

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO.2080/2022

In the matter between:

JOACHIM POPI SHONGWE

Plaintiff

And

THE EXECUTRIX N.O-ESTATE LATE JUBA DLAMINI

1st Defendant

THE MASTER OF THE HIGH COURT

2nd Defendant

THE ATTORNEY GENERAL

3rd Defendant

JUDGEMENT

Neutral citation:

*Joachim Popi Shongwe vs The Executrix N.O.Estate
Late Juba Dlamini and two others (2080/2022) SZHC
254(20th September 2023).*

Coram:

S.M. MASUKU J

Date of heard:

19th July 2023, 02nd August 2023 and 15th August 2023

Date delivered: 20th September 2023

Summary: *Law of contract- monies lent and advanced by the Plaintiff to the deceased. Loan partly re-paid by the deceased during his lifetime. This being a claim for an amount of E51 000-00 (Fifty thousand emalangeni) as balance outstanding, now due owing and payable. The court to establish from evidence presented the quantum of indebtedness or balance outstanding due to the Plaintiff*

Held: *Plaintiff's claim succeeds but, at a lesser amount of E48 000-00 (Forty eight thousand emalangeni) together with interest at 9% per annum a tempora morea. Costs infavour of the Plaintiff at ordinary scale.*

Introduction

[1] The Plaintiff instituted an action against the 1st Defendant seeking relief from this court the following:

- a) Payment of E51 000-00 (Fifty one thousand emalangeni).
- b) Interest thereon at 9% per annum.
- c) Costs of suit.

[2] In his particulars of claim the Plaintiff averred that on or about the 30th May 2018 he entered into a verbal agreement with his work colleague the late Samuel Juba Dlamini.

- [3] He loaned and advanced him a sum of E140 000-00 (One hundred and forty thousand emalangeni) at the deceased own special instance and request. The deceased would repay the loan and advance in monthly instalments of E3000-00 (Three thousand emalangeni) and in other months E5000-00 (Five thousand emalangeni) when he had enough money to pay. At some point of the repayment period, the deceased arranged a bank stop order for the repayment with the Swaziland Building Society.
- [4] The deceased made his repayment towards the loan on monthly basis and his last instalment was on the 4th November 2020 leaving a balance of E51 000 (Fifty one thousand emalangeni). According to the Plaintiff the principal debt was E140 000 (One hundred and forty thousand emalangeni), the total amount repaid by the deceased was E89 000-00 (Eighty nine thousand emalangeni) leaving a balance of E51 000 which is now due owing and payable.
- [5] The 1st Defendant is the deceased wife and executrix of her late's husband estate. She defended the action and in her plea, she denied that her husband or the estate was indebted to the Plaintiff. She also denied that there remained a substantial balance of E51 000-00 (Fifty thousand emalangeni) and/or any amount due to the Plaintiff.
- [6] At the close of the pleadings, the Plaintiff requested for trial dates with all the necessary information in accordance with Rule 55-(A) of the rules of this court. Before the matter was called for allocation, the court had occasion to peruse the book of pleadings. The pre-trial minute filed by the parties in terms of the rules had no meaning. It was scanty and without details of admissions, denials and issues that required the intervention of the court to be tried. The court ordered the parties to re-visit their pre-trial conference and to file a

meaningful pre-trial minute of which they filed and was signed by both parties.

- [7] Despite the Defendant's denial in her plea, the Pre-trial conference minute reflected that;

"The 1st Defendant admits that the loan agreement amount advanced by the Plaintiff to the late Juba Dlamini was the sum of E140 000 (One hundred and forty thousand emalangen).

Notwithstanding the admission the matter proceeded to trial as the 1st Defendant;

"... denies that her husband was indebted the Plaintiff in the sum of E51 000-00 (Fifty one thousand emalangen) at the time of his demise".

- [8] The issues for determination (according to the pre-trial minute) was whether the deceased owed an outstanding balance of E51 000-00 (Fifty one thousand emalangen) at the time of his untimely death or whether the said Juba Dlamini had fully liquidated the E140 000-00 (One hundred and forty thousand emalangen) he had borrowed from the Plaintiff during his lifetime.

EVIDENCE

- [9] The Plaintiff took the stand and in examination in Chief, testified that the deceased had challenges with his child's school fees at a University in South Africa. He was also paying some Attorneys in South Africa for certain issues hence he borrowed the sum of E140 000-00 (One hundred and forty thousand emalangen) from him.

- [10] He testified that this was not the first time he loaned and advanced the deceased money. The deceased had always paid him back.
- [11] To repay this loan, the deceased would pay cash or by bank transfers and or by stop orders. For this loan his repayment varied from E5000-00 (Five thousand emalangeni) to E3000-00 (Three thousand emalangeni). By the time he passed on, he had put in place a stop order for an amount of E3000-00 (Three thousand emalangeni) per month. The Plaintiff submitted his own bank statement that reflected repayments made to his account by the deceased. The bank statement was admitted and marked 'Exhibit 1'. The Plaintiff also produced a copy of the stop order he had executed for the repayment of the loan. The form was admitted and marked 'Exhibit 2'.
- [12] The Plaintiff gave a narration on the re-payments that were credited into his bank account in 'Exhibit 1'. He testified that on the 3rd September 2020, the deceased paid E3000-00 (Three thousand emalangeni), on the 1st October 2020, he made payment of E3000-00 (Three thousand emalangeni). On the 4th November 2020 he made another payment of E3000-00 (Three thousand emalangeni). On the 3rd December 2019 the deceased had paid E3000-00 (Three thousand emalangeni) and on the same month, the 31st December 2019 a payment of E5000-00 (Five thousand emalangeni) was made. The total reflected as repayments from the bank statement ('Exhibit 1') is E17 000-00 (Seventeen thousand emalangeni).
- [13] The Plaintiff then produced his own hand written schedule of record which he said he recorded the repayments made by the deceased towards the loan of E140 000-00 (One hundred and forty emalangeni). The loan was interest free. The schedule was handed in and marked 'Exhibit 4'. He testified that the balance as at the 17th July 2020 was E60.000-00 (Sixty thousand emalangeni).

It was then that the deceased activated a stop order of E3000-00 (Three thousand emalangeni) in September 2020. He testified that from the balance of E60 000-00 (Sixty thousand emalangeni) reflected in 'Exhibit 4' there were three payments that were captured amounting to E9 000-00 (Nine thousand emalangeni) leaving a balance of E51000 (Fifty one thousand emalangeni) that he claimed in his particulars of claim and at trial.

- [14] In cross-examination he admitted that his-reconciled record of payments ('Exhibit 4') did not capture a credit of E3000-00 (Three thousand emalangeni) into his account in 'Exhibit 1' on the 3rd December 2020. Although it was put to the Plaintiff that the absence of the E3000-00 (Three thousand Emalangeni) credited into his account and not reflected in 'Exhibit 4' showed that the court could not rely on 'Exhibit 4' as there was a possibility that there were more payments made and not captured there. The Plaintiff disagreed and insisted that he had capture all payments except the E3000-00 (Three thousand emalangeni).
- [15] The Plaintiff testified further that it was on the basis of his record of 'Exhibit 4' that he filed a claim for an outstanding amount of E51 000 (Fifty one thousand emalangeni) with the court and also with the Master of the High Court through the 1st Defendant (Executrix dative of the late Juba Dlamini). The claim, he testified was accepted by the Master of the High Court, processed but was not paid to him.
- [16] He showed the court a Liquidation and Distribution Account (L & D Account) that was prepared and signed by the 1st Respondent as executrix dative of the estate. The 1st Respondent under the Executrix certificate certified that the account was a true account of the L & D of the estate. The L & D account

reflected the E51000-00 (Fifty one thousand emalangeni) as a claim under the liability column.

- [17] The 1st Defendant took the stand under oath and she testified that her husband (the deceased) was acquainted to the Plaintiff. She admitted that her late husband requested loans from the Plaintiff as Plaintiff was a shylock. She claimed that the Plaintiff charged interest of 30% on such loans. She would in most of the times be present when her husband solicited the loans from the Plaintiff although she could not accurately recall all the times of the borrowing. She said she did not recall the loan of E140 000-00 (One hundred and forty thousand emalangeni). When asked if she was present when this loan was made to her late husband, she said she was not present.
- [18] She testified that her husband would repay the loans to the Plaintiff in lump sum payment of E10 000 (Ten thousand emalangeni) and E20 000-00 (Twenty thousand emalangeni) by bank transfer or cash. She admitted that she was a qualified accountant even though neither herself nor her husband kept records of these loans and repayments. The only records the court could rely on were the records produced by the Plaintiff.
- [19] She was further shown an affidavit that she deposed to sincerely declaring under oath that the Plaintiff was being owed a sum of E51 000 (Fifty one thousand emalangeni) by the deceased, out of the E140 000-00 (One hundred and forty thousand emalangeni). He had been paying through a stop order. She placed a *caveat* that whilst admitting that she signed for the amounts, she had been put under pressure by the Plaintiff who insisted on the repayment of the E51 000-00 (Fifty one thousand emalangeni) thus she deposed to the affidavit. In cross-examination she admitted that the Plaintiff was not in her company when she deposed to the affidavit before a Commissioner of Oaths

(a Senior Police Officer). Thus if she really was under some duress she would have reported the circumstances in which she was signing the affidavit when it was administered.

- [20] She confirmed her signature on the affidavit but denied knowledge of a stop order for E3000 (Three thousand emalangi). She could not however produce any of her records and that of her husband to counter the Plaintiff's record. She also admitted the preparation of the L & D account and the fact that, the account was approved by the Master of the High Court for distribution. The payment of the E51 000-00 (Fifty one thousand emalangi) was stopped when she had a change of heart to then say the deceased had been paid the whole loan amount of E140 000-00 (One hundred and forty thousand emalangi) to the Plaintiff before he met his death.

Closing submissions and Judgement

- [21] The onus is upon the Plaintiff to prove her case on a preponderance of probabilities. If the court is satisfied, it will grant the judgement for the Plaintiff. If the Plaintiff fails to discharge the onus, the court may dismiss the Plaintiff's claim. Her Ladyship Justice Ota in the case of James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 (30 November 2012) at paragraph [33] stated;

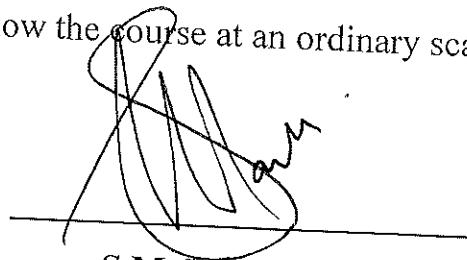
"...Although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible, relevant and credible evidence that is conclusive, that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before the court however must be considered to determine which has weight and which has no weight".

- [22] In *casu* the evidence that establishes whether there existed a loan agreement of E140 000-00 (One hundred and forty thousand emalangeni) between the parties was dispensed with at pre-trial conference. The reason is that the parties agreed that this was not an issue although it was in the 1st Defendant's plea. The parties did not have to adduce evidence to establish this fact after the admission.
- [23] However the Plaintiff had to lead evidence to establish on a preponderance of probability that the amount outstanding at the death of the deceased was E51 000-00 (Fifty one thousand emalangeni) as claimed.
- [24] The Plaintiff submitted admissible and credible documentary proof in 'Exhibit 4' being his records for the repayments he received from the deceased. Although the 1st Defendant disputed these documents and the contents thereto especially 'Exhibit 4', she could not at the trial produce her own records in rebuttal. The Plaintiff was not shaken in his evidence save for the admission he made regarding an amount of E3000-00 (Three thousand emalangeni) credited in his account and not captured in his reconciled record of payments ('Exhibit 4'). That amount was received by him and is not credited anywhere on the records produced. The said sums should have been recorded so as to reduce the sum of E51 000(Fifty one thousand emalangeni) demanded in this action.
- [25] In the circumstances, 'Exhibit 4' of Plaintiff's reconciled record does not reflect the amount of E3000-00 (Three thousand emalangeni) to reduce his balances from E51 000-00 (Fifty one thousand emalangeni) to E48 000-00 (Forty eight thousand emalangeni). He admitted in his evidence that his balance of E60 000-00 (Sixty thousand emalangeni) in 'Exhibit 4' had only taken into account the three payments of E3 000 (Three thousand emalangeni)

each as reflected by his bank statement of the 7th July 2023 ('Exhibit 1'). The amount of E51 000-00 (Fifty one thousand emalangeni) he claimed as an outstanding balance did not take into account the E3 000-00 (Three thousand emalangeni) credited on the 3rd December 2019 in 'Exhibit 1'.

[26] The Plaintiff's claim succeeds but in a lesser amount of E48 000-00 (Forty eight thousand emalangeni). Judgement is entered as follows:-

1. Payment of E48 000-00 (Forty eight thousand emalangeni) by the 1st Defendant to the Plaintiff.
2. Interest thereon at 9% per annum from date of summons to date of payment.
3. Costs to follow the course at an ordinary scale.



S.M. MASUKU J
JUDGE - OF THE HIGH COURT

For the Plaintiff: Mr S.Mngomezulu of Mngomezulu Attorneys.

For the 1st Defendant: N.Dhlamini of S.V.Mdladla & Associates.