excess of the sum of **one million three hundred and seventy-nine thousand three hundred and forty-five emalangeni and seventy cents (E1, 379, 345.70)** as at May 2019. According to the agreement, the defendants were to pay the sum of **sixty-four thousand eight hundred and thirty-five emalangeni and twenty-nine cents (E64, 835.29)** per month from inception of the loan in September 2017.

[20] There is clearly no dispute about this amount which the defendants contend to have repaid towards settlement of the loan, hence there is no issue that requires to be referred to trial concerning this repayment.

[21] Another defence pleaded by the defendants is that the project failed and losses were incurred because of advice that the plaintiff gave, which advice was in direct contrast with that of the Eswatini Dairy Board. It is contended that the plaintiff advised the first defendant to start the dairy project with 55 cows whilst the Eswatini Dairy Board advised that the project should begin with a lower number that would expand until it reaches a maximum of 40 cows due to the size of the land. Having acted on the advice given by the plaintiff, 35 cows died within three months. This made the first defendant to suffer huge losses because the supply of its dairy product greatly decreased.

[22] In *contra* argument, the plaintiff submitted that the relationship between the plaintiff and defendants is based on a written agreement which sets out the obligations of the two parties. This defence seeks to alter the agreement because it is not part of it. The court was referred to the case of **Busaf (Pty) Ltd v Vusi Emmanuel Khumalo t/a Zimeleni Transport (2839/2008) [2009] SZHC 61 (6 February 2009)** where **Masuku J** cites Zeffert *et al* **The South African Law of Evidence, Lexis Nexis, 2003, p.**322, regarding the position to be taken where an agreement has been reduced to writing. The following is stated:

> *If, however, the parties, decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the parties' previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible.*

[23] The plaintiff's attorney correctly argued that the issue of the advice is irrelevant because it falls outside the written agreement signed by the parties. My finding therefore, is that this is not an issue that warrants a trial or that for some other reason it ought to be referred to trial, hence it does not repel the summary judgment application.

[24] The defendants also pleaded that they have tried to engage the plaintiff on a number of instances in order to negotiate a variation of the agreement but the plaintiff has refused to negotiate. The plaintiff denies this averment and states that it has made two variation proposals with the first defendant in January 2018 and August 2018 but the defendants failed to adhere to the proposed terms. Copies of the variation documents were attached as annexures "E7" and "E8". Furthermore, the plaintiff submitted that it has refused to negotiate further with the first defendant because it has failed to honour any of its proposed variations to date.

[25] During arguments, it was submitted by the plaintiff's attorney that agreeing to a variation of the signed terms can only be done voluntarily. I am in agreement with the argument that a variation of an agreement is a voluntary act by both parties to the agreement and cannot be imposed as of right. The reluctance to agree to the variation is not therefore a defence to the claim and does not repel the summary judgment application.

[26] The defendants also pleaded that it acquired an insurance policy of over **five million emalangeni (E5, 000, 000.00)** to be ceded to the plaintiff to ensure that sufficient security is provided. This information, according to the

defendants, was passed on to the plaintiff but no response was offered by it. This submission does not constitute a defence because it also falls outside the terms of the Loan Facility Agreement, an agreement that was reduced to writing. The signed agreement is conclusive as to the terms of the transaction agreed to. The alleged insurance policy cover which the first defendant intends to cede to the plaintiff is irrelevant because it does not form part of the agreed terms of the transaction.

[27] Lastly, the defendants submitted that the letter of offer of the loan agreement was first given to them in February 2019 when it ought to have been given prior to the signing of the agreement. The date on which the offer was accepted and signed is January 2017. They also submitted that the loan agreement was itself never furnished to them and that their first encounter with it was when the summons was served in March 2019. They further stated that when a statement detailing the interest calculation was requested, none was furnished by the plaintiff. They therefore argued that they were kept in the dark concerning the material provisions of the agreement.

[28] I agree with the submission by the plaintiff's attorney that this argument is unmeritorious. The agreement was initialed and signed on behalf of the first defendant by the third defendant in January 2017. The defendants cannot therefore come to court in March 2019 to state that they were not aware of the terms of the contract that they signed, per the *caveat subscripto* rule. I am inclined to agree with the plaintiff's attorney that the defendants were actually aware of the agreement terms, hence the payments that they made, and the active role they played in negotiating variations of the repayment terms notwithstanding their failure to honour them.

[29] I am satisfied that there is no issue raised by the defendants which warrants a trial. There is also no issue which for some other reason, warrants a referral of the plaintiff's claim or part thereof to trial. The defendants are in breach of the loan facility agreement and summary judgment is competent to be granted in the plaintiff's favour.

[30] Concerning prayer 1.3 of the summary judgment application found at page 55 of the book of pleadings, *viz.*, payment of interest at 12.45% per annum *a tempore morae*, charged on the claimed amount of **E5, 062, 537.44**, the court is of the considered view that if granted, it would be nothing than a penalty for undertaking a business which becomes unsuccessful and crumbles. This is the view of the court because the claimed amount of **E5, 062, 537.44** is inclusive of the interest charged in terms of the signed loan agreement. I say so because clause 4.1 of the agreement stipulates that "*The loan capital together with interest thereon shall be repaid to the Bank (the plaintiff) in the following manner: INSTALLMENT OF E64, 835.29*". Therefore, the total amount claimed is inclusive of arrears which are made up of the due but unpaid installments. The installments are inclusive of the interest component.

[31] The default in payment of the installments has not been shown to have been done in bad faith by the first defendant. It appears to be common cause that the business in respect of which the loan was taken did not do well but failed. The first defendant therefore became unable to fulfil the repayment obligation it had. Nothing has been shown to have been done by the other defendants in bad faith either. It was merely a case of a business undertaking

that became unsuccessful. In my view, it would be an injustice to penalize the defendants by charging them more interest merely because the business undertaking failed and they could not generate money to enable them to meet their duty to repay the loan. I am therefore not inclined to award the interest of 12.45% per annum *a tempore morae*.

[32] On the issue of costs, the plaintiff seeks an order at the scale of attorney and own client. An award of costs is at the discretion of the court. **See: Graham v Odendaal 1972 (2) SA 611 at 616** and **Smit v Maqabe 1985 (3) SA 974 at 977**. The plaintiff's attorney did not motivate the court on why costs should be granted at the punitive scale of attorney and client. The default on repayments as agreed between the parties was not intentional but due to business failure. That is a risk inherent in any business. It however, does not mean that the failure should be penalized by a punitive costs order in the event that litigation is instituted. In my opinion, costs at the ordinary scale would be a fair order *in casu*.

[33] For the aforegoing, summary judgment is granted in favour of the plaintiff in the following terms:

33.1 Cancellation of the Finance Facility Agreement between the plaintiff and first defendant is hereby confirmed.

33.2 Payment of the sum of **E5, 062, 537.44**.

33.3 The immovable property mortgaged in favour of the plaintiff under Continuing Mortgage Bond No. 105/2017 is declared executable.

33.4 The movable assets hypothecated in favour of the plaintiff under Deed of Hypothecation No. 36/2017 is declared executable.

33.5 Costs of suit at the ordinary scale.

T. DLAMINI
JUDGE

For plaintiff : Mr M. Tsambokhulu
For defendants : Mr S. Jele