



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 908/2019

In the matter between:

NEDBANK (SWAZILAND) LIMITED

PLAINTIFF

AND

KOSELTRONICS INVESTMENT (PTY) Ltd

1st DEFENDANT

THE TRUSTEES FOR THE TIME BEING

OF THE AVALI TRUST

2nd DEFENDANT

LINDINJABULO DANIA MASINA

3rd DEFENDANT

Neutral citation: *Nedbank (Swaziland) Limited and Koseltronics Investments (Pty) Ltd & 2 Others [908/2019] [2019] SZHC 191 (11th October, 2019)*

Coram: FAKUDZE, J

Heard: 2nd October, 2019

Delivered: 11th October, 2019

Summary: *Civil Procedure – Plaintiff and Defendant entered into various overdraft facility agreements – Defendant fails to settle same – Plaintiff issues out Summons and Defendant issues out Notice to Defend – Summary Judgment Application filed by Plaintiff – Defendant resists same on grounds that sum owed is disputed – Further, Plaintiff did not supply Plaintiff with Bank Statement notwithstanding request to that effect – Finally, Defendant made payments which should have reduced the amount owed – held that Plaintiff has ably demonstrated how sum owed was computed – further proves that statement received as part of Plaintiff’s declaration – amounts allegedly paid by Defendant reflected in statement sent to Defendant – Summary Judgment Application succeeds with costs.*

BACKGROUND

[1] The Plaintiff issued out summons against the Defendants on the 7th June, 2019 claiming the capital sum of E3,153 934.41, interest, and declaring Lot 2521 situate at Mbabane Extension 11 (Thembelihle Township (the “property”)) executable and costs.

[2] The Defendant filed a Notice to Defend and the Plaintiff filed a declaration which was then followed by an Application for Summary Judgment which should have been heard on the 12th July, 2019. The Defendants filed an Affidavit Resisting Summary Judgment. The Plaintiff then filed a reply thereto.

THE PARTIES' CONTENTION

The Plaintiff

[3] The Plaintiff's case is that a written agreement with the First Defendant (a company), duly represented by the Second Defendant, was entered into sometime in May, 2018. The Agreement was entered into pursuant to the First Defendant's request of the 30th May, 2018 wherein it acknowledged that the balance owing to the Plaintiff as at that date was E2,874 342.58 (see Annexure "M1" pages 110 of the bundle).

[4] Pursuant to the agreement being granted on the 30th May, 2018, the First Defendant disbursed further funds inclusive of the E260,000.00 requested as per Annexure "M1" (see annexures "H2" and "M2," pages 84, 85 and 113 of the bundle). On the 2nd October, 2018, the First Defendant paid a sum of E576,996.75 towards reducing the debt to E2838 938.86 (see page 85 of the bundle). On the 3rd October, 2018, the First Defendant made another application for an overdraft of E40,000.00 and in that application acknowledged that as of the 3rd October, 2018, the balance owing to the Plaintiff was a sum of E2838 938.36 (see pages 114-115 of the bundle). The

overdraft of E40,000.00 was granted and the First Defendant was able to cash a cheque of that amount on the same day as evidenced by Annexure “H2,” page 85 of the bundle.

- [5] The overdraft which had been granted in May, 2018 as per “Annexure A” was payable in full on the 30th June, 2018. The Defendant failed to pay, reason being that it was waiting for the funds from the Prime Minister’s Office (See letter of October, 2018 – page 116 of the bundle). Pursuant to this letter, a further indulgence was granted to the First Defendant regarding the delay in the payment of the full debt. Since no funds were forthcoming the Plaintiff sent a letter of demand dated the 13th March, 2019 (see Annexure “D” – page 34 of the bundle). The breach was not remedied by the Defendant. The present legal proceedings were instituted.
- [6] Pursuant to the breach, the full balance became due and owing as reflected in the statement and the certificate of balance (See pages 28 to 33 and 73 to 85 of the bundle). The second and third Defendants stood as sureties and co-principal debtors of the First Defendant (see pages 45-48 of the bundle). As additional security, the Second Defendant furnished as security a surety mortgage bond over Lot 2521 situate at Mbabane Extension No. 11 (Thembelihle Township), District of Hhohho.

The Defendants

- [7] The Defendants raised four (4) points in *limine* in its papers. On the day of argument same were abandoned. They therefore remain abandoned.
- [8] The Defendants state that they are not indebted to the Plaintiff in the sum of E3153 934.41. In as much as the First Defendant did make and/or apply for an overdraft facility with the Plaintiff which was approved, the 1st Defendant never received the moneys claimed by the Plaintiff. The First Defendant acknowledges that it received a sum of E752 460 as a benefit from the overdraft facility. It states that the aforesaid amount was paid in full as Plaintiff was unilaterally deducting some monies whenever payments were made to the First Defendant's account held with the Plaintiff.
- [9] The Defendant further contends that prior to the overdraft facility being granted to the First Defendant, the Plaintiff requested surety and a property belonging to the 2nd Defendant was bonded for an amount of E2 000 000 with an additional E400.000. The arrangement with the Plaintiff was that the overdraft facility was not to exceed the aforesaid amount of E2.4 million. The monies which were received through the overdraft facility never even reached half the maximum amount that the First Defendant was entitled to in respect of the maximum amount of E2.4 million; strangely plaintiff is claiming an amount in excess of E3 Million yet the First Defendant was entitled to E2.4 Million.

[10] The Defendant finally says that a demand from Plaintiff was received and the sum claimed was queried. The Plaintiff made an undertaking to verify the queries and revert to the Defendant. The Defendant was then served with Summons whilst awaiting a response from Plaintiff. The First Defendant should be given a proper statement by the Plaintiff and be allowed to discuss same with the Plaintiff.

The Plaintiff's Reply

[11] In reply, the Plaintiff states that the First Defendant since 2016 has confirmed the amounts it owes to the Plaintiff when applying for extensions or additions to the overdraft facility; when the Plaintiff sent the letter of demand in September, 2017 stating that the amount owing was E2124 483.63; on the 8th September, 2017 when the First Defendant was applying for an extension of the payment of the overdraft it confirmed owing the sum of E2124 483.63 and stated that the payment was being delayed by the payment expected from the Prime Minister's Office (see Annexure "J2" – "J3" Pages 95 to 101 of the bundles). The bundle includes over-the-counter account statement issued to the Defendant. There was also the sum of E400,000.00 which was extended to First Defendant. The Defendant acknowledged this in its Affidavit resisting Summary Judgment.

[12] When the First Defendant was applying for an addition of E300,000.00 to the overdraft facility in May, 2018 it again confirmed that it was now owing the Plaintiff the increased sum of E2874 342.58 (see pages 108-110 of the

bundles. E260 000.00 was cashed by the Defendant on the same day. (see annexure “M 2” of page 113 of the bundle).

[13] On the 3rd October, 2018, the First Defendant when applying for the increase of the overdraft of E40,000.00 confirmed that it was owing E2838 938.36. So as of 3rd October, 2018 the amount owed increased to E3153 934.41 (as of the 30th April, 2019) due to the charges and interest levied to the account.

[14] On the issue of failure to furnish a statement, the Plaintiff states that every time the First Defendant requested for an increase in the overdraft facility from the initial E2,000 000.00 limit acknowledged the amount owing as of those periods and the last one was in October, 2018. Later a further request of E40, 000.00 was made by the First Defendant.

[15] The statement was also availed to the First Defendant as per the over-the-counter account statement dated 01 May 2019. This is besides the statement that accompanied the Plaintiff’s Declaration as seen on pages 28 to 32 of the Book.

The Applicable law

[16] In the **Small Enterprises Development Company V Clocte Ntombi Bhembe t/a Computer Proficiency Training Centre and Business**

College, Civil Appeal, Case No. 38 (2014) SZSC (30 December, 2014),
the Supreme Court stated as follows:

“[12] Now the principles governing Summary Judgment are well settled in this jurisdiction. The court proceeds from the premise that summary judgment is an extra ordinary and stringent procedure which is primarily designed to provide a speedy remedy to a plaintiff in a case where the defendant has no bona fide defence and where appearance to defend has been made solely for the purposes of delay.”

[17] Likewise, in **Supa Swift (Swaziland) (Pty) Ltd V Guard Alert Security Services Ltd case No. 4328/09**, the court stated as follows:

“A Summary Judgment is one given in favour of a plaintiff without a plenary trial of action. The normal steps of filing all necessary pleading, hearing of witnesses and addresses by counsel, before the court’s judgment are not followed. The procedure by way of summary judgment is resorted to by a plaintiff, where obviously there can be no reasonable doubt that the plaintiff is entitled to judgment and where it is expedient to allow the defendant to defend for mere purposes of delay. It is for the plain and straight forward, not for the devices and crafting. Rather than suffer unnecessary delay and expense which attend a full trial and plaintiff may therefore apply to the court for instant judgment if his claim is manifestly unanswerable both in fact and in law.”

[18] It was in **Mater Dorolosa High School V R.J.M. Stationery (Pty) Ltd Appeal Case No. 3 of 2005** where the court pronounced that the existence of a triable issue (3) is a bar to the granting of Summary Judgment. Therefore 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 an opportunity of having such issue tried.

Court's analysis and conclusion

[19] The Defendant basically raises three points which are the basis of his defence. The first one is that he does not deny that he applied for the overdraft at various times, but denies that he received the amount claimed by the Plaintiff. The Defendant also made payments whose effect was to reduce the overdraft.

[20] The second point is that the Defendant requested that he be furnished with a bank statement showing all the transactions in the Defendant's account. This would have given the Defendant enough time to scrutinise each transaction and satisfy itself that the computation by the Plaintiff is correct.

[21] The third point is that the Defendant only agreed to an overdraft facility not exceeding E2,4 Million Emalangen. It is the Defendant's argument that it never exceeded the said amount.

[22] It is this court's view that the Plaintiff has ably demonstrated how the amount claimed was arrived at. The bank statement has been attached to the Plaintiff's Declaration. At some point in time, the Defendant requested a statement over the counter and same was given to it. The issue of the statement is therefore neither here or there.

[23] The statement tabulates the amounts owed by the Plaintiff together with the amounts paid by the Defendants towards reducing the overdraft. The Plaintiff further demonstrated that the First overdraft facility was for E2 Million Emalangeni. It later increased to E2.4 Million as acknowledged by the Defendant when raising one of its defences. A sum of E300,000.00 was further advanced to the Defendant in the form of an extended overdraft. There was a further extension of E40,000.00. Various withdrawals by the Plaintiff appear in the Bank statement and the charges and interest levied by the Bank. The Plaintiff has also demonstrated how the Defendants acknowledged its debt to the Plaintiff each time they needed an extension of the overdraft facility. The same argument extends to the issue of the E2.4 Million ceiling.

[24] In light of all that has been said above, it is the court's view that there are no triable issues that have been raised by the Defendants. Accordingly, Summary Judgment is hereby entered against the First, Second and Third Defendants in the following terms:

(a) Payment of the sum of E3153 934.41.

- (b) Interest on the sum of E3153 934.41 at the rate of prime plus 5% from 30th April, 2019 to date of final payment.
- (c) Costs of the suit on the scale as between attorney and own client including collection commission.
- (d) Declaring Lot No. 2521 situate in Mbabane extension No. 11 (Thembelihle Township), District of Hhohho, Swaziland, measuring 600 square metres and held by the Mortgagor under Deed of Transfer No. 421/2016 dated 15th of June, 2016, executable.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Plaintiff: K. Motsa

Defendant: T. Fakudze