IN THE HIGH COURT OF SWAZILAND

Civil Case No. 790/2016

In the matter between

SELECT MANAGEMENT SERVICES (PTY) LTD **PLAINTIFF**

And

SIBUSISO MHLATSI SHONGWE **DEFENDANT**

Neutral citation: *Select Management Services (Pty) Ltd. v Sibusiso Mhlatsi Shongwe* (790/2016) [2017] SZHC 228 (31 October 2017)

Coram: **MAMBA J**

Heard: **27 October 2017**

Delivered: **31 October 2017**

[1] *Civil Law and Procedure – Application for Summary Judgment. What a defendant must allege successfully resist such application: a triable issue or that for some other reason the matter should go to trial – as per Rule 32 (5) of the Rules of Court.*

[2] *Civil Law and Procedure – Application for Summary Judgment. Dispute of fact arising and unconscionable conduct by the plaintiff. Application refused and matter referred to trial.*

[1] This is an opposed application for Summary Judgment wherein the Plaintiff prays for judgment in the following terms:

‘1. Payment of the total sum of E188, 640-00

2. Interest thereon at the contractually rate of 12.99% per annum *a tempore morae*;

3. Costs of suit at the contract scale of attorney and his own client.’

[2] The above claim, according to the Plaintiff is in respect of a written loan agreement entered into by and between the parties on 09 September 2015 in Manzini. The total amount of the loan as at the said date was computed or made up as follows:

2.1	Existing loan	80, 638.00
2.2	Amount due to Bunye Betfu Co-operative	6, 402.82
2.3	Hlalawati Savings Co-operative	18, 768.59
2.4	Sum advanced on 09/09/2015	24, 361.50
2.5	Interest on total loan	46, 950.00
2.6	Charges and levies on loan	15, 750.00

The Plaintiff states further that the total sum had to be paid at a monthly instalment of E3, 144.00 but the Defendant has failed to make the said monthly instalments thus the full amount of E188, 640.00 is now due and owing in terms of the loan agreement. Attached to the summons is the

relevant loan agreement and the schedule thereto tabulating the various charges and the consolidated loan accounts and amounts. It is noted that a simple calculation of the sums above do not amount to the amount claimed. This is unexplained by the Plaintiff and the sum owing is disputed by the Defendant.

[3] In opposition to the application, the Defendant states that the loan agreement was novated on 19 April 2016 whereby it was agreed between the parties that the monthly instalment would be a sum of E2 455.00. This monthly instalment was to be made through a salary deduction authorisation granted by the Defendant to his employer, the Swaziland Government. In support of this assertion, the Defendant has filed a copy of the loan schedule which reflects that the total amount due at the time was a sum of E175, 440.00. Again, the loan had to be repaid within a period of 60 months with effect from 28 May 2016. I note that, contrary to the Defendant's assertion, the monthly instalment is a sum of E2, 924.00 and not E2, 455.00 (see annexure A at page 33 of the Book of Pleadings). Annexure B is a copy of the Defendant's salary advice slip for May 2016 and reflects a deduction of E2, 455.00 from his salary. Annexure B also shows deductions to both Bunye Betfu Cooperative and Hlalawati Savings & Credit Cooperative. These deductions are E2, 263.34 and E1, 742.00 respectively.

[4] In *limine*, the Defendant submitted that 'he has actually overpaid [the plaintiff] as the interest charged was more than what the law permits and other charges such as administration fee and origination fee were unlawfully included.' The Defendant also raised a point of non-joinder of his paymaster; the Accountant General who, in terms of the loan agreement was to be mandated by the Defendant to effect the monthly deductions.

[5] There is absolutely no merit in these points *in limine*. First, the Accountant General has no interest whatsoever in these proceedings. Any judgment that this court may render or hand down would in no way affect the Accountant General. In any event, even if the said office of the Accountant General were to be involved in the salary deductions, it would only do so on the orders of the Defendant. It would act as his agent and not a party to the underlying agreement or transaction. Secondly, the actual amount owing; constituting the consolidated 4 loans, as at 09 September 2015 is far more than the E46, 950.00 charged as interest over the agreed period. Granted that this amount was calculated on the date on which the loan was granted, it still, had to take into account the amounts owing by the Defendant to the Plaintiff from time to time over the period of the loan.

[6] The classic formulation of the *in duplum* rule is that interest ceases to run or accrue once the unpaid or accrued interest equals the amount of the capital outstanding at the relevant time. The Defendant has not demonstrated that there was a violation of this rule in this case. Neither has the Defendant demonstrated or shown that the rate of interest was, when the loan agreement was concluded, in violation of any law governing the transaction or agreement in question. *Cebile Nomzamo Simelane v Micro Provident Swaziland T/A Letshego Financial Services & 3 Others (39/2015) [2015] SZSC 14 (09 December 2015),* See *Swaziland Development & Savings Bank v Mark Mordaunt, Standard Bank of South Africa Ltd v Oueanate Investments (Pty) Ltd (in Liquidation) 1998 (1) SA 811 Financial Company (Pty) Ltd v Ketshotseng 2008 (2) BLR 269 (HC) and Barclays Bank of Botswana v Mokopotsa T/A Boikhutso Small General Dealer 2005 (2) BLR (HC).* The authorities further clarify that interest on interest or capitalised interest does not lose its character as interest and it does not become part of the capital.

[7] In Cebile's case (Supra) the court stated:

> '[22] In its basic form the in duplum rule 'provides that arrear interest ceases to accrue once the sum of the unpaid interest

equals the amount of the outstanding capital.' (*Paulsen supra* at para 42).

[23] In *Commercial Bank of Zimbabwe v W.M. Builders Supplies (Pty) Ltd 1997 (2) SA 285 @ 303C-D* the Court had this to say:

> '…it is a principle firmly entrenched in our law that interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of the capital outstanding. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted.'

From the above cited authorities, it is plain that it is possible for a credit receiver or borrower to eventually legitimately pay interest in excess of the capital loan advanced to him. A clear case of this situation is where

the credit receiver is either in arrears with his monthly or periodic instalments or his instalments are so low that he merely tinkers with the capital sum of loan. Therefore, the mere fact that in any given situation, the credit receiver pays interest that is more than the capital amount loaned to him, is no indication that the rule has been violated. The standard rule of practice and the common law is that, unless otherwise agreed between the lender and the borrower, payments to the lender are appropriated first to interest and then only to capital. This obviously has an effect on the rate at which the capital is being reduced. In the present appeal, there is not even a shred of evidence suggesting that the appellant was at any given period charged interest that was more than 100% of the capital loan owing. The defence, founded on the *in duplum* rule was raised by the appellant. She had to satisfy the court below that she was at a particular given period charged interest that was more than 100% of the amount of the capital owing or that the interest owing at any given time had exceeded the amount. She failed to do so. Similarly, on appeal, she has woefully failed in this regard. The rule governs not just interest but arrear interest in relation to the capital amount owing at the relevant time. (See *Paulsen supra* at para 107 and 122). The appellant was never in arrears and thus the rule does not come into play in this case.

[8] In its replying affidavit the Plaintiff alleges that after the consolidation of the accounts, the Defendant negotiated and was granted fresh loans by the two cooperatives and this explains the current deductions from his salary. This is however, denied by the Defendant.

[9] The Defendant was granted leave to supplement his opposing affidavit and the Plaintiff was also granted leave to respond to the supplementary affidavit. In his supplementary affidavit, the Defendant submitted a copy of his bank statement. The bank statement shows about four credits made to his bank account by the Plaintiff. These reversals, the Defendant argues, proves that he is up to date with his monthly instalments, as these credits were made after April 2016. In response to this the Plaintiff states that these credits 'are actual standing debit orders which could not be honoured due to the Defendant having depleted his account and the automated debit orders having been reneged due to insufficient funds'. It is the Plaintiff's contention further that the Defendant was granted a further loan for which he had to make a stop order at the bank because his employer would not agree to a further salary deduction as this would have amounted to more than a third of the Defendant's salary and such would have been illegal. The Plaintiff states that the Defendant is in arrears in respect of this loan account too.

[10] The Plaintiff states that the alleged loan agreement of 19April 2016 was never concluded and was a mere proposal and is not binding on the parties.

[11] From the above summary of the evidence, it is plain to me that this application is replete with disputes of fact. These disputes are substantial and go to the actual dispute between parties. I have stated above that even the amount claimed is less than certain. It is not a liquidated amount.

[12] During arguments, I questioned Counsel for the Plaintiff on what appears to have been a reckless exercise by Plaintiff in continuously granting loans to the Defendant when it ought to have been clear to the Plaintiff that such grants had the effect of depleting the Defendant's finances and were less than lawful. On the Plaintiff's own showing, the Defendant could not instruct his employer to make any further deductions from his salary because this would have been unlawful. The Plaintiff nonetheless continued to burden the Defendant with further debts or loans. If this was not unconscionable conduct, it was certainly reckless trading on the part of the Plaintiff. This factor alone may be a sufficient ground for this court to refuse the application for summary judgment.

[13] In Busalive Bhembe v Basil Mthethwa (1675/2015) [2016] SZHC 125 (19 July 2016*)* this court stated as follows:

[8] The law governing Summary judgment has been consistently stated in numerous cases before this Court and the Supreme Court in this jurisdiction. In *Benedict Vusi Kunene v Mduduzi Mdziniso and Another (1011/2015) [2016] SZHC 40 (12 February 2016)* this court stated as follows:

> '[9] The circumstances or grounds upon which summary judgment may be granted or refused are well known in this jurisdiction. In *Swaziland Flooring and Allied Industries Limited v WSL Construction (Pty) Ltd (24/2014) [2015] SZHC 08 (05 January 2015)* this court stated the following:
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> '[12] In *Swaziland Tyre Services (Pty) ltd t/a Max T. Solutions v Sharp Freight (Swaziland) (Pty) Ltd (381/2012) [2014] SZHC 74 (01 April 2014),* this court stated as follows:
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> '[6] In *Swaziland Livestock Technical Services v Swaziland Government and Another,* judgment delivered on 19 April 2012 Ota J said:
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> "…in the case of *Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007.*
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> *"It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy, in that it closes the door in final fashion to the defendant and permits judgment to be given without trial … it*

is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far…"

See *Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3830/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.*

The rules have therefore laid down certain requirements to act as checks and balances to the summary judgment procedure, in an effort to prevent it from working a miscarriage of justice. Thus, Rule 32 (5) requires a Defendant who is opposed to summary judgment, to file an affidavit resisting same, and by rule 32 (4) (a) the court is obligated to scrutinize such an opposing affidavit to ascertain for itself whether "…**there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof".**

It is now the judicial accord, that the existence of a triable issue or issues or the disclosure of a *bona fide* defence in the opposing affidavit, emasculates summary judgment, and entitles the Defendant to proceed to trial. As the court stated in *Mater Dolorosa High School v RJM Stationery (Pty) Ltd (supra)*

"It would be more accurate to say that a court will not merely "be slow" to close the door to a defendant, but will in fact refuse to do so, if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the Plaintiff's claim, the Court cannot deny him the opportunity of having such an issue tried."

Case law is also agreed, that for the Defendant to be said to have raised triable issues, he must have set out material facts of his defence in his affidavit, though not in an exhaustive fashion. The defence must be clear, unequivocal and valid."

Again in *SINKHWA SEMASWATI t/a MISTER BREAD BAKERY AND CONFECTIONARY v PSB ENTERPRISES (PTY) LTD* judgment delivered in February 2011 (unreported) I had occasion to say:

> "[3] In terms of Rule 32 (5) (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgment "… may show cause against an application under sub rule 1 by affidavit or otherwise to the satisfaction of the court and, with the leave of the court the plaintiff may deliver an affidavit in reply." In the present case the defendant has filed an affidavit. In showing cause rules 32 (4) (a) requires the defendant to satisfy the court "…that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof." I observe here that before these rules were amended by Legal Notice Number 38 of 1990, rule 32 (3) (b) required the defendant's affidavit or evidence to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the former or old rule, a defendant was specifically required to show or "disclose fully the nature and grounds of his defence and the material facts relied upon therefor", whereas under the present rule, he is required to satisfy the court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial on the whole claim or part thereof. The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.
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> [4] A close examination or reading of the case law on both the old and present rule, shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under the present rule, the primary obligation for the defendant is to satisfy the court that there is a triable issue or question, or that for some other reason there ought to be a trial. This, I think, is wider than merely satisfying the court that the defendant has a bona fide defence to the action as provided in the former rule. See *VARIETY INVESTMENTS (PTY) LTD v MOTSA, 1982-1986 SLR*

77 at 80-81 and BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER, 1982-1986 SLR 406 at page 406H-407E which all refer to a defendant satisfying the court that he has a bona fide defence to the action and fully disclosing its nature and the material facts relied upon therefor. I would also add that where there is a dispute of fact a court would be entitled to refuse an application for summary judgment. Under the present rule, the defendant is not confined or restricted to satisfying the court that he has a bona fide defence to the action or to complain of procedural irregularities.

[5] In *MILES v BULL [1969] 1QB258; [1968]3 ALL ER 632*, the court pointed out that the words "that there ought for some other reason to be a trial" of the claim or part thereof, are wider in their scope than those used in the former rule referred to above. "It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial. …

Circumstances which might afford "some other reason for trial" might be, where, e.g. the defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in full light of publicity."

See also *First National Bank of Swaziland Limited t/a Wesbank v Rodgers Mabhoyane du Pont, case 4356/09* delivered on 08 June 2012 where I pointed out that:

"[7] In **Sinkhwa Semaswati** *(supra)* I referred to the differences between our current rule and the old rule on this topic and I do not find it necessary to repeat that here, suffice to say that the old rule required the defendant to disclose fully the nature and grounds of his or her defence and the material facts relied upon therefor. Emphasis was placed on a defence to the action.

> The current rule entitles a defendant to satisfy the court "…that there is an issue or question in dispute which ought to be tried" or that for some other reason the matter should be referred to trial."

These remarks are applicable in this case.'

[14] Because of the disputes of fact and the unconscionable conduct by the Plaintiff, I refused the application for summary judgment. Costs to be costs in the cause.

FOR THE PLAINTIFF: **MR. TENGBEH**

FOR THE DEFENDANT: **MR. NXUMALO**