

IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Civil Appeal Case No. 43/2019

HELD AT MBABANE

In the matter between:

GCEBILE MABUZA Appellant

and

REGISTRAR OF INSURANCE Respondent

RETIREMENT FUND

Neutral Citation: Gcebile Mabuza v. Registrar of Insurance Retirement
Fund (43/2019) [2020] SZSC 06 (21/04/2020)

Coram: M.C.B. MAPHALALA CJ, DR. B.J. ODOKI JA AND

J.P. ANNANDALE JA.

Heard: 23 MARCH 2020.

Delivered: 21 APRIL 2020.

SUMMARY: Civil procedure — Application for summary Judgment — Matter sent for oral evidence — Respondent claiming from the Appellant money paid in settlement of outstanding balance on loan advanced to the Appellant — Instructions by Respondent sent to the Bank to pay outstanding amount on Appellant 's account — Letter of instructions and attachment provisionally admitted in evidence without being formally produced by bank official — Whether Respondent proved payment of the outstanding amount on the loan — Held, no proof of payment produced — Appeal allowed with costs.

JUDGMENT

DR. B.J. ODOKI- JA

[1] This is an appeal against the decision of the High Court whereby the Appellant was ordered to pay the Respondent the sum of E71,597.16 with interest and half of the costs of suit.

[2] Both the Appellant and the Respondent filed applications for condonation for late filing of Heads of Argument and leave to file the two documents. After hearing the submissions of both parties, the Court granted the applications and proceeded to hear the appeal.

BACKGROUND

[3] The Appellant is a former employee of the Respondent having been employed from 2007 to 2009 when her services were terminated. The Respondent is now called the Financial Services Regulatory Authority.

[41] During the year 2007, while the Appellant was still in employment of the Respondent, the parties entered into an Employer Guaranteed Personal Loan Scheme agreement in terms of which the Respondent stood surety against the loan advanced to the Appellant by the Swaziland Building Society. One of the terms of the agreement was that should the employment relationship between the parties be terminated prior to the loan being liquidated, the Respondent would have to pay the remainder of

the loan that remained unpaid and thereafter go against the Appellant to recover its monies. It was alleged

that the amount outstanding at the date of the Appellant's termination was E 143,050.29, which the Respondent duly settled.

[5] The Respondent issued summons against the Appellant claiming:

(a) Payment of the sum of E

149,373.54 (b) Interest at the rate of

9% per annum (c) Costs of suit

(d) Such further and/or alternative relief

[6] The Appellant did not enter a plea but her defence was set out in an affidavit resisting summary judgment. The Appellant admitted receiving the loan, but denied the indebtedness. She claimed that the signature on the acknowledgement of debt dated 19 January 2010 was forged. She also challenged the documents submitted to the Court from the bank showing the balance outstanding on her account because they were not produced by officers from the Bank. Therefore, there was no proof of payment by the

Respondent.

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[7] The application proceedings for summary judgment came before Maphalala PJ (as he then was) who dismissed the application on 29 April 2016 and referred the matter to oral evidence.

[8] The matter was tried before Mabuza PJ who found that the Respondent had proved that it had paid a sum of E 1,597.16, and that the Respondent had failed to prove the rest of its claim.

[9] The Appellant has now appealed to this Court on a sole ground appeal stated as follows:

"The Court erred in fact and in law in granting order [A] an order against the Defendant for payment of the sum of M 1,597.16 (seventy one thousand, five hundred and ninety seven Emalangeni sixteen cents) in the absence of evidence confirming that the Plaintiff was entitled to same".

ARGUMENTS OF THE PARTIES

[10] In the Heads of Argument and submissions in Court, the Appellant emphasised that the main complaint was that there was no proof of payment to

settle the loan. Appellant referred to Exhibit A1 which was a letter from the Respondent instructing the Manager of the Building Society to transfer funds from Special Savings account to settle the Appellant's outstanding amount of E71,597.16 as indicated in her account number 422 and listed as Exhibit A2 from the Bank. It was the Appellant's submission that these exhibits were provisionally marked but not properly admitted in evidence.

[11] The Appellant argued that there was therefore no proof of payment. It was the Appellant's submission that even the trial Judge in the Court a quo called

for the evidence to prove payment from the bank, but none was produced.

[12] The Appellant submitted furthermore that the Respondent claimed E149,373.05 and yet it was awarded E71,597.16 without amendment of the claim. It was the contention of the Appellant that the Respondent should have applied for an amendment of the claim.

[13] On the other hand, the Respondent submitted that the Court a quo was correct to rely on Exhibits marked as A1 and A2. It was the Respondent's contention that the Respondent's witness PWI confirmed that the instructions to pay

contained in Exhibit A1 were acted upon and the outstanding balance on the Appellant's loan was settled.

- [14] The Respondent further submitted that the Court a quo had the benefit of seeing the witnesses and assessing their credibility and demeanor and believed the witnesses for the Respondent, and therefore the Supreme Court, as an appellate Court, should be slow to interfere with the findings of the Court a quo. Reference was made to the case of *R v. Dhlumayo and Another* 1948 (2) SA 677 (A) at 765.

CONSIDERATION OF THE GROUND OF APPEAL

- [15] The determination of this appeal rests on a single issue, namely whether the Respondent produced sufficient evidence to prove that the sum of R71,597.16 was paid by the Respondent in settlement of the Appellant's loan.

[16] The Respondent relied on documentary and oral evidence. The documentary evidence consisted of the annexures to the claim provisionally marked as

Exhibit A1 and A2. Exhibit A1 was a letter dated 31 July 2012 from the Respondent to the Manager Building Society headed: "Instruction to Transfer Funds from Special Savings Account — 016684732" which stated:

"You are hereby instructed to transfer funds from our Special Savings Account No. 016684732 to clear all the balance in the following PIRF guaranteed loan accounts;

Account Number Names of Account

422Mabuza Nonhlanhla

443Simelane Nomsa

445Mabuza Zwelisha

The letter was received by Swaziland Building Society on 3 August 2012. The letter attached a bank statement indicating certain persons, including the Appellant whose balance on account 442 stood at E71,597.16. There was also a third document Exhibit 'A3' which was a Memo dated 31 July 2012 from the Senior Financial Accountant to the Manager Finance and

Corporate Services requesting "that Swaziland Building Society be instructed to utilise the interest from Permanent Shares that is currently kept in Special Account to clear all outstanding balances in the accounts detailed below". The balance against the Appellant was indicated as E71,597.16.

[17] These documents from the Bank were only provisionally marked and were not properly proven and admitted in evidence. Therefore their probative value was negligible. This is notwithstanding the fact that the witness for the Respondent stated that the instructions to pay had been issued and the loan settled.

[18] During the hearing of the matter, the Court a quo was alive to the need to produce proof of payment. After the witness for the Respondent Ms. Gugu Makhanya had testified as to the instructions given to the bank to pay the outstanding balance from the Surety account, Counsel for the Appellant asked,

"When was this amount paid? If I may kindly direct you to Page 125 of the consolidated book."

Then the trial Judge asked,

"That's a proof of payment?"

Counsel for the Respondent replied answered,

"It's not per se a proof of payment my Lady. It is an instruction but she will explain."

The Judge then observed,

"No we want the proof of payment. You must have a proof of payment."

The learned Counsel then replied,

"If I may my Lady, with regards to issue of proof of payment, we had encountered difficulty."

The Judge insisted,

"We need proof of payment unless you are going to object to it Mr. Gamedze, you must have proof of payment otherwise how do you claim this money from the air."

The Judge concluded during this interaction by stating that the Court

"needed the credibility from the Bank."

[19] In her Judgment the trial Judge observed:

"1221 The Court noted that the Defendant's account No.442 is included in these instructions. The letter is signed by PW 1 and Mr. S.

Dlamini, the Registrar of the Plaintiff. The letter appears on Page 125 of the Book of Pleadings. At Page 126 is a statement (Annexure

A2) dated 3 July 2012 which is for the period 1/6/2011 - 30/6/2012. It has a list of employees on the Guaranteed Loan Scheme and reflects outstanding amounts of their accounts.

Included in the statement is the Defendant with an outstanding balance of

E71,597.16 (Seventy one thousand, five hundred and ninety seven Emalangenis sixteen cents). This amount is further reflected in

Annexure "A3" on Page 127 which reads:

<u>Account number</u>	<u>Name of Account</u>	<u>Balance as at</u> <u>30/6/12</u>
	Mabuza Nonhlanhla	71,597.16
443	Simelane Nomsa	31,567.78
445	Mabuza Zwelisha	<u>48.30</u>

103 213.24"

[20] The learned Judge then concluded as follows:

"1381 It is my finding that the Plaintiff has proved the amount of E71,597.16 (seventy one thousand five hundred and ninety seven Emalangeneni sixteen cents) as reflected in Annexure A3 discussed in paragraph 22 supra. The Plaintiff has failed to prove the rest of that claim."

[21] It is clear from the analysis of the evidence I have shown above that the findings made by the learned Judge were not supported by the evidence produced in Court. There was a request for proof of payment but no confirmation of payment. The learned Judge was alive to the fact that proof of payment was critical but none was produced. The Exhibits relied upon by the Court a quo were not properly admitted in evidence and therefore could not form a basis as proof of payment. In the circumstances, therefore, the Court a quo erred in allowing the Respondent's claim for E71,597.16 as payment was not proved.

[22] I do not find it necessary to consider whether the Respondent should have amended the claim as this would have no effect in the outcome of the appeal. Nor do I find it necessary to address the question whether this Court should interfere with the finding of the Court a quo which did not base its decision on the demeanor of witnesses.

[23] In the result this appeal is allowed.

COURT ORDER

[24] For these reasons, I make the following order:

1. The appeal is allowed with costs.
2. The Judgment of the Court a quo is set aside and substituted with the following order;

"(i) The Plaintiffs claim is dismissed.

(ii) The Defendant is awarded costs of suit."

A handwritten signature in black ink, appearing to be "P. M. Q. du Toit", is written over a horizontal line.

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree


M.C.B. MAPI LALA



M.C.B. MAPHALALA

CHIEF JUSTICE

I agree



J.P. ANNANDALE
JUSTICE OF APPEAL

For the Appellant: MR. B. GAMEDZE

For the Respondent: MR. 1. MOTSA