



**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**CASE NO: 4029/2021**

**HELD IN MBABANE**

**IN THE MATTER BETWEEN**

**ESWATINI ROYAL INSURANCE CORPORATION                      APPELLANT**

**AND**

**SABELO DLAMINI    RESPONDENT**

***NEUTRAL CITATION:                      ESWATINI                      ROYAL                      INSURANCE  
CORPORATION                      VS                      SABELO                      DLAMINI  
(4029/2021) SZHC – 160 [27/07/2022]***

**CORAM:    B W MAGAGULA J**

**HEARD:    11/03/2022**

**DELIVERED:    27/07/2022**

**SUMMARY:** *Civil Appeal – In respect of a ruling from the Senior Magistrate for the District of Hhohho on an application for summary judgment – basis of the liquid document being an acknowledgement of debt – principles governing summary judgment revisited - parole evidence rule – Magistrate strays into issues that did not form part of the acknowledgement of debt agreement – The Senior Magistrate misdirected himself by holding that the issue pertained to an employer and the employee relationship – issue squarely on the provisions of the acknowledgement of debt signed by the parties – Appeal upheld with costs.*

---

## **JUDGMENT**

---

### **INTRODUCTION**

- [1] This is an appeal noted against a decision of the Senior Magistrate Court for the district of Hhohho.
- [2] The Learned Senior Magistrate, S. Vilakati dismissed the Appellant’s claim for summary judgment. The Appellant was the Plaintiff in the court *a quo*, who instituted a summary judgment application pursuant to an acknowledgement of a debt agreement being signed by the parties.

- [3] The Respondent who was the Defendant in the court *a quo*, resisted the Application on the basis that there was an employment relationship between the parties, which entitled him to a performance bonus.
- [4] The Learned Magistrate took the position that the mere fact that a counter claim has not been quantified, does not mean the Defendant has no *bona fidei* defence.
- [5] The Appellant is dissatisfied with the decision of the learned Magistrate hence the appeal lies before this court.

### **BRIEF BACKGROUND FACTS**

- [6] The Appellant is Eswatini Royal Insurance Corporation a Company duly registered in terms of company laws of Eswatini.
- [7] The Defendant is a Liswati male of Nkoyoyo. It is common cause that he is a former employee of the Appellant.
- [8] The record reflects that during the course of the employment relationship between the parties, the Appellant instituted disciplinary proceeding against the Respondent. This necessitated that Respondent be suspended from employment, pending the finalization of the disciplinary enquiry.
- [9] Whilst the disciplinary process was ongoing, there was a meeting between the Appellant's Human Resources Manager, Mrs. Carol Muir and the Appellant in the company of his colleague with whom he had been charged

with.<sup>1</sup> In that meeting, they registered a complaint regarding the non-payment of their performance bonus.

[10] I will not belabour the judgment with the detail of the meeting. Ultimately Mrs. Muir who was the chairperson advised the Respondent that, the payment of the performance bonus hinged on a performance review being conducted in respect of the affected employees (including Appellant). As long as that appraisal had not happened, the payment of the performance bonus could not be effected.

[11] It is also common cause that subsequent thereto, the disciplinary hearing between the Appellant and the Respondent was finalized. In a letter dated 11<sup>th</sup> of December 2020, the Respondent's employment relationship with the Appellant was terminated.<sup>2</sup> The final day of employment was recorded to be the 8<sup>th</sup> of December 2020. The letter was acknowledged and read by the Respondent on the 17<sup>th</sup> December 2020.

[12] The record reflects that 5 days after the Respondent had received and read his letter of dismissal, he signed an acknowledgement of debt and agreement to pay the Appellant.<sup>3</sup>

[13] I will not belabour the judgement by quoting word for word, the terms and conditions of the acknowledgment of debt. But, the material terms of the agreement of debt are captured in the particulars of claim and they are the following;

**5.1 That the Defendant (Debtor in terms of the agreement) acknowledges to be indebted to the Plaintiff (Creditor in**

---

<sup>1</sup> See the minutes relating to performance bonus at page 32 of the record

<sup>2</sup> Reference in this regard is made at page 86 of the record where the letter from the Appellant is contained.

<sup>3</sup> The acknowledgement of debt an agreement is found on page 17 of the record.

**terms of the agreement) in the total sum of E100, 473.44 (One Hundred Thousand Four Hundred and Seventy Three Emalangeneni Forty Four Cents) in respect of personal loan duly advanced to the Defendant.**

**5.2 The Defendant undertakes to settle the debt by payment of the full sum of E100,473.44 (One Hundred Thousand Four Hundred and Seventy Three Emalangeneni Forty Four Cents) on the 31<sup>st</sup> December 2020 through the Plaintiff's Cashier office or bank transfer and / or cash deposit into the Plaintiff's bank account.**

**5.3 In the event of default, the Plaintiff shall be entitled to recover, in addition to all the amounts owed legal costs on the scale as between attorney and his own client.**

**5.4 It was further an express and material term of the agreement that the parties *“agree that the Subordinate Court in the District of Hhohho shall have jurisdiction in the enforcement of this acknowledgment of debt and agreement to pay irrespective of the amount involved”*.**

**(A true copy of the aforementioned agreement is annexed hereto and is marked “ESRIC 1”).**

**5.5 May all the terms thereof be incorporated herein as is specifically pleaded.**

[14] It is worth noting as early as this stage of the judgment that the particulars of claim do not detail how the debt acknowledged by the Defendant arose. Therefore, the cause of action is solely premised on the terms and conditions of the acknowledgement of debt, not necessarily on how the debt arose.

[15] It appears that the Respondent failed to honour his obligation in terms of the acknowledgment of debt. He failed to pay the amount that he acknowledged, timeously or at all. This default resulted in the Appellant approaching the court *a quo* for relief.

### **ACTION PROCEEDINGS AT THE MAGISTRATES COURT**

[16] The Respondent as a Defendant in the court *a quo*, exercised his right and defended the summons. The Plaintiff as per the rules of Court instituted summary judgment proceedings. This basis was that the notice of intention to defend had been filed solely to delay the claim and the Defendant did not have a *bona fide* defence. A full set of pleadings pertaining to those proceedings was filed by the parties and the matter was eventually argued before His Worship, Senior Magistrate Sifiso Vilakati. After hearing the arguments for both parties, the Learned Senior Magistrate in a written ruling of the 9<sup>th</sup> September 2021, dismissed the Summary Judgment Application.

[17] It is this ruling, that the Appellant is dissatisfied with, hence the appeal before this court.

### **GROUND OF APPEAL**

[18] The Appellant's grounds of appeal are as follows;

1. **The Court a quo erred in law and in fact in holding that it had no jurisdiction to hear and determine the matter, as the Acknowledgment of Debt between the Appellant and Respondent falls within the ambit of the employer/employee relationship in terms of Section 8 of the Industrial Relations Act.**
2. **The Court a quo erred in law in interpreting the Acknowledgment of Debt contrary to the Parole Evidence Rule.**
3. **The Court a quo erred in law and in fact by holding that the Respondent has a Counter Claim against the Appellant and / or that such a Counter Claim was well founded in law.**
4. **The Court a quo erred in law and in fact in holding that a non-quantified claim amounted to a defence against Summary Judgment.**

## **APPELLANT’S ARGUMENTS**

[19] It is the Appellant’s contention that the Learned Senior Magistrate erred in law and in fact in holding that the court *a quo* had no jurisdiction to hear and determine the matter because the acknowledgement of debt between the parties fell within an ambit of the employer and employee relationship, in terms of **Section 8 of the Industrial Relations Act of 2000**. The Appellant premises it’s argument on the judgment its self. Where it reflects that the court invited the parties to address it on the issue of jurisdiction. The record also reflects the following in paragraph 17;

*“If the loan was an advance on salary it would mean that at the time the monies were advanced to the Defendant, the*

*relationship between the employer and employee existed. That is depriving this court of jurisdiction in terms of Section 8 of the Industrial Relations Act”.*

[20] The Appellant further argues that the court *a quo* erred in law when finding that the matter between Appellant and Respondent fell within the ambit of the employer/employee relationship, in terms of Section 8 of the Industrial Relations Act of 2000 as amended.

[21] The Appellant continues to argue that the Section 8 in its import, grants exclusive jurisdiction to the Industrial Court to hear and determine matters which arise between an employer and employee. This in fact denotes that no other court can determine matters that are in this bracket.

[22] The argument is developed further by the Applicant to say, for a court of law to have jurisdiction to determine the alleged relationship, there must be an existing employer / employee relationship. In instances where such a relationship exist, it must be referred to the Industrial Court, as it holds exclusive jurisdiction.

[23] The court *a quo* in paragraph 22 of the judgment, stated the following;

***“At the time the loan was advanced to the Defendant, the relationship of the employer / employee existed between the parties.....”.***



- [24] The court proceeded to opine that, the acknowledgment of debt agreement cannot be divorced from the contract. Despite the fact that the contract of employer / employee had be terminated.
- [25] The Appellant further argues that the acknowledgment of debt agreement was not within the ambit of Section 8 of the Industrial Relations Act. Meaning, the court *a quo* had the requisite jurisdiction to hear and determine the issue as the Plaintiff before it sought to enforce the provisions of the acknowledgement of debt agreement.
- [26] In support of the second ground of appeal, the Appellant argues that the court *a quo* erred in law in interpreting that the acknowledgement of debt contravenes the parole evidence rule.
- [27] The import of this argument is that, the court *a quo* erred in paragraph 22 of it's judgment when holding that the acknowledgement of debt cannot be divorced from the loan agreement which gave rise to the debt of E100, 473.44. The issue of the loan agreement did not form part of the terms and conditions of the acknowledgment of debt.
- [28] In support of this argument, the Appellant cited the case of **KPMG Chartered Accountant SA Vs Securefin Ltd and Another [2009] ZASCA 7** where it was held as follows;

***“If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning”.***

[29] In support of the third ground of appeal, the Appellant argues that the court *a quo* misdirected itself when it held that the Respondent had a legitimate counter claim against it and or such that a counter claim was well founded in law.

[30] The Appellant buttressed its argument by arguing that, the counter claim as couched by the Respondent, is not well founded in-law. The Respondent's counter claim emanates from an employer / employee relationship. As such, the court *a quo* had no jurisdiction to adjudicate on. The basis of the counter claim pertains to the Respondents performance bonus and long service award, which are claims arising squarely on an employer / employee relationship.

[31] In essence, the Appellant's argument is that the counter claim fell outside ambit of the jurisdiction of the court *a quo* and therefore the court *a quo* had no power to even consider it. This should have defeated the summary judgment application there and then.

[32] The argument in support of the fourth ground is one way or the other related to the third ground as the Appellant argues that the court *a quo* erred in law and in fact in holding that a non quantified claim amounted to defence against a summary judgment application.

## **THE RESPONDENT'S ARGUMENTS**

[33] The Respondent in essence argues that the court *a quo* was correct in holding that it has no jurisdiction to adjudicate over the matter as the matter

fell in the realm of an employer and employee relationship. Such matters should ordinarily be decided by the Industrial Court.

[34] The spirit of the argument as advanced by the Respondent is that, the acknowledgment of debt which formed the cause of action of the Plaintiff at the court *a quo*, was an offspring of the initial loan agreement which the parties entered into whilst the employer and employee relationship subsisted between the parties.

[35] In relation to the counter claim which exceeded the jurisdiction of the Magistrate Court, the Respondent addressed the issue as follows;

**S 30 (1) of the Magistrate Court Act 66/1938** states as follows;

***“Counter claim exceeding jurisdiction”***

***30. (1) when in answer to a claim within the jurisdiction the Defendant sets up a counter claim exceeding the jurisdiction, the claim shall not in that account be dismissed; but the court may if satisfied that the Defendant is a reasonable prospect of recovering the amount exceeding the jurisdiction, state the action for a reasonable period in order to enable him to institute an action in a competent court. The Plaintiff in the court in which the action was originally instituted may (not withholding his action therein) counter claim in such competent court, and in that event all questions has cost incurred shall be decided by that competent court.***

[36] The import of this argument by the Respondent is that the Appellant is allowed in terms of the above cited section to stay the main action of the matter, so that an action in a competent court can be instituted. In this case, being the Industrial Court.

- [37] In opposition to the second ground of appeal, the Respondent refutes that the parole evidence rule has been contravened. Citing the case of **Nihon Investments Pty Ltd Vs Tillie S.I. Investments (Pty) Ltd Civil Appeal No. 103/2017** (See paragraph 21, 22 and 34) the Respondent argues that the court *a quo* did not in any way depart from the principle which was enunciated in the above decision. The acknowledgment of debt and agreement to pay document, cannot be a stand-alone document. It flows from the loan agreement between the parties which was entered into whilst the employer and employee relationship existed.
- [38] The Respondent argues further that, even if the loan agreement could be treated as a stand-alone agreement, the court *a quo* should not be faulted for considering it, as it had already opined that even a verbal contract which is undisputed can vary a written agreement. In the present matter, the issues are even much clearer because the loan agreement was written and it was not disputed by the parties. In that regard, the Respondent referred the court to page 96 of the record court of appeal.
- [39] The Respondent further refutes that the Court *a quo* erred in law and infact by holding that he has a valid counter-claim against the Applicant. The Respondent cited the case of **Moses Motsa of Vukuzenzele Wholesalers vs Moses Shongwe Case No. 3578/2009 (HC)** where the following principles were annunciated;

*“[8] In assessing the defence on whether it is bona fide, Horwitz J. supra at 1055 highlights;*

*“a defendant adduces sufficient facts and particulars which show he has “a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence....It is not contemplated by this rule that the Magistrate shall investigate any disputed question of fact in detail or he decide whether the defence*

*is likely to succeed or not, if the affidavit discloses that the nature and ground of the defence is sufficient, provided that it is a bona fide defence. It does not appear to be necessary to show a complete defence, but a “fair probability of a defence” (underlining provided by us).*

***See Moses Motsa t/a Evukuzenzele Wholesalers Vs Moses Shongwe Case No. 3578/2009 (HC) at paragraph 8***

- [40] The crux of the argument by the Respondent in this regard is that even though the defence of a counter claim was not articulated in an exhaustive manner as it was not quantified. The agreement was such that it could constitute a valid defence when proven a trial. The Respondent argues further that the probability of the defence had been shown, and any further detailed interrogation of the counter claim by the court *a quo*, would have been *ultra vires*. As such, the court *a quo* rightly dismissed the summary judgment application.
- [41] The Respondent seems to attack the manner in which the fourth ground of appeal by the Appellant has been couched. The fourth ground of appeal is that the court *a quo* erred in law and in fact in holding to that a non-quantified claim amounted to a defence of summary judgment.
- [42] The Respondent argues that the mere fact that the counter claim was not quantified does not mean that the Defendant had no defence. This is different from arguing that a non-quantified claim amounts to a defence of summary judgment.

## **THE LAW**

[43] What was before the court *a quo* for determination was a summary judgment application that had been filed by the Plaintiff. It is apposite that even before I begin to analyze and apply the law to the grounds of appeal, I reflect on the legal position obtaining at the Magistrate Court in so far as summary judgment is concerned. Order No XIV in respect of summary judgment states as follows:

**1. (1) If a Defendant has entered an appearance to defend, the Plaintiff in convention may in addition to costs, apply to court for summary judgment if the claim is only-**

**a) On a liquid document;**

**b) For a liquidated amount in money.**

[44] It is trite law that an acknowledgement of debt (AOD) is a document that contains an unequivocal admission of liability by a debtor. The debtor must acknowledge that he or she owes a particular sum of money due to a specified creditor. The debtor undertakes to pay what is owed. The AOD a “*liquid document*”, which in simpler terms proves a debt without any extraneous evidence.

***See SI Essel Offshore Services Ltd vs Fantasy Construction Central Pty Ltd and 3 Others Case No. 1795/2010 In the High Court of South Africa Gauteng Division.***

[45] The provisions of an acknowledgement of debt can establish a cause of action on its own. Irrespective of how the amount reflected in the acknowledgment of debt came about. **See Charl Daniel Wilkeno and another Vs Griek Waland Wes Korporatief Ltd (1327/2019) [2020] ZASCA 183 (23<sup>rd</sup> December 2020)**

[46] The rules of the Magistrate Court in so far as summary judgment is concerned are clear. Summary judgment is obtainable based on a liquid document.

## **ANALYSIS AND CONCLUSION**

[47] The cause of action as I read it, from the summons is not based on how the sum of E100 473.44 came about prior to the signing of the acknowledgment of debt by the parties. The cause of action is the acknowledgment of a debt document itself. In other words, the cause of action is not the basis or circumstances which the Appellant advanced the money to the Respondent. But it is the acknowledgment of debt document was signed by the parties.

[48] That being the case, the Appellant was within its right to invoke summary judgment proceedings as stipulated in the Rules of the Magistrate Court because the document on which it based its cause of action on was the acknowledgment of debt, which is a liquid document.

[49] Having established that the question, what now must be unpacked is whether the court *a quo* was correct to hold that it had no jurisdiction to hear and determine the matter, just because the acknowledgment of debt between the parties fell within the employer and employee relationship in terms of Section 8 of the Industrial Relations Court Act of 2000 as amended.

[50] If the cause of action is the acknowledgment of debt, then the answer should lie on whether the acknowledgement of debt itself as a document, traverses on the issue of employer and employee. In my view, the acknowledgment of debt does not touch on the status of the parties being an employer and employee. This is exacerbated by the fact that, when this document was drawn, the employer and employee relationship had terminated. It is another question whether the Industrial Court's jurisdiction can be ousted, just

because the employer and employee relationship terminated. I hold a different view in that respect. It does not matter whether that relationship had terminated, if an employer or employee has a valid claim that arose out of an employer and employee relationship, the correct route is to approach the Industrial Court, after the parties have satisfied the requirements of Part VIII of the **Industrial Relations Act of 2000 as amended**. However, that procedure is irrelevant in the matter at hand, as the cause of action is based on the acknowledgment of debt, and nothing more.

- [51] There is therefore no basis as set out in the judgment of the court *a quo* as to why did the court *a quo* decide to stray outside of the terms and conditions of the acknowledgment of debt signed by the parties and bring in the loan agreement. That was not part of the cause of action that was in the particulars of claim. The issue of the loan agreement was not before the court *a quo* for determination.
- [52] The Respondent's argument to the effect that it was not disputed by the Appellant at the court *a quo* that the acknowledgement of debt arose from a loan agreement which the parties had entered into at some point in time when the employer and employee relationship subsisted is misplaced. In as much as it may be true that at some point, the parties entered into a loan agreement. However, the Plaintiff elected not to hinge its cause of action on that loan agreement. It based its cause of action on a subsequent document that was executed and signed by the parties, which is the acknowledgment of debt. Why did the court *a quo* overlook the cause of action and premise its reasoning on a loan agreement which had not been pleaded before it by the Plaintiff in its cause of action?
- [53] The second ground of appeal as advanced by the Appellant in the matter at hand is that the court *a quo* erred in law in interpreting the acknowledgement of debt contrary to the parole evidence rule.



[54] In the case of **Auckland Park Theological Seminary Vs University of Johannesburg (1160/2018) (ZA SCA)** at page 24 at paragraph 6 quoting the case of **KPMG Chartered Accountants (SA) vs Securifield (Ltd) and Another [2009] ZA SCA 7**. It was stated as follows:

*“If a document was intended provide a complete memorial of Act the extrinsic evidence may not contradict it to modify its meaning”*

[55] It is clear that the Learned Magistrate when stating his reasons for dismissing the summary judgement, premised it on the existence of a loan agreement. Unfortunately, it was not part of the cause of action advanced by the Plaintiff before him. Clearly he misdirected himself and erred. He also erred when he held that the acknowledgement of debt cannot be divorced from the loan agreement. It cannot be, because the acknowledgement of a debt is an independent document from the loan agreement. It has it's own terms and conditions.

[56] The acknowledgement of debt is a contract on its own which was reduced into writing by the parties. There is no reason why the acknowledgement of debt should not have been regarded as an inclusive embodiment or memorial of the transaction. It then follows that no extrinsic evidence should have been given to the acknowledgement of debt by the Learned Senior Magistrate, which has the effect of contradicting, altering, adding and overriding the written acknowledgement of debt. It is my considered view that to bring the issue of loan agreement which took place in the era of the relationship of the parties of an employer and employee, is tantamount to bringing in extrinsic evidence to alter or contaminate what the parties had reduced into writing and regarded as their exclusive memorial. This being the acknowledgment of debt agreement.

[57] The position taken by the court *a quo* with respect, was misconstrued and misguided. The employer and the employee relationship between the Appellant and Respondent had terminated at the time the acknowledgement of debt was signed. As such, there was no longer any existing employer / employee relationship at the time the court *a quo* was seized with the matter. The acknowledgement of debt agreement is a stand-alone agreement, which is independent of the previous relationship of employer/employee between the parties.

[58] The third ground of appeal is whether the Court erred in law and in fact when holding that the Respondent has a valid counter claim against the Appellant. In Paragraph [b], the Respondent argues that he has a counter claim against the Applicant in respect of his performance bonus and long service award that is due to him. This is on the basis of the employer and employee relationship that existed between the parties before the acknowledgment of debt was signed.

[59] I have no reason to depart from the finding that I made in the case of **Ned Bank Limited Vs Mzwandile Shiba**<sup>4</sup>. I held that a Counter claim that is made at the High Court pertaining to a claim to be launched at the Industrial Court where the latter court has exclusive jurisdiction, is problematic. Especially in light of dicta in **South African Case of Traut Du Toit 1966 (1) SA** where it was stated that a total failure of the Defendant to set out his counter claim fully, makes it impossible for the Court to say that the counter claim can disclose a *bona fide* defence.

---

<sup>4</sup>High Court Case 60/2021 [2021] SZHC

[60] In light of the above reasoning, how then does a court that does not have jurisdiction on the counter claim even decide whether the counter claim is a valid liquid document or competent as a defence to the summary judgment. In my view, in as much as that is the case, this does not close the door for the Respondent to pursue the counter claim in the appropriate court that has the requisite jurisdiction.

[61] Having said so, the Respondent in my view failed dismally to disclose the full nature of his counter claim at the court *a quo* as he couched it in general terms. He only stated that it is a performance bonus and long service award. He did not bother to articulate the figures or amounts that are due and the circumstances under which the claims came about. Even if he had, there was still going to be the jurisdiction issue. Would the court *a quo* have been clothed with the requisite jurisdiction to apply its mind on the counter claim as the nature of the claim falls in the realm of the Industrial Court? I hold a different view.

## **CONCLUSION**

It is my considered view that the Respondent has not adduced any acceptable defence in law which would upset the Appellant's appeal. In the circumstances, the appeal must succeed.

## **ORDER**

The decision of the court *a quo* is set aside and replaced with the following order:

(a) The Respondent to make Payment of the sum of E100, 473.44 (One Hundred Thousand Four Hundred and Seventy Three Emalangeneni Forty Four Cents);

(b) Interest at the rate of 6% per annum a *tempora morae*;

(c) Costs of suit at ordinary scale.

---

**BW MAGAGULA**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For the Appellant: Mr M. Tengbeh from S.V. Mdladla & Associates

For the Crown: Mr A. Dlamini from B.S. Dlamini & Associates