IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 115/2023**

In the matter between:

STANDARD BANK ESWATINI (PTY) LTD **PLAINTIFF**

And

SEVENTH GS INVESTMENTS (PTY) LTD **FIRST DEFENDANT**

REJOICE MABUZA **SECOND DEFENDANT**

NGCEBO NXUMALO **THIRD DEFENDANT**

Neutral citation : *Standard Bank Eswatini Ltd v Seventh GS and Two Others (115/2023) [2023] SZHC 242 (31/08/2023)*

CORAM:	**B.S. DLAMINI J**
DATE HEARD:	16 August 2023
DATE DELIVERED	31 August 2023

Summary:	*Application for summary judgment-Defendants opposing the granting of summary judgment and arguing that they have valid defences to Plaintiff's claims.*
Held;	*Having considered all the grounds of opposition to Plaintiff's claims, the Court accordingly grants summary judgment as prayed for by the Plaintiff.*

JUDGMENT

INTRODUCTION

[1] This is an application for summary judgment instituted on behalf of the Plaintiff on or around the 4th May 2023. The application is in terms of Rule 32 of the High Court Rules of Eswatini. The Defendants are opposing the application for summary judgment and have

advanced primarily three grounds of opposition which will be discussed in detail herein below.

[2] The Plaintiff is a financial institution operating in the Kingdom of Eswatini and is involved in the business of *inter alia*, availing different credit facilities to its deserving customers upon assessment and approval.

[3] The Plaintiff alleges that on or around February 2021, it entered into a written loan agreement with the First Defendant in terms of which it advanced a sum of **E 150,000.00 (One Hundred and Fifty Thousand Emalangeni)** to the First Defendant. The Plaintiff further alleges that the First and Second Defendants availed themselves to be sureties and co-principal debtors against the loan of E 150,000.00 issued by Plaintiff to the First Defendant.

[4] The loan referred to above was to be repayable within 24 months at a monthly repayment rate of **E 7,079.00 (Seven Thousand and Seventy-Nine Emalangeni).** According to the Plaintiff, the Defendants acted in breach of their obligations such that as at the 24th

January 2023, they were in arrears in the amount of **E 86,073,86 (Eighty Six Thousand and Seventy Three Emalangeni and Six Cents)**, which sum of money was now due, owing and payable.

[5] The second component of Plaintiff's claim against the Defendants is based on an overdraft facility extended to the latter by the former. It is alleged by the Plaintiff that on or around June 2021, it extended an overdraft facility at the special instance and request of the First Defendant in the sum of **E 700,000.00 (Seven Hundred Thousand Emalangeni)**. This sum of money was to be repaid by the First Defendant within a period of three months from the month of June 2021, meaning it should have been repaid on or before 30th September 2021. Like in the first claim, the First and Second Defendants agreed to be sureties and co-principal debtors in respect of the overdraft facility to the tune of E 700,000.00.

[6] The Plaintiff alleges that as at the 24th January 2023, the Defendants were indebted to it in the sum of **E 592,374.09 (Five Hundred and Ninety-Two Thousand Three Hundred and Seventy Four Emalangeni and Nine Cents)** on the overdraft facility extended to

them. The two sums of money, namely, E 86,073.86 and E 592,374.09 are the liquid claims sought to be recovered by the Plaintiff in the summary judgment application.

DEFENDANTS' OPPOSITION

[7] In their opposing papers, the Defendants do not necessarily dispute that they are indebted to the Plaintiff but instead, argue that the Plaintiff has instituted the claims against them prematurely without following the dictates of certain legislative framework and also because of an act of '*viz majore*', caused by the adverse effects of the covid-19 pandemic, which rendered the First Defendant to be unable to service its loans with the Plaintiff. Taken *verbatim* from the opposing affidavit to the summary judgment application, the Defendants allege that;

> "(6) **I do confess that First Defendant has been in default for servicing some instalments of the Business Loan Account which but [sic] we have never been an exception to the adverse effects of covid-19 and the economic recession that it generated into our economy. Thus the loan instalments**

arrears were not caused by my deliberate ineptitude and unwillingness to comply with my obligation but it was caused by an act of *viz majore* I had no control of."

[8] On the alleged failure by the Plaintiff to comply with the laws of the country prior to approaching the High Court for relief, the Defendants have asserted that;

"14. I do have a defence in the main action in that the provisions of section 100 (1) of the Consumer Credit Act have not been complied with in terms of which Plaintiff is obliged to write to me a notice of the arrears and indebtedness with a view of having the same corrected before coming to this Honourable Court. I have absolutely no correspondence in terms of section 100 (1) and as such this action was brought prematurely.

15. On a proper reading of section 100 and 101 of the Act, the spirit it is apparent [sic] that the effect of the legislation is to the effect that no enforcement of obligations arising out a [sic] credit agreement may be instituted unless and until the

indebtedness of the consumer has been conciliated upon. It shall be argued during the hearing of this application that this legislation makes it unlawful to approach a court of law in enforcement of a debt unless a debt re-arrangement has been explored, *albeit* in a conciliatory spirit between the parties."

[9] The third defence to the application for summary application seeks to protect the second and third Defendants in their personal or individual capacities against any judgment which may be issued against them without following the provisions of Sections 100 and 101 of the Consumer Credit Act. In this regard, it is argued that even if the Court can conclude that Sections 100 and 101of the Act is not applicable to the First Defendant because of the threshold set for companies, the First and Second Defendants are exempt from the threshold set in the Act.

[10] As I understand, the argument here is that in order for persons to be sued in their personal or individual capacities on any credit facility wherein they are cited as sureties, the lender must first apply the

provisions of Sections 100 and 101 as there is no threshold set for them to qualify for protection under these provisions. The argument was thus that since the Second and Third Defendants were sued in their capacities as sureties for the principal loans of the company, that they were in fact being sued in their personal or individual capacities. Accordingly, the Plaintiff, so the argument goes, should have complied with the provisions of Section 100 of the Consumer Credit Act in so far as the Second and Third Defendants are concerned, there being no threshold applicable to them.

ANALYSIS AND FINDINGS

[11] The first point of opposition to the summary judgment application from the papers by the Defendants is that the company (First Defendant) was affected by the Covid-19 pandemic and therefore should, on the basis of the principle of '*viz majore*', have been allowed to modify the loan repayment in order to accommodate them from the effects of the unfortunate 'natural disaster' which was unexpected.

[12] The Defendants' attorney did not pursue this point during the hearing of the matter. To mention it in passing, this defence, also referred to as '*force majeure*' or 'Acts of God', does not appear to form part of our law or at the very least not part of the loan and overdraft agreements before Court. In some jurisdictions, for instance Australia, it appears that this principle is recognized. In an article found at *www.armstronglegal.com.au*, it is stated that;

"Some contracts contain an act of God or '*force majeure*' clause. A '*force majeure*' clause stipulates what happens to the obligations imposed by the contract in the event its terms cannot be carried out because of an event that is beyond the party's control. For example, a '*force majeure*' clause may state that neither party is responsible for failing to perform its obligations under the contract where the failure results from events beyond the party's reasonable control...This may include natural disasters or the outbreak of war."

[13] It would thus appear that even in those jurisdictions where this defence is recognized as part of commercial law, it would still need to form part of the agreement. Some writings seem to suggest that this defence

is part of the common law of those jurisdictions in which it finds application. In an article by **P, Bafna *'Unitedworld School of Law'* Karnavati University;** the writer refers to the **Black's Law Dictionary** which defines an act of God as meaning;

"An act occasioned exclusively by the violence of nature without the interference of any human agency."

[14] According to this writer;

"The 'act of God' is based on the tort law principle that liability must be founded on a fault and that a person cannot be penalized where the fault is that of a 'vis major' where all precautions were taken, and a causality still occurred."

[15] As briefly highlighted herein above, the Defendants' representative chose not to pursue this point and there would be no point for the Court to delve much into same. The reference by the Court to this principle is for the simple reason that it is mentioned in the affidavit resisting summary judgment. In order to be considered, the party raising it must then breathe life to it by way of argument and by

providing legal authorities. This would enable the other party to counter it and respond to same.

[16] The second ground of opposition to the application for summary judgment is that the Plaintiff or Applicant in the summary judgment application did not follow the dictates of sections 100 and 101 of the **Consumer Credit Act, 2016**. Section 100 of the Act [as taken from the Defendants' heads of argument] provides;

"If the consumer is in default under a credit agreement, the credit provider –

(a) Shall deliver to the consumer a notice in writing drawing the attention of the consumer to default and propose, in the case of inability to pay, that the consumer refer the credit agreement to a debt counsellor with the intent that the parties develop and agree on a plan to bring the payments under the agreement to date or in the case of any other disputes under the agreement refer the matter to the ombudsman.

(b) With the intent that the parties resolve the dispute and;

(c) Subject to section 101 (2) may not commence any legal proceedings to enforce the agreement."

[17] The argument advanced on behalf of the Defendants is that the Plaintiff approached the Court prematurely without following the provisions already referred to above. The parties were in agreement during argument of the matter that there is a threshold applicable to any company that seeks protection under sections 100 and 101 of the Act. This threshold is found in section 3 of the Consumer Credit Act wherein it is provided that;

"**(1) This Act applies to a credit agreement between parties dealing at arms' length and made in and having its effect in the Kingdom of Swaziland.**

(2) This Act shall not apply to credit agreements in terms of which-

(a) The consumer is-

(i) A company or body corporate whose assets or turn over value equals or exceeds the threshold determined by the Minister in terms of section 11.

(ii) The Government.

(iii) Parliament and Judiciary as defined in the Constitution.

(iv) Local Government."

[18] The Defendants' representative referred the Court to **Legal Notice No.119 of 2021** which was issued by the Minister in terms of Sections 3, 11 and 21 of the Act. This notice titled **'The Determination of Thresholds Notice'** provides as follows under section 3;

"The Act shall not apply to a credit agreement in terms of which the consumer is a company or body corporate whose assets or turnover value equals or exceeds One Million (1 000,000.00) Emalangeni."

[19] In order to qualify for protection under section 100 and 101 of the Consumer Credit Act, a company must be one that has assets or turnover value that are equal to or below One Million Emalangeni. Put conversely, a company that has a net value or an annual turnover value exceeding One Million cannot seek cover under section 100 and 101 of the Act.

[20] In the case of **Standard Bank Eswatini Limited v Moonstruck Investments (Pty) Ltd & 2 Others (903/2023) [2023] SZHC 142,** the High Court of Eswatini was faced with a similar point on the applicability or otherwise of Section 100 of the Consumer Credit Act, same having been raised by the First Respondent. In dealing with the issue, the Court held as follows;

"[18] The applicability of this definition to the 1st Respondent, is hamstrung by Section 3 (2) (a) (i). One cannot tell as of yet, whether the assets or turnover value of the 1st Respondent equals or exceeds the specific threshold which is yet to be determined by the Minister. It is common cause that the Minister has not yet determined nor published the threshold as required by Section 11 of the Consumer Credit Act of 2016. As long as the threshold has not been determined by the Minister as the Act enjoins him to do, it is difficult to know that the 1st Respondent before Court is a consumer to whom the provisions of Section 100 of the Consumer Credit Act should apply."

[21] The judgment in the **Standard Bank matter** referred to above was delivered in June 2023. Clearly the Court's attention had not been drawn to the fact that there was a legal notice already issued by the relevant Minister in the year 2021 in terms of which the threshold in such matters is set out.

[22] The threshold set by the Minister is a net asset value or annual turnover value equaling or below One Million Emalangeni. Logically, the next question should be for the Court to enquire on what is the asset value or turnover value of the First Defendant on the facts of the matter before Court.

[23] In the Plaintiff's Replying Affidavit to the Affidavit Resisting Summary Judgment, the Plaintiff has annexed financial statements submitted by the First Defendant when applying for the overdraft facility in June 2021. These financials were for the period ending in January 2021. They (financials) were used by the First Defendant in motivating its application for the overdraft facility. A plain reading of these financials show that as at January 2021, the First Defendant had net assets of **E 1,366 658.00 (One Million Three Hundred and Sixty**

Six Thousand and Six Hundred and Fifty Eight Emalangeni). This figure is way above the threshold of One Million Emalangeni set by the Minister.

[24] It has already been indicated above that a company that has assets or a turnover value exceeding One Million Emalangeni at the time of concluding the deal or agreement cannot seek protection or cover under Section 100 of the Consumer Credit Act, 2016. The second ground of opposition to the application for summary judgment by the Defendants must therefore fail on this score.

[25] The third ground of opposition to the granting of summary judgment in the matter is that the Second and Third Defendants, when sued as sureties for the respective loans, were in fact sued in their personal capacities and therefore that the provisions of Section 100 of the Consumer Credit Act, 2016 should be applicable to them. This point is problematic. Indeed when judgment is granted against all the Defendants, its execution will take place as though the Second and Third Defendants have been sued in their personal or individual capacities.

[26] In Section 252 (1) of the Constitution of the Kingdom of Eswatini, 2005, it is provided that;

"Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman-Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or statute."

[27] The specific type of common law to be applied by the Courts in Eswatini as directed by Section 252 of the Constitution of Eswatini from 1907 is the **General Law and Administration Proclamation No.4 of 1907**. In this piece of legislation, it is provided in Section 3 thereof that;

'3 (1) The Roman Dutch Common Law, save insofar as the same has been heretofore or may from time to time hereafter modified by statute, shall be law in Swaziland.

(2) Save and except in so far as the same have been repealed or amended, the statutes in force in Transvaal on the fifteenth day of October 1904, and the statutory regulations thereunder shall *mutatis mutandis*, as far as they may be applicable, be in force in Swaziland..."

[28] In interpreting treaties, contracts, legislation, rules and regulation, amongst other things, Courts in Eswatini are enjoined to apply the common law, not just any common law, but principles of common law as espoused by the superior Courts of South Africa. What used to be the Transvaal then is now the Republic of South Africa. The reference to common law decisions by South African Courts in the local context is therefore not persuasive but authoritative.

[29] The Plaintiff's representative, in contesting the third point raised on behalf of the Second and Third Defendants, referred the Court to a decision of the High Court of South Africa (Gauteng Division) in **Darier v First Bank Limited (32115/2015) [2017] ZAGPJHC 40** wherein the Applicant (William Arthur Darier) sought to be

discharged as surety on the basis that the bank had allowed one of the parties who acted as surety on the loan to recklessly withdraw money which had been loaned from the bank. The Applicant also argued that he was protected under the **National Credit Act 34 of 2005** ("NCA") which also deals with individual debt management in South Africa.

[30] In dealing with the issues, the High Court of South Africa held that;

"[37] To qualify for mortgage bonds, the Banks conduct rigorous enquiries to ensure that repayment of instalments are fully sustainable. To qualify for substantial loans to corporate entities, the Banks are similarly rigorous and usually call upon members or directors to stand surety, (and indeed co-principal debtor), conducting similar checks on the sureties to ensure that the suretyships obtained will provide for potential recovery, I may take judicial notice of the aforegoing as established commercial banking practice...

[39] I endorse the ratio in Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) which held, where a surety was also a co-principal debtor, <u>that this did not</u>

transform the contract into any other species of agreement other than a suretyship. This was affirmed in a case post the NCA's promulgation, namely Firstrand Bank Limited v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 384 (T)." [under-lined for emphasis].

[31] What the Court pronounced, which appears to be the correct legal position, is that when a party is sued as a surety and co-principal debtor, the nature of the contract does not change. In other words, liability on this type of transaction extends to all the parties as a group and not separately between the company and its members. This makes sense in that the members of the company or directors are the ones who take a resolution to borrow money on behalf of the company and are the ones practically in charge of the use of those funds. The company, its directors or members apply for the loan jointly and as one unit.

[32] The essence of the argument by the Second and Third Defendants is to say they were in fact sued in their personal or individual capacities. It is true that the legal consequences of acting as surety for this type of

loan are the same as though the person was sued in his or her personal capacity. The nature of the contract or liability arising therefrom is however not necessarily the same. In this type of contract, the onus is on the directors or members of the company to ensure that the company performs its obligations in terms of the contract, failing which they are also automatically liable.

[33] A contract entered into by an individual in his or her personal capacity is, on the other hand, distinct in that it is the person himself or herself who enters into the contract from inception and personally undertakes to perform certain obligations arising from the agreement. It is therefore at the commencement of the transaction that the Court must look up to in order to understand the nature of the contract.

[34] A person who enters into a credit agreement in his or her individual capacity is entitled to receive protection under the Consumer Credit Act, 2016. On the other hand, a person who is a director or member or acting in some other capacity and who avails himself or herself as surety is jointly and severally liable for the debts of the company. The nature of the contract changes in such circumstances. To hold

otherwise and to allow such people to get protection from the provisions of the Consumer Credit Act would defeat the very purpose and legal significance of suretyships.

[35] This Court is in agreement with the statement made by the High Court of South Africa in the **Darier case** (supra) in which it observed that;

> **"41. Banks may be dissuaded from lending large amounts of money to potential corporate debtors where suretyships are sought, but which may not be legally actionable [I may add '*or who may require debt management in terms of the Consumer Credit 2016*']. The banks' interest in the lending of money for the generation of economic activities in the open market could be seriously compromised as a result of a defence which the NCA does not entertain for large debts. This cannot be consistent with what the legislature intended. After all, the NCA exists to protect both money lender and borrowers."**

[36] The Court therefore comes to the conclusion that the third ground of opposition to the summary judgment application advanced on behalf of the Second and Third Defendants must equally fail.

ORDER

[37] The Court will therefore issue orders as follows;

(a) The First, Second and Third Defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay to the Plaintiff or its attorneys the sum of *E 86,073.86 (Eighty Six Thousand Seventy Three Hundred Emalangeni and Eighty Six Cents)* in respect of Claim No.1.

(b) The Defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay to the Plaintiff or its attorneys the sum of *E 592,374.09 (Five Hundred and ninety two Three Hundred and Seventy Four Emalangeni and Nine Cents)* in respect of Claim No. 2.

(c) The Defendants are ordered to pay costs of suit in the ordinary scale.

(d)The Defendants are ordered to pay collection commission in accordance with the applicable laws in such matters.

B.S DLAMINI J

HIGH COURT OF ESWATINI

For Plaintiff: Mr. K.J.M Motsa (Robinson Bertram Attorneys)

For Defendants: Mr. P. Msibi (Dlamini Kunene Associated)