

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 267/01

In the matter between:

AMOS WELILE DLAMINI

PLAINTIFF

and

SWAZILAND BUILDING SOCIETY

DEFENDANT

CORAM: Q.M. MABUZA -AJ

FOR PLAINTIFF: MR. O. NZIMA

FOR DEFENDANT: MR. J. HENWOOD

RULING 7/12/06

[1] This is an action in which the Plaintiff claims damages in the sum of E555,000.00 from the Swaziland Building Society, costs of suit, further and alternative relief.

[2] In his particulars of claim the Plaintiff alleges that during the period August 1989 to October 1994 he loaned from the Defendant the total amount of E52,000.00. This amount of money was secured by three separate and ongoing mortgage bonds in favour of the

Defendant over the Plaintiffs immovable property described as Lot No. 1257 (hereinafter referred to as the immovable property) situate at Ngwane Park Township, Extension No. 1 in the district of Manzini.

[3] Plaintiff in turn agreed to repay the money loaned to him in monthly installments amounting to E806.00. Plaintiff however alleges that he repaid more in respect of this money by making payments ranging from E1,000.00 to E2,000.00 per month.

[4] During 1999 due to Plaintiffs failure to make regular payment the Defendant successfully instituted action against the Plaintiff for payment of an amount of E51,288.71 and to have the immovable property declared executable.

[5] The Plaintiff alleges in his particulars of claim that he approached the Defendant and successfully negotiated an agreement whereby the Defendant agreed to suspend further action in the matter and that Plaintiff repay the balance owing in an increased amount of E1600.00 per month. Plaintiff alleges that he made payment in terms of this renegotiated agreement continuously for 6 months.

[6] It is the Plaintiffs evidence that the Defendant breached the said agreement and behind Plaintiffs back proceeded with the

action it had instituted and sold the immovable property behind the Plaintiffs back.

[7] The cause of action therefore is the breach of the re-negotiated agreement referred to in paragraph (5) hereinabove. Flowing from this breach are damages in the amount of E550,000.00 made up as follows:

- a) E183,000.00 value of property.
 - b) E200,000.00 loss of income from tenants.
 - c) E60,000.00 improvements on property.
- 17,000.00 items taken from the property.
75,000.00 inconvenience and costs.
15,000.00 legal costs.

[8] The Defendant in its plea denies that it entered into the agreement alleged by the Plaintiff. The Defendant also pleaded in the alternative that in the event that the court should find that the agreement alleged by the Plaintiff did exist (which it denied) that such agreement was void and unenforceable because the provisions of the mortgage bonds were to the effect any subsequent re-negotiated agreements would be in writing.

[9] In his oral evidence given in this court the Plaintiff maintained the existence of this renegotiated agreement. He further maintained that as a result of this agreement a new installment per month was agreed upon and this was the sum of E1600.00.

This amount would cater for legal costs, interest and arrears. A further term of this agreement was that the Plaintiff would continue payments until the Defendant advised him to stop. The Plaintiff further stated in his evidence that this new agreement was negotiated with one Hamilton Dlamini an employee of the Defendant.

[10] The Defendants attorney through cross-examination of the Plaintiff denied the existence of the new agreement. The Defendant also maintained that had there been such an agreement it would have been recorded in terms of Clause 20 of the mortgage bond(s).

[11] The Plaintiff went on further to give evidence as to how the various amounts totaling to E550,000.00 were made up. He first dealt with the figure of E183,000.00. This he said was the value of the immovable property. However, he had caused an evaluation to be carried out in 1994 and this amounted to E108,500.00. He further testified that the amount of E 183,000.00 was in respect of a more recent valuation carried out during 2003 and 2004. When asked by his attorney how he had carried out the latter valuation as he no longer had control over the immovable property he then recalled that the latter valuation was carried out during 1998.

[12] When the Plaintiff was cross-examined he admitted that the

earlier valuation was E 108,500.00 and that he did not have the valuation amounting to E183,000.00, it had been misplaced after he had been involved in a motor vehicle accident by the people who removed his things from the wreckage.

[13] The result hereof is that there was no evidence to support the amount of E 183,000.00. The valuation amounting to E108,500.00 is dated 1994. The true value should be somewhere, in between. The market value of properties situate in Ngwane Park, Manzini are well known to most residents of Manzini such as myself. The land on which the improvements are built is not less than E65,000.00.

[14] The second issue that the Plaintiff dealt with was the amount of 200,000.00 being in respect of loss of income from tenants. In his evidence he stated that this amount was calculated from December 1999 to date (16/5/06). He stated that from the single rooms he received E150.00 per month and from the bed sitters E250.00 per month. There were a total of 5 single rooms which brought in an income of E750.00 per month. There were a total of 6 bed sitters which brought in an income of E1500.00 per month making the total income per month E2250.00. This came to E27,000.00 per year. The period from December 1999 to May 2006 would equal E 189,000.00 (i.e. 7 years)

[15] The Plaintiff called a witness Majaha Dlamini to testify on his

behalf under this item. This witness told the court that he lived in one of the Plaintiffs single rooms from 1994 to 2000. He used to pay E150.00 therefore to Plaintiff from 1994 to November 1999 when he and the other tenants received letters advising them to no longer pay rent to the Plaintiff. This witness also continued that he knew that the other tenants used to pay the same amount. He did not talk about the bed sitters and how much they cost.

[16] When the Plaintiff was cross examined by the Defendant's attorney with regard to this item he disclosed that he used not to keep formal records of payments but he knew how much was due per month.

The witness, Mr. Majaha Dlamini under cross-examination disclosed to the court that during the time he lived on the Plaintiffs property, the single rooms were always occupied.

[17] My view is that the Plaintiff is correct with regard to how much he collected per month in respect of the rooms and bed sitters on his property. This is income that was coming to him and he would know the amount without keeping formal records.

[18] The third item that the Plaintiff dealt with was the amount of E60,000.00 being in respect of improvements which he had

effected on the property. The Plaintiff stated in his evidence that he levelled the property which sloped. He had to hire a grader to level the ground. He also fenced the property. He also dug a trench which he built up by using concrete and this acted like a storm water drain. He also built a retaining wall.

[19] The Plaintiff when cross-examined by Mr. Henwood the Defendant's attorney under this item disclosed that the above improvements took place during 1985 and 1986. The Plaintiff told the court that he hired a Mr. du Pont to level his property but that Mr. du Pont had since died. In short he did not have any evidence to support this claim. He did however disclose that these improvements were effected before the valuation amounting to E 108,500.00 was carried out. When pressed further about this item he disclosed that he had enquired from the City Council people who had advised him that the evaluation of the properties increased every year and that the amount of E60,000.00 emanated from there.

[20] My view under this head is that the Plaintiff has not proved the claim for improvements. Even if he had the amounts were absorbed in the valuation of E 108,000.00 as it was carried out during 1994 and these improvements were effected during 1985 and 1986.

[21] The fourth item that the Plaintiff dealt with was the amount

of E17,000.00 being in respect of items taken away from the property. The Plaintiff testified that there were two motor vehicles which had been under repair by him and his assistant one Constantine Mthethwa. There were also two engines and one gear box. He also lost one toilet seat, twenty x 16 mm reinforcers.

When the Plaintiff was cross-examined about these items as to how he placed a value on them he was not able to. The Plaintiff was not able to say whether the Defendant had removed these or the new owners of the property or even the assistant Mr. Constantine Mthethwa or even their owners.

[22] The fifth item that the Plaintiff dealt with was the amount of E75,000.00 being in respect of inconvenience and costs. The Plaintiff in his evidence explained what he meant by this claim. He told this court that he was not informed that his plot had been sold by the Defendant. He was informed by his tenants. He was embarrassed in the face of the community because people regarded him as a person who had failed to pay for his plot hence it was repossessed. He further informed the court that he nearly committed suicide by hanging himself because of the pain he had suffered. He also revealed that his life had now been jeopardised because he used to use the plot as a source of income for himself and his children.

[23] Under cross-examination as to how he had assessed the amount claimed herein he repeated the things he had said above. Pressed further by Mr. Henwood the Plaintiff revealed that he had guessed the figure.

[24] The sixth and last issue that the Plaintiff dealt with was the amount of E 15,000.00 being in respect of legal costs. The Plaintiff told the court that he had paid his first lawyers Maphalala and Company the amount of E7,000.00 and the present lawyers E500.00.

[25] When the Plaintiff was cross-examined by Mr. Henwood he admitted that he had not yet expended the sum of E15,000.00 as legal costs.

[26] My view herein is that the claim has substance but the Plaintiff was unable to produce receipts from both legal firms who are still in practice.

[27] The Plaintiff in his evidence states that after the summons were served on him in July 1999 he went to the Defendant and renegotiated new terms of payment. He says he spoke to one Hamilton Dlamini. The new arrangement was for him to repay in the amount of E 1600.00. This figure included arrears, costs and interest. The Plaintiff says this was not the first time during his

relationship with the Defendant for him to enter into such a verbal agreement.

[28] The mortgage statement dated 17/01/2000 Exhibit (b) indeed reflects the following payments:

16/7/99	-	2,000.00
12/8/99	-	1,000.00
13/9/99	-	1,600.00
12/10/99	-	1,600.00
10/11/99	-	1,600.00
10/12/99	-	1,600.00

[29] It may well be that there was a re-negotiated agreement and Mr. Hamilton Dlamini forgot to make a follow up in writing. He may at that time not even have been aware of the bond requirement that such agreements had to be written.

On a balance of probabilities it seems to me that the Plaintiff has made out a prima facie case with regard to certain items in his particulars of claim.

[30] The law as stated in **Gascoyne v Paint & Hunter** 1917 TPD 170 the following:

"At the close of the case for the plaintiff therefore,

the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff?... The question therefore is, at the close of the case for the plaintiff was there a prima facie case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

[31] The inquiry then is: Is there evidence upon which the court ought to give judgment in favour of the Plaintiff?

The answer is clearly yes especially in respect of prayer 7 (a) set out in clauses 11 - 13 herein above as well as prayer 7 (b) set out in clauses 14 - 17 above. The quantum would of course have to be refined somewhat.

[32] The Defendant has a laudable slogan to the effect that **"they fight poverty."** It is therefore incumbent upon it to explain the departure in this instance wherein the Plaintiff was left impoverished when it sold the Plaintiffs property much less than its value. It also has to explain what the meaning of the insured value of E341,930.00 which appears at the bottom of Exhibit (b) means and whether the Plaintiffs expectation of fair play was ill founded. It also has to advise the court whether or not there was a reserve price and how much it was and whether the

amount the property was sold for was the reserve price.

[33] In the event the application for absolution from the instance is refused with costs.

Q.M. MABUZA -AJ