IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 60/2021

HELD AT MBABANE
In the matter between:

NEDBANK SWAZILAND LIMITED Plaintiff

And

MZWANDILE SHIBA Defendant

Neutral Citation: *Nedbank Swaziland Limited v Mzwandile Shiba (60/2021)* [2021] *SZHC* 213 (2021)

Coram: **B.W. MAGAGULA A.I,**

Heard: 29th October, 2021

Delivered : 17th November, 2021

SUMMARY

Civil Procedure - Application in terms of Rule 32 - Principles thereof Considered - The Defendant in his affidavit resisting summary judgment raised a legal point that the Plaintiff was already out of time when it filed the declaration and subsequently the summary judgment application - He also argues that he has a counter claim based on his terminal benefits arising from the employment contact that existed between the parties. Held: The Defendant should have issued a notice of bar when he realized that the Plaintiff was out of time to file the declaration in terms of the Rules of Court-Held further: This Court does not have jurisdiction to adjudicate on the counter claim - there remains no other triable issues necessitating that the matter be referred to trial - Summary judgment granted accordingly with costs on the ordinary scale.

JUDGMENT

INTRODUCTION

(!] Serving before this Court is an application for summary judgment. The debt which is the subject of dispute, arises from a personal loan

advanced by the Plaintiff to the Defendant sometime in November 2019. It is common cause that the Defendant is a fonner employee of the Plaintiff. The loan was granted during the tenure of the employ1nent relationship between the parties. The summary judgment is opposed by the Defendant who has incorporated in his affidavit resisting summary judgn1ent, a legal point. The Plaintiff was granted leave to file an affidavit in reply, through the consent of the Defendant. [1]

BACKGROUND

[2] This Court, amongst other issues, is called upon to decide whether the Plaintiff is entitled to take a further legal step of filing a declaration when it is out of time to do so. Rule 20 of the Rules of Court prescribes a 14 day period. The Plaintiff accepts that it was out of time, but it argues that the Defendant neglected to bar it from filing the declaration. Further, the Plaintiff contends that even if it can be accepted that it's step of filing the declaration was an irregular step, the Defendant did not file a notice in terms of Rule 30 in the prescribed fonnat as stipulated in the Rules. The situation was further exacerbated by the Defendant in allowing further legal steps to be taken without any objection. This includes consenting to

[1] **See court record of this 14th August, 2021.**

the filing of a replying affidavit to his affidavit resisting summary judgment.

PLAINTIFF'S CASE

[3] It is c01n1non cause that the Plaintiffs case is premised on money lent and advanced. Plaintiffs case is set out in the declaration. The Plaintiff argues that the terms and conditions of the loan, *interalia,* were that, in event the Defendant would leave the employment of the Plaintiff, the whole amount of the loan will become due and payable. It fmiher argues that this was a peren1ptory requirement of the loan. [2] It is on that basis that Plaintiff argues that the Defendant does not have a *bona fide* defence to it's clai1n and that there are no triable issues raised which would entitle this Court to grant leave for the matter to be referred to trial.

[4] In response to the legal point raised by the Defendant in his affidavit resisting summary judgment, the following contention are raised by Plaintiff:-

[2] See paragraph 3 of annexure A being a letter from Plaintiff to the Defendant dated 8 November 2019

4.1 The Defendant ought to have filed a notice of bar in the event he felt the Plaintiff had not filed a declaration within the *dies* stipulated in the rules.

4.2 In the event the Defendant felt the Plaintiff had taken an irregular step by filing the declaration out of time, he ought to have set aside that allegedly irregular step, through the filing of a notice in terms of Rule 30. That should have been done in the format as prescribed in Rule 30 of the Rules of Court.

4.3 The Defendant's conduct of responding to the Plaintiffs application for smnmary judgment through an affidavit resisting summary judgment, is an indication that the Defendant has waived his rights to raise this technical issue. In other words, the horse has bolted at this stage. Fmihermore, the Defendant cannot raise a Rule 30 notice through an affidavit resisting summary judgment. There is a prescribed procedure to do so[3]. The Plaintiff also argues that an irregular step 1nust be dealt with and determined before fmiher pleadings are exchanged by the parties. The fact that the Defendant consented to further pleadings being exchanged, including consenting to the filing of a replying affidavit resisting summary judgment, is a clear indication that the

[3] Which is set out in Rule 30 of the Rules of Court.

Defendant had waived his rights to raise the issue of non c01npliance with Rule 20 (1) of the Rules of Court.

[5] The Plaintiff further argues that it has a good cause of action in this matter. It's case fits the test for the granting of a summary judgment. Yet on the other hand, the Defendant has failed to prove that he has a *bona .fide* defence or that there are any triable issues that have been raised.

[6] Buttressing this argument, Plaintiffs Counsel referred this Court to the case of **Ntombifuthi Phindile Dlamini and Busisiwe Ngcaphalala v Nondumiso Magongo** [4] where the Court held as follows:

> ***"A sununary judgment application is to be filed where the Respondent is alleged to be without a defence to the clabn but defending the proceedings merely to delay finalization thereof''***

[7] It is the Plaintiffs other argument that, the Defendant in the matter at hand, has only framed something pausing as a triable issue. When

[4] High Court case 577/27 [2018)

in fact it is a mere recipe of delaying tactics. According to the Plaintiff, the Defendant has no *bona fide* defence. The issue of terminal benefits which he has raised, is irrelevant to the present matter. The Defendant has failed to furnish any proof that the Plaintiff is indebted to him. The Plaintiff also argues that the alleged counter claim is not competent to repel the summary judgment application. This Court does not have jurisdiction to adjudicate on it, as it is a claim arising from an employment relationship. It is a purview of the Industrial Court.

[8] The Plaintiff also argues that the matter before Court is one of the clearest of cases, as the Defendant is well aware of the strict terms of the loan. In particular, that in the event he leaves the employment of the bank, the whole amount will become due and payable. The Defendant has also not denied that he is indebted to the Plaintiff. The Defendant only argues that he has a counter clai1n, without taking the Court into his confidence, as to how much is it.

[9] In a way of persuading this Court on the absence of a *bona fide* defence and triable issues, the Plaintiff also cited the case of

Benedict Vusi Kunene v Mdziniso and another [5] where the Court held as follows:

> *"The Rules have therefore laid down certain requirements to act as checks and balances to summary judgment procedure. In an effort to prevent it fi"om creating 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 that ought to be tried or that they ought for some other reasons to be at trial of that claim".*

[1O] The Plaintiff sub111its that the Defendant has failed dismally to put the Court into his confidence that indeed there is a dispute which ought to be tried and that he has a *bona fide* defence to the Plaintiff's claim.

DEFENDANT'S ARGUMENT

[11] The Defendant argues in his affidavit resisting smnmary judgment that, he has a counter claim against the Plaintiff. He has also raised

[5] High case No. 1011/2018

a point of law to the effect that, the Plaintiffs declaration and subsequent summary judgment application, are an irregular step in tenns of Rule 30. The Defendant contends that the Plaintiff is indebted to him in a sum that he believes to be above the sum claimed. The counter claim relates to his terminal benefits and his pension that the Plaintiff is holding onto. The Defendant also argue that the Plaintiff has not applied to the Court for an extension of time, in terms of Rule 27. The bank just behaved as if it was still entitled to file the declaration and the summary judgment application, yet it was way out of tin1e to do so. The Defendant continues to argue that the Plaintiff has not volunteered a reason why the declaration and summary judgment application was filed some four months out of time, instead of the prescribed 14 days.·

[6] High Court case

A Defendant who opposes summary judgment in terms of Rule 32 (4), only needs to demonstrate that there is either a triable issue or a question which ought to be determined by means of a trial. In that regard, the case of **Metro Cash and Carry (pty) limited t/a Manzini Liquor Warehouse v Inyakatfo Investments** was cited.[6]

[12]

[13] The Defendant also argues that he need not deal exhaustively with the details of his defence, provided he discloses fully the nature and grounds thereof and the material facts that he relies on. Also he insists that he has a *bonafide* defence in this matter. The Court may not judge the truthfulness of his allegations at this stage. The Comi was referred as an authority for this proposition to **Herbstein Van Wissen -civil parties of the Supreme Court of South Africa fourth edition at page 144.**

[14] It is also the Defendant's contention that the procedure for summary judgment, constitutes an extraordinary stringent remedy, as it permits a final judgment to be given against a Defendant without a trial. The Court was therefore urged not to grant summary judgment, if there is a reasonable possibility that the Plaintiffs application is defective or that the Defendant has a good defence. The Defendant argues that his case before Court fits the test expressed by the authorities **Herbstein and Van Wissen.** [7] In that, the Defendant has demonstrated that he has a good and *bona fide* defence to the Plaintiffs claim for summary judgment and it must accordingly fail. The Defendant argues fmiher that at this stage, he is

only called upon to disclose material facts upon which his defence

[7] *Supra*

is based and it's up to the Court to decide whether the affidavit discloses a *bona fide* defence.

[15] The Defendant therefore argues that the mere fact that the Plaintiff is indebted to him in the fonn of tern1inal benefits, as well as his pension benefits, establishes a counter claim against the Plaintiff. It is a defence on it's own. A counter claim is a valid defence to an application for su1nn1ary judgment. The Court was referred to the case of **Bonacord Auto Clinic v Patricia S. Lukhele**[8]

9 where Masuku J stated the following at page 3 to 5 of the judgment:

> ***"It is worth noting that one of the defences raised by the Defendant is a counter claim in excess of the Plaintiff's claint. An unliquidated counter claim does constitute a bona fide defence to a Plaint ff liquidated clabn. The Defendant ,nay accordingly relay on unliquidated counter claim to avoid su,nmary judgment even when he ad,nits owing a liquidated aniount of money to the Plaintiff. There is no requirement that the counter claini even when*** *it* ***depends upon facts and circumstances d(fferent material front those forming the basis of the Plaintiff's clabn is based. Any unliquidated counter claini even when it depends upon***

[8] The case of Mbuso E Simelane Associates v Llyod Graig Henwood (1137/2016) [2016] SZHC 270

[9] High Court case No 3690/2003 [2003] SZHC15

facts and circumstance different material from those forming the basis of the Plaintiff's clailn, may be advised by the Defendant and in all constitute a bona fide defence in sumntary judgnient".

THE LAW ON SUMMARY JUDGMENT APPLICANTIONS

[16] Our jurisdiction is now replete with authorities on this area of the law. In order for a Defendant to successfully resist a summary judg1nent application being granted against him, he must show cause by affidavit or otherwise to the satisfaction of the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reasons to be a trial of that claim or part thereof see ***Rule 32 (4) (a) Rule and 32(5)(a)*** of the Rules of Court.

[17] In the matter of **Sikhwa semaSwati t/a Mr. Bread Bakery v PSB Enterprises (pty) Iimited** [10], his Lordship Ma1nba J. synchronized the position of the law as follows;

*"I **observed here that before these Rules were mnended by Legal Notice No. 38 of 1990, Rules 32 (3), (b) required the Defendant's affidavit or evidence to disclose fully the nature and grounds of the defence and the ,naterial facts relied upon therefore. This is the old rule that was quoted by***

[10] High Court Case No. 3830/09

Counsel for the Plaintiff in his heads of argument and similarly worded, advised, to Rule 32 (3) (b) of the uniform Rules of Court of South Aji·ica. Thus under the former or the old Rule, a Defendant specifically required to show or "disclose fully the nature and grounds of his defence and the 1naterial facts relied upon therefore", whereas under the present Rules, he is require,! to satisfy the Court that there is an issue or question in dispute which ought to be trialed and that there ought for some other reasons to be a trial on the whole clai111 or part thereof. The Defendant 111ust show that there is a trouble issue or question or that for some other reason they ought be a trial. This Rule is 1110/ded on English order No. 14/3 of the Rules of the Supreme Court.

[18] The position of the law as espoused by his Lordship Mamba J, is that the underlining obligation for any Defendant, is to satisfy the Court that there is a triable issue or question, or for that some other reason there ought to be a trial . It appears that there is a shift in the trajectory of jurisprudence in this jurisdiction, in this area of the law. The more acceptable consideration now, being wider than the widely revered existence of a *bona fide* defence.

[19] The above legal position has been cited with approval in many other decisions of this Court, following the **Sikhwa semaSwati** one. They include the following; **Swaziland Development and Savings Bank v Phineas Butter Nkambule High Court case No 129/2015; Swaziland Tyre Services v Sharp Freight Swaziland (381 [2014]SZHC 74 see also FNB Swaziland Limited t/a West Bank v Rogers Mabhoyane Du Point (4365/2009) (4556/09).**

THE COURT'S ANALYSIS

[20] What this Court will endeavor to do, is to decipher from the Defendant's affidavit resisting sun1mary judgment, whether the Defendant has been able to demonstrate that there is an issue or question in dispute, which ought be tried or that there ought for some other reason to be a trial of the claim or part it. The very first issue that has been raised by the Defendant in his affidavit resisting summary judgn1ent is that, the application for summary judgment and the declaration filed by the Plaintiff constitute an irregular step, in terms of Rule 30 of the Rules of the above honourable Court.

[21] The Defendant further argues that in terms of Rule 20 of the Rules of the above honourable Comi, declaration shall be delivered within14 days from the date of receipt of notice intention to defend.

In the matter at hand, the notice of intention to defend was received by the Plaintiff on the 9 February 2021. The declaration was subsequently filed and delivered to the Defendant on the 24 June 2021. The summary judgment application was served the following day, on 25 June 2021.

[22] According to the Plaintiff, the period that lapsed between the delivery of the notice of intention to defend and the declaration extends to four moriths. This is way out of the 14 day period as provided for in the Rules of Court. Therefore, the Defendant argues the Plaintiff failed to take advantage of Rule 27 of the Rules of Court, but proceeded to take fwiher legal steps, as if *it* was still within ti1ne. It is on that basis that the Defendant then argues that the entire application for the summary judgment filed by the Plaintiff constitute an irregular step.

[23] In dissecting this legal quagmire, I will commence by restating the provisions of Rules 30 of the Rules of Court.

> ***30 (I) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within 14 days after beco111ing aware of the irregularity, apply to Court to set aside the step of proceedings; provided that no***

party who has taken any further steps in cause with knowledge of the irregularity shall be entitled to make such application.

23.1 ***Application in tern1s of sub-rule (]) shall be on notice to all parties specifying particulars of the irregularity alleged.***

23.2 *If* ***at the hearing of such application the Court of the opinion the proceeding or step are irregular, it ,nay set it aside in whole or in part, either against or against some of then1 grant leave to amend order make such other fit***

[24] It is co1nmon cause that the Defendant has not applied to Comito set aside the steps which he alleges were taken by the Plaintiff that he claim are irregular. He has not done so through an application to Court on notice(my underlining) as provided for under Rule 30 (2) as captioned for above. The issue of the irregularity of the steps, has been raised on the affidavit resisting summary judgment as a technicality.

[25] This issue was debated at length by both .Counsels during the arguments of the 1natter. In responding to the lack of adherence of Rule 30, Mr. M.S Dlamini, counsel for Defendant, argued that legal points can be raised at any time before judgment. In order to fully comprehend the import of Rule 30, a proper reading of the Rule and

interpretation is important. First, the Rules impose a time frame within which a party who intends to exercise it's provisions of should act. The Rule states that the other party may within 14 days after bec01ning aware (my own underling) of the iJTegularity, apply(my further underlining) to Court to set aside the steps or proceedings. This means that the issue is not only what constitutes an irregularity. But, also the party who raises the complaint or irregularity must apply to Court within 14 days after becoming aware of the irregularity. In my interpretation, the Rules impose a time frame within which this issue must be raised. It also goes ahead to stipulate a format in which the issue must be raised. This is through an application on notice. This means that the issue must be raised within 14 days and it must be raised through an application to Court which shall be on notice to all parties, specifying the

irregular steps complained of.

[26] I now turn to the pleadings in the matter at hand to ascertain when should the Defendant have been aware of the irregularity complained of. In his own version, the Defendant in the affidavit resisting sum1nary judge1nent, in paragraph 2.1, states that the declaration was filed and delivered on the 24 June, 2021. The summary judgment application was delivered the following day on

the 25 June 2021.

[27] If the 14 day period as stipulated in Rule 30 (1) is applied, it means the Defendant should have filed a notice to set aside the steps which he alleges are irregular, within 14 Court days from 25 June 2021. When one computes the 14 Court days from the 25 June 2021, the last day on which the Defendant should have filed the notice in terms of Rule 30, is the 15th July 2021. Even if the Court would accept that a legal issue can be raised at any time before judgment, but it should have been done on notice, This one was raised through an affidavit resisting summary judgment only on the 13 August 2021. Besides being way out of the time, the format that has been used is not by way of application and on notice. It is therefor not an application on notice but it is a technical point raised when the Defendant was resisting the summary judgment application that had been moved against him. The Court has not been favoured with an explanation why a fully blown Rule 30 notice was not filed. There is also another important aspect that is raised by Rule 30 (1). Other than stipulating the format and dies there is also a rider which is as follows:

> ***"provided that 110 party who has taken any further step in the course with knowledge of the irregularity sha/[be entitled to niake such an application"***

[28] In essence, the Rule stipulates that once a, party becomes aware of the irregularities complained of and elects to proceed and take further steps in the full knowledge of the irregularity, it is then not entitled to benefit through an application in terms of Rule 30, In a nutshell, this means that if a party is aware of an irregular step, but proceeds to take further legal steps in the course of the proceedings, it is then not entitled to benefit from the provisions of this Rule at a later stage.

[29] In the matter at hand, as it has been outlined above, the Defendant should have been aware that the Plaintiff was now out of time to file a declaration and the summary judgment application, as early as the 25th June 2021. Having been alive to this, he proceeded to take the following legal steps:

29.1 He filed an affidavit resisting the summary judgment.

29.2 Consented that the Plaintiff be granted leave to reply to his affidavit resisting summary judgment.

[30] Clearly, the Defendant took further steps in the course of the matter, with the full knowledge of the alleged irregularity. As such, he therefore should not be entitled to raise the complaint of an irregular step subsequent thereto.

RULE 27 ARGUMENT

[31] The Defendant has also argued strenuously that in in terms of Rule 27 of the Rules of Court the Plaintiff ought to have applied to Court for an extension of time instead of behaving as if was still within time to file its declaration and summary judgment. The Defendant further argues that the Plaintiff has not explained as to why the Declaration was filed 4 months late.

EXTENSION OF TIME AND REMOVAL OF BAR AND CONDONATION

[32] Rule 27 of the rules ofComi states:

> ***In the absence of an agreenient between parties, the Court may upon application and Notice and on good cause shown make an order extending or up bridging the anytin1e prescribe by the rules or by an order of Court or .fixed by an Order extending or up bridging anytime for doing any act or taking any step in connection with any proceedings of any nature or whatsoever upon such tin1e as to it seems fit.***

In applying this rule to the facts at hand, it is my considered view that this rule should have applied if the Plaintiff had been successfully barred by the Defendant. However, the Defendant did not bar the Plaintiff. Therefore, the application for removal of bar and extension of time could not have been activated, in the circumstances.

[33] Rule 27 deals with extension of time fran1es, the removal of bar and condonation. There are two categories of time frames relevant to Court proceedings. For example, the time prescribed by these rules or by an order of Court. The Plaintiff would have only been entitled to apply for the removal of bar or extension of time in terms of Rules 27, if it had been barred by the Defendant.

TRIABLE ISSUES

[34] I would now 1nove on to ascertain if the Defendant has raised any triable issues in his affidavit resisting smnmary judgment. Other than the technical point of the declaration and summary judgment being filed out of time, the Defendant in his Affidavit resisting Summary Judgment has stated that he does have a defence to the Plaintiffs claim in a fo1m of a counter claim. The Defendant argues that the Plaintiff is indebted to him in an amount that he believes to be in excess of what the Plaintiff claims from him. The Defendant further submits that, when he resigned from work, the Plaintiff refused to give him his terminal benefits which include his pension. The Plaintiff further argues that the bank even refused to give him a breakdown of the monies that were due to him. He alleges that when he demanded same, he was refused and no reason was advanced by the bank for such.

[35] It is cmnmon cause that in his affidavit resisting summary judgment, the Defendant has not stated the amount which he claims he is being owed by the Plaintiff (his former employer). According to him, his reason for failing to state the exact amount is that he asked for a breakdown from his employer, but he was refused. What is clear is that, as the matter stands, the Plaintiff has not advised with clarity to the Court how much is owed by the Bank to hin1 in tenns of the full extent and particularly of his clai1n against the bank. If that is so, how can this issue be a question that would be a subject for trial, when the Defendant cannot even tell how much is owed to him

[36] Terminal benefits are usually set out in either the contract of employment or in the collective agreement where a Union exists, also by operation of the law. It is common cause that the Plaintiff has instructed a form of attorneys who are representing him in the matter before Comi. There is no reason that has been volunteered to the Court, as to why the Plaintiff cannot be assisted to compute or calculate the terminal benefits which he alleges are owed to him. The Defendant unfortunately has neglected to even particularise the nature of the alleged terminal benefits. ls it gratuity, severance pay, leave?

[37] If this Court applies the provisions of rule 32 (4) (a) which requires that the Defendant must satisfy the Court that there is an issue or a question in dispute which ought to be tried or that there ought for some other reason(s) be a trial of that clain1 or part thereof.

[38] This rule presupposes that there must be a reason advanced by the Defendant that there should be a trial of that claim (my underlining) The proble1n with the 1natter before Court is that, the Plaintiff has not established that this Court has the requisite jurisdiction to adjudicate the alleged claim which pe1iains to his terminal benefits. How does this Cou1i then deduce that there is a triable issue, when the Plaintiff has failed to state the amount owed and to demonstrate that this Court has jurisdiction to adjudicate on the alleged counter claim.

[39] The Court is alive to the fact that, at this stage of the proceedings, the Defendant is not required to deal exhaustively with the details of his defence. However, as was stated by the learned author **Herbstein and Van Winsen** in their work titled **Civil procedures of the Supreme Court of South Africa fourth edition at page 144;** there is still a duty on the Defendant to disclose the full nature and ground of his defence.

[40] It is my considered view that the fu11 nature of this counter clai1n has not been disclosed. What the Defendant has slated in the Affidavit of resisting summary judgment, is bare and too general for the Court to be persuaded that there is a triable issue which ought to be referred to trial.

JURISDICTION OF THIS COURT TO ENTERTAIN THE COUNTER CLAIM

[41] The Industrial Relation Act of 2000 as amended states as follows;

> *"8 (I)"* ***the Court shall subject to Section 17 and 65, have exclusive to hear and detennine and grant any appropriate relieve in respect of an application, claim, co,npliant or infringe111ent of any of the provisions of the E111ploy1nent Act, Workmen Compensation Act, or***
>
> ***any other legistration which extend jurisdiction to the***
>
> ***Court, or in respect of any matter which n1ay arise at co111mon law between an employer and employee in the cause of employment or between an employer and employee association and the trade union, staff association or between an employee's association a trade union staff association, federation and the***

1nember thereof.

The nature of the Defendant's counter claim as can be gleaned from what has been stated before Court, appears to be a dispute between an employer and an employee. It appears to me that this issue falls within the exclusive jurisdiction of the Industrial Court.

[42] If this Court does not have jurisdiction, how can it entertain the counter claim as a possible issue that should be referred to · trial. Even if this Court would refer the counter claim to trial, clearly this Court would not have jurisdiction to entertain that it, at that stage. The Court is well aware of what was stated by Mamba Jin the matter **ofMbuso E. Simelane and Associates v Lloyd Graig Henwood** [11] ; where his Lordship stated that a Defendant is not expected to state or furnish his defence with such precision or exactitude that would be expected of a litigant in a plea.

[43] There is actually no prec1s1on or exactitude that can be expected of the current Defendant, when his counter claim falls outside the jurisdiction of this Court. In his affidavit resisting summary judgment, the Defendant states that it is an undisputed fact that the Plaintiff is indebted to him in the form

[11]1137/2016 12016] SZHC270

of terminal benefits, as well as pension benefits. Therefore, he has a counter claim against the Plaintiff. Firstly, it is inaccurate to say it is an undisputed fact. The Plaintiff has clearly controverted this in it's papers before Court. [12] Unfortunately, the Defendant has failed to refer the Court to the de1nands that he alleges were made or even state the amount of the indebtedness. Secondly, even if the tenninal benefits and the pension benefits were computed, the nature of the claim falls outside the jurisdiction of this Court.

[44] I am in agreement with the principle argued by the Defendant, to the effect that a counter claim constitutes a val id defence to an application for summary judgment. [13] However, each matter should be detennined in accordance to it's own facts and merits. The amount of the counter claim before Court has not been stated, let alone that it is a labour issue which is the exclusive preserve of the Industrial Court ofeSwatini.

[45] In conclusion, there seems to be insufficient motivation on the part of the Defendant to sway the Court that there is a triable issue or that there is a question in dispute which ought to be

[12] See paragraph 6 of the Plaintiff's replying affidavit.
[13] See Brooklin Investment (ply) Ltd v Bongane Bhembhe High Court case No. 506/2018; where in paragraph 5, his Lordship Mlangeni J. stated that the counter claim exceeded the Plaintiff's claim. Unfortunately, same cannot be said about the matter at hand.

tried or that for some other reason the Plaintiff's claim or part thereof ought be referred to trial. On the totality of evidence before this Cou1i, and for the foregoing reasons it is my considered view that the summary judgment application must succeed. The Defendant is perfectly entitled to follow the provisions of **Part VIII of the Industrial Relation Act of 2000** (as amended) to pursue his alleged counter claim, at the Industrial Court of eSwatini.

COSTS

[46] In as much as the Plaintiff has prayed for costs at a punitive scale of attorney and own client, as provided for in the loan agreement. I am loathe to allow the costs at such a higher scale. The Plaintiff has been complicit in the compounding of the contentious issues which the Court has had to grapple with. Especially by filing the declaration out of time, and failing to state reasons thereof.

[47] I therefore grant stm1mary judgment as prayed for, with costs at an ordinary scale.

ORDER

[48] That Summary Judgment is hereby entered against the Defendant in the following terms:

48.1 Payment of the sum of El25 682.16 (One hundred and twenty five thousand six hundred and eight two Emalangeni sixteen cents).

48.2 Interest at the rate of 9% per annum.

48.3 Costs of suit at ordinary scale.

B.WMAGAGULA AJ

THE HIGH COURT OF ESWATINI

For the Plaintiff: MR. K.Q. MAGAGULA OF SJTHOLE & M/\G/\GULA ATTORNEYS

For the Defendant: MR. M.S DLA MINI OF MS LEGAL