



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 797/1996

In the matter between:

SWAZILAND DEVELOPMENT AND SAVINGS BANK

PLAINTIFF

and

ABSALOM NGWENYA

DEFENDANT

Consolidated with:

CASE NO. 4004/2007

ABSALOM MVANA NGWENYA

PLAINTIFF

And

SWAZILAND DEVELOPMENT AND SAVINGS BANK

DEFENDANT

Neutral Citation: *Swaziland Development & Savings Bank v Absalom Ngwenya (797/1996) [2021] SZHC 206 (09 November 2021)*

CORAM: **Q.M. MABUZA PRINCIPAL JUDGE**

DATE HEARD: DURING 2014, 2017, 2018, 2019 AND 2020

DATE DELIVERED: 09 November 2021

SUMMARY

Law of Contract – *Plaintiff's claim is against Defendant for payment of moneys lent and advanced to the Defendant.*

Law of Delict - *Defendant's claim against the Plaintiff is for damages in respect of loss of projected rental income.*

Held - *The Plaintiff's claim succeeds with costs and the Defendant's claim is dismissed with costs.*

JUDGMENT

MABUZA – PJ

[1] The Plaintiff is Swaziland Development and Savings Bank, a body corporate established in terms of the Statutory Laws of the Kingdom of Swaziland and carrying on business and registered as a bank with its Head Office at Engungwini Building, Allister Miller Street, Mbabane District of Hhohho (the Bank)

[2] The Defendant is Absalom Mvana Ngwenya, and adult male Swazi Business person who chose *domicilium citandi et executandi* for purposes of the Mortgage Bond herein referred to, at the remaining Extent of Farm No. 223 situate in the District of Manzini, Swaziland.

[3] This matter is divided into two cases which were consolidated. The first case is Case No. 797/1996 instituted by the Bank and the second one is Case No. 4004/2007 instituted by Mr Ngwenya.

[4] Re: Case 897/1996 (the Bank' case).

The Plaintiff's claim against the Defendant is for: -

- (a) Payment of the sum of E227 530-00 (Emalangeneni Two Hundred and Twenty Seven Thousand Five Hundred and Thirty).
- (b) Costs of suit on the scale of attorney and own client including payment of collection commission;
- (c) An order declaring the property mortgaged in terms of Mortgage Bond No. 126/1994 to be executable;
- (d) Further or alternative relief.

[5] Re: Case No. 4004/2007 (Mr Ngwenya's case).

- 1) Payment of the sum of E572 470-00 (Five Hundred and Seventy Two Thousand Four Hundred and Seventy Emalangeneni);
- 2) Interest thereon at the rate of 9% per annum a *tempore morae* calculated from the 28th of June 1995 to the date of payment;

- 3) Failing to comply with prayer 1 and 2 within (14) fourteen days of the grant of the Order the mortgage bond held in favour of Defendant in this matter be deemed cancelled and;
- 4) The Registrar of Deeds be authorized to cancel the security (mortgage bond) in favour of Defendant against Plaintiff Property and;
- 5) The Defendant to release the Title Deed to Plaintiff within (15) fifteen days after the grant of the Order;
- 6) That the Defendant forfeits all monies advanced on behalf of Plaintiff to his creditors in terms of this loan agreement;
- 7) That the Defendant pays to Plaintiff a sum of E8 541 126-00 (Eight Million Five Hundred and Forty One Thousand One Hundred and Twenty Six Emalangen) as damages due to unrealized net annual income.
- 8) Costs;
- 9) Further or alternative relief.

[6] The parties led oral evidence in support of their claims. The Plaintiff led the evidence of its employee Mr Enock Sayitjeni Mavimbela (PW1) and the Defendant Mr Absalom Mvana Ngwenya (DW1) testified on his own behalf.

At the hearing before me, the Defendant abandoned prayers 1, 2, 3, 4, 5 and said that he would proceed with prayers 6, 7, 8 and 9.

[7] PW1 confirmed that during the period May 1993 and April 1994, the The Bank (Plaintiff) lent and advanced certain moneys to the Defendant at the latter's special instance and request totalling the amount of E227, 530-00 (Emalangeneni Two Hundred and Twenty Seven Thousand Five Hundred and Thirty)

[8] As security the Defendant was to register a first mortgage bond over his immovable property described as remaining extent of Farm No. 223 situate in the District of Manzini measuring 2.5757 (two comma five seven five seven) hectares which bond was registered in favour of Plaintiff on the 8th February, 1994. The Defendant was also to cede rentals to the Plaintiff.

[9] PW1 further confirmed that the aforesaid moneys attracted interest and that these moneys were never paid and remain outstanding to date.

[10] The Defendant did not deny that he owed the above amount. In fact his erstwhile lawyer Mr Bheki G. Simelane confirmed the Defendant's indebtedness in a letter to the Plaintiff's lawyers.

[11] On his part the Defendant gave evidence in support of his claim for damages. He stated that when he approached the Plaintiff for a loan, the Plaintiff agreed to advance him with a sum of E800-00-00 (Emalangeni Eight Hundred Thousand) in total. That part of this money was the E227 530 – 00 (Emalangeni Two Hundred and Twenty Seven Thousand Five Hundred and Thirty to pay off his creditors and the balance of E572 470-00 (Emalangeni Five Hundred and Seventy Two Thousand Four Hundred and Seventy) was to help him refurbish a hotel he owned at Mankayane. To that end the Plaintiff requested him to do a feasibility study of the business prospects of the hotel and he would be advanced with the money therefore. This was an oral agreement entered into with Mr Sam Kuhlase who was the Managing Director of the Plaintiff at the time. He filed the business proposal but it was rejected by the Plaintiff as being not viable.

[12] Defendant testified that further proof of the agreement reached with Mr Kuhlase was the actual registration of the bond for E800 000-00 (Emalangeni Eight Hundred Thousand).

[13] It is the Defendant's evidence that due to the unlawful non-release of the amount of E572 470-00 (Emalangeni Five Hundred and Seventy Two Thousand Four Hundred and Seventy) that he suffered a loss of an estimated net annual income of E8 541 126 00 (Eight Million Five Hundred

and Forty One Thousand One Hundred and Twenty Six) as projected income in the feasibility study calculated from 1st September 1996 to August 2008.

[14] The Defendant had indicated that he would call as an expert, a witness the party who had prepared the document projecting rental income but failed to do that. Consequently, the document is inadmissible.

[15] Mr Mavimbela (DW1) denied that there was ever any agreement verbal or written entered into with PW1. As to the insistence of an existing oral agreement, he categorically stated that the Defendant strictly operates under Clause 12 (1) of the Swaziland Development and Savings Bank Order 1973 under which it was created. This section states as follows:

"All deeds, instruments, contracts and other documents shall be deemed to be duly executed by or on behalf of the Bank authenticated by the signature of the chairman of the Board or of some other member of the Board duly authorized by the Board in that behalf together with the signature of the General Manager or some other person authorized by the Board to act in that behalf."

[16] This section prohibits oral agreements by providing that all agreements should be in writing.

[17] Unfortunately for the Plaintiff all the managers that he dealt with are deceased and nobody can corroborate his evidence in respect of the oral agreement. Mr Mavimbela stated that even if Mr Kuhlase had orally agreed to advance money to the Defendant, that agreement would have been illegal and unenforceable.

Conclusions

[18] There is no expert evidence supporting the feasibility study as well as the document projecting rental income. The documents filed off record are inadmissible and do not comply with the evidence rule in regard to admissibility of documents.

[19] Prayer 6 of the Defendant's claim has not been proved.

[20] The Plaintiff has proved its claim of E227 530-00 (Emalangeni Two Hundred and Twenty Seven Thousand Five Hundred and Thirty).

[21] The Plaintiff has not proved costs on the scale of attorney and own client.

[22] The Plaintiff has not proved any entitlement to collection commission.

[23] In respect of costs on the ordinary scale the matter is very old and could have been resolved after Chief Justice Sapire declined the application for summary judgment moved by the Bank. And had the Bank accepted the offer of payment by lesser instalments, the matter would have long been settled by the Defendant. It would not be fair for me to order the Defendant to pay any costs.

Court Order

[24] The Defendant is hereby ordered to pay to the Plaintiff the sum of
E227 530-00 (Emalangeneni Two Hundred and Twenty Seven Thousand Five
Hundred and Thirty).



Q.M. MABUZA
PRINCIPAL JUDGE

For the Plaintiff : Mr S.V. Mdladla

For the Defendant: Mr S. Jeje