IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 815/2023**

In the matter between:

ESWATINI DEVELOPMENT & SAVINGS BANK **PLAINTIFF**

And

CARDO PROPERTY DEVELOPERS (PTY) LTD **DEFENDANT**

Neutral citation : *Eswatini Development & Savings Bank v Cardo Property Developers (Pty) Ltd (815/2023) SZHC 04 [2023] 01/02/2024.*

CORAM:	**B.S DLAMINI J**
DATE HEARD:	21 December 2023
DATE DELIVERED	01 February 2024

Summary: *Application for summary judgment- Parties concluding a Finance Facility Agreement- Defendant contending inter alia, that its directors did not authorize or approve some of the transactions debited against its bank account- Defendant also disputing its directors' signatures in some written instructions to the bank.*

Held; *The defences advanced on behalf of the Defendant do not raise triable issues or constitute valid or bona fide defences to Plaintiff's application for summary judgment. Summary judgment is accordingly granted as prayed for.*

JUDGMENT

INTRODUCTION

[1] The Plaintiff issued simple summons against the Defendant on or around the 3rd April 2023 claiming payment of a sum of **E 84, 372, 990.12 (Eighty Four Million Three Hundred and Seventy Two Thousand Nine Hundred and Ninety Emalangeni and Twelve Cents** in respect of a loan disbursed by the former to the latter.

[2] The Defendant duly filed a notice of intention to defend against the simple summons and Plaintiff filed a Declaration as well as an application for summary judgment in terms of the relevant Rules of this Court. The Defendant in turn filed an affidavit resisting summary judgment, setting out its opposition to Plaintiff's claim, and, Plaintiff filed its reply thereto after obtaining the necessary leave of Court to do.

[3] In terms of the Plaintiff's Declaration, Plaintiff alleges that the parties entered into a written finance facility agreement on the 18th February 2022 in terms of which Plaintiff agreed to lend a sum of E 76,422,897.68 (Seventy Six Million Four Hundred and Twenty Two Thousand Eight Hundred and Ninety Seven Emalangeni and Sixty

Eight Cents) to the Defendant as a commercial housing loan for the development of a commercial centre at Ngwane Park area, Manzini.

[4] Plaintiff alleges that Defendant agreed to pay interest on the balance of the initial capital sum at prime rate, plus 2% per annum, calculated daily and charged monthly in arrears. The Defendant further agreed to pay to Plaintiff the usual and customary bank charges and commission whilst also acknowledging Plaintiff's right to adjust the same from time to time.

[5] It is Plaintiff's averment that Defendant was, in terms of the agreement, expected to repay the loan amount in One Hundred and Twenty (120) monthly instalments at the rate of E 782,000.00 per month. It is further stated by Plaintiff in its declaration that;

"4. **The Defendant breached the agreement in that it failed to pay the due instalments of the loan facility.**

5. **As at the 10th day of March 2023 the outstanding amount of the loan facility amounted to E 84 372 990.12 (eighty four million three hundred and seventy two thousand nine**

hundred and ninety emalangeni twelve cents) as appears more fully from the statement annexed hereto marked "C"."

[6] In opposition to Plaintiff's claim, it is stated by the Defendant in the affidavit resisting summary judgment that;

"4 (b) It is defendant's case that in order for the draw down or payment to be made (from its account), it appointed two directors being Mathew Sprague and Bobby Makhanya to authorize payment. Such authorization upon being made electronically, was to be confirmed with the authorized signatories by the bank.

4.2 Contrary to the authorization arrangement, the bank allowed several transactions (payments) to be made without the requisite authorization and without verifying the authorization with all the defendant's directors who were authorized signatories in particular Bobby Makhanya. These payments which were made without authorization and without verification by the bank resulted in payments

that were fraudulent, not due and not for the benefit to be made by the plaintiff. The signature of Bobby Makhanya was implanted electronically, hence the payments appeared authorized but the bank did not verify with him.

The Honourable Court is implored to note that there is currently a forensic audit being carried out by the defendant and the amount is set to increase when the forensic audit has been finalized. Further, the Honourable Court is implored to take into account that payment of these fraudulent amounts and without authorization had a negative impact on the liability of defendant as it increased the disbursed amount and its interest."

[7] The Defendant then outlined in detail the amounts and the entities which according to it, were improperly and/or fraudulently paid without authorization or verification from its account held with the Plaintiff. In total these amounts, according to Defendant, make about E 20,000.000.00 (Twenty Million Emalangeni).

DEFENDANT'S ARGUMENTS

[8] Defendant argued that Plaintiff's Reply to the Affidavit Resisting Summary Judgment runs to about Three Hundred and Sixteen (316) pages. This on its own, according to Defendant, means that there are triable issues and therefore the matter ought to be referred to trial in order to properly ventilate all the issues averred in this bulky document. Defendant submitted that "***the additional evidence contained in the Replying Affidavit effectively denies the Defendant her procedural right of reply. The defendant is deprived of the opportunity to address the Court on the additional 316 pages contained therein***..."

[9] Defendant argued that inasmuch as Plaintiff alleges that the finance facility agreement was concluded in February 2022, the bank statement attached reflects transactions (on the same loan) dating way back to the years 2019 and 2020. Defendant argues that this discrepancy means Plaintiff cannot be granted summary judgment. According to Defendant, Plaintiff was supposed to particularize how much was disbursed in the past years prior to the year 2022. The Plaintiff's Declaration, according to Defendant, is clearly wrong in

stating that the entire amount of the loan or that the loan agreement was concluded in February 2022 and that the entire amount of the loan was disbursed in the year 2022.

[10] The importance of properly referencing the time or period of disbursement of the amounts in the past, according to Defendant, is that such would afford Defendant the opportunity of properly identifying and dealing with all the transactions it considers to be unauthorized by it. Defendant submitted that the variance or discrepancy in all the issues raised by it means that the Plaintiff's cause of action is *excipiable* and should be treated as such.

[11] Defendant's further argument was that in terms of the legal authorities, where there is sufficient security to cover the entire debt claimed by a Plaintiff, the Court ought to refer the matter to oral evidence and to avoid granting the swift remedy of summary judgment in such circumstances. Defendant argued that the mortgaged property is way more than enough to cover Plaintiff's claim

[12] On the merits of the matter, Defendant argued that it has a *bona fide* defence to the claim in that a total sum of about E 20 Million of the total loan amount is being contested by it as having been unlawfully disbursed by Plaintiff without its authorization.

[13] In dealing with the issue of the alleged unauthorized payments, it is contended by Defendant in its heads of argument that;

> **"19. Whilst the Defendant's counter-claim that it intends to pursue against the plaintiff arose during the period from 2019 to 2020, It is submitted that the Defendant's affidavit sets out sufficient detail to enable the above Honourable Court to decide whether it is well founded. Just to avoid any doubt, the position of the law is that the counter-claim need not necessarily arise out of the same set of facts as a claim in convention." [Emphasis underlined]**

[14] During argument, Defendant's counsel forcefully argued that one of the Defendant's director's signature, namely Bobby Makhanya, was forged and electronically implanted in the letter of instruction to the

bank such that the transactions appeared authentic when in truth they were not, as the latter did not know or authorize these transactions.

[15] The argument by Defendant's counsel was that the agreement between the parties was that before any payment based on a written instruction could be made, Plaintiff was supposed to first verify same with the said director or directors of the Defendant. This, according to counsel representing Defendant, did not happen, resulting in the said unauthorized payments being made against Defendant's bank account.

[16] Based on all of these issues and what the Defendant refers to as its 'counter-claim' or 'intended counter-claim', the Court was urged to dismiss the application for summary judgment and refer the matter to trial.

PLAINTIFF'S ARGUMENTS

[17] On behalf of Plaintiff, it was argued that the claim by Plaintiff is a liquid claim in terms of Rule 32 of the High Court Rules of Eswatini. Plaintiff's counsel submitted that all the issues raised on behalf of

Defendant do not constitute a *bona fide* defence or raise triable issues as required by law.

[18] On behalf of Plaintiff, it was disputed that only two signatories were appointed to authorize payment from Defendant's account. Plaintiff submitted that there were three authorized signatories appointed by Defendant namely, Jim McSeveny, Mathew Sprague and Bobby Makhanya. These three, according to Plaintiff, were given signing authority as per Defendant's resolution of the 14th June 2019.

[19] Plaintiff's submission was that neither the memorandum of agreement nor the resolution submitted to Plaintiff by Defendant instructed the bank to first confirm an electronic signature or payment instruction with any of Defendant's directors before making any payment. In response to this allegation by Defendant, Plaintiff has argued that;

"8.1 **First, it is trite in law that where a bank pays in accordance with instructions of a client, and such instructions are confirmed by correspondence from an authorized agent, if the bank pays as per the instruction in the ordinary course of business, it cannot later be faulted for doing so. In this**

matter as shown in the various express instructions, the instructions were issued by two directors who were given the authority by the Defendant to instruct the bank to make payments. The bank acted on these instructions in the ordinary course of this loan agreement, hence it cannot be faulted when it seeks to recover the monies paid by it.

8.2 Second, where a party by its express and implied actions admits or approve validity of actions, it cannot then seek to change at a later date. In this matter it is submitted that the Defendant by its express and implied actions approved the validity of the various payment instructions signed by Matthew and Bobby for the following;

8.2.1 after the various payment instructions had been complied with by the bank, it sent statements and proof of payments (normally the following day) between the period August 2019 to December 2021 to the Defendant. The latter accepted payments and never queried any of the payments done as per the instructions during the relevant time and;

8.2.2 Also, the payment instructions did not only relate to the amounts mentioned in paragraphs 4.2 to 4.9 of the affidavit resisting summary judgment. Instead as shown in the replying affidavit, the amounts being queried were paid through instructions which involved the companies of Bobby and Sipho Makhanya. Therefore, the Plaintiff submits that the instruction cannot be valid for payments to Toughstone, Cardo Capital but the Defendant then claims that they are valid for other third parties. Put differently, the argument is just misconceived as the Defendant by its implied conduct accepted the payment instructions which did not only relate to third parties but also to companies owned by the deponent and Bobby Makhanya..."

[20] In the course of arguing the matter on this issue, Plaintiff's counsel referred the Court to all the letters of instruction issued to the bank and signed by the mandated signatories. These letters are specifying

the amounts to be paid and the entities to be paid. This in essence, is what caused the replying affidavit to be bulky.

[21] Plaintiff's counsel further submitted that in order for a counter-claim to succeed in watering down or defeating a summary judgment application, that counter-claim must be equal to or be more than the amount claimed by the Plaintiff. The Defendant's claim, according to Plaintiff, being around E 28 Million, cannot defeat its claim for summary judgment which is for a higher amount (above E 76 Million).

[22] In its supplementary heads of argument, Plaintiff contends that Defendant is clutching on straws in that it does not dispute the existence of the loan agreement in terms of which it received the sum of money claimed by Plaintiff as a loan disbursed by it to Defendant. Plaintiff argues that the issue of the different dates of the loan agreement is raised for the first time in Defendant's heads of argument and is not part of the affidavit resisting summary judgment.

[23] The date of the agreement, according to Plaintiff, is clearly set out in the Declaration as being February 2022. Plaintiff further argued that what is important in a summons is clearly set out in the summons as being monies loaned and advanced to the Defendant at the latter's special instance and request. All the necessary averments to sustain this cause of action, have, according to Plaintiff, been properly pleaded to enable the Defendant to respond thereto.

[24] On the issue of the application of Clause 5 of the loan agreement in terms of which Defendant argued that Plaintiff should not have permitted the account to be drawn down prior to a deposit and other conditions being fulfilled, Plaintiff argued that such a clause is for the benefit of the creditor hence Defendant cannot use it as a defence to its claim.

[25] It was submitted on Plaintiff's behalf that the replying affidavit had to be bulky as it was forced to attach all documents relating to payments made by it having been duly instructed by Defendant's directors to do so, in order to rebut all allegations of impropriety as alleged by the latter.

ANALYSIS AND FINDINGS

[26] In the case of **Sinkhwa Semaswati (Pty) Ltd t/a Mister Bread and Confectionary v PSB Enterprises (Pty) Ltd Civil Case No 4468/08,** the High Court of Eswatini held as follows regarding a *bona defence* to an application for summary defence;

> **"[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, rule 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 therefore." This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly word, 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 therefore", 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 modelled on *English Order Number 14/3 of the Rules of the Supreme Court.*

[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 appears to be exactly the same. Under the present rule, the primary obligation of the defendant is to satisfy the court that there

is a triable issue or question, or that for 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 Investments Corporation Ltd and Another, 1982-1986 SLR 406 at pages 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 therefore. 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 court that he has a *bona fide* defence to the action or to complain of procedural irregularities."

[27] Our legal authorities therefore require that a defendant opposing summary judgment must not merely demonstrate that he has a *bona*

fide defence but must also satisfy the Court either that there are disputes of fact or that there are material issues which can only be resolved at trial.

[28] In the present matter, the Defendant has chosen not to respond to Plaintiff's claim which is based on a written finance facility agreement said to have been concluded in February 2022. Instead, the Defendant has opted to plead its own claim, quite distinct and separate from that pleaded by Plaintiff. In paragraph (32) of its heads of argument, Defendant submits that;

> **"32. Before answering the question whether or not there was a breach, the Plaintiff must take the Honourable Court into its confidence and show that the loan was disbursed. As is, the Court is only limited to annexure C which begins on 27th February 2020, (and not from February 2022) with a closing negative balance of E 34,231,919.72. It is submitted that the evidence placed by the plaintiff before this Honourable Court is insufficient for purposes of discharging its onus. There is clearly no evidence of the loan disbursement, unless the Court is to rely upon the *ipse dixit* of the plaintiff."**

[29] The assertion by Defendant to the effect that there is no evidence of the loan being disbursed by Plaintiff to Defendant is mind-boggling and, quite frankly disturbing, to say the least. First of all, the Defendant, duly represented by its identified directors, signed a written agreement on the 18th February 2022, in which it accepted a loan amount of E 76,422,897.568 from Plaintiff. Secondly, in paragraph (3) of the Declaration, Plaintiff alleges that;

> "3 **The Plaintiff duly and timeously complied with all its obligations in terms of the agreement and in particular, the Plaintiff duly advanced the loan facility to the Defendant.**"

[30] The express averments by Plaintiff to the effect that it entered into a written finance facility agreement with Defendant and that it (Plaintiff) complied with its obligations of advancing the loan amount in terms of the said facility to Defendant have been expressly pleaded but have not been disputed by the latter.

[31] A party having a *bona fide* defence or a counter-claim is still required to plead to Plaintiff's or Applicant's claim for the simple reason that

failure to do so would mean Plaintiff's or Applicant's claim is not disputed. In **Swaziland Development & Savings Bank v Phineas Butter Nkambule (129/2015) [2018] SZHC 123 (12th June 2018)**, the Court was faced with an almost similar issue in that an application for summary judgment was being resisted on the ground *inter alia*, that there had been 'unlawful deductions' from Defendant's account. The Court in dealing with this issue stated that;

"**[31] On the defendant's own affidavit he neither disputes his indebtedness to the plaintiff for the said loan nor does he contest the computation of the outstanding sums in the certificate of balance submitted by the plaintiff. Instead, he purports to put up a delictual claim for damages. In any event the key and pertinent question is whether even if he did, such a claim should serve as a valid basis for refusing summary judgment herein. I now turn to this consideration.**

[32] Under the old rule on summary judgment there was nothing in principle to prevent a Defendant from pleading a counter-claim founded on a separate and completely unrelated cause of action in defence to an action. In that

regard there is a preponderance of judicial opinion in support of the proposition that a Defendant could raise the existence of an unliquidated counter-claim as a defence to the plaintiff's action (*See Wilson v Hoffman and Another 1974 (2) SA 44 R; H1 Lokhart (Pty) Ltd v Domingo 1979 (3) SA 696 (T) and see also Statten v Stoffberg 1973 (3) SA 725 (C).*

[33] Now it goes without saying that the South African judgments I refer to here deal with principles postulated upon interpretation and application [of] the rules of summary judgment proceedings in that country. Historically the South African rule was similar in its wording to the provisions of our old rule on the subject. That was before an amendment of our rule that altered this position substantially...

[36] I need only highlight that the operative qualifying words or phrases that define what would constitute valid grounds for

refusal of summary judgment that a defendant must set out are simply that he must satisfy the court or demonstrate:

"With respect to the claim or the part to the claim to which the application relates that there is an issue or a 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." [My emphasis]

[37] Our current rule is clear in that any 'cause', 'reason' or 'question' or issue that the defendant raises must not only [raise] some triable issue but must be germane, relate or be in respect to the whole or part [of] the claim to which [the] action relates... [My emphasis]

[39] Upon that premise and in the context of our sub-rule 32 (4) (b), it is my considered view that in terms of our rules as presently framed, a bare counterclaim for an unliquidated claim for damages does not constitute a valid defence to a summary judgment application. It is my understanding that such a claim in reconvention founded, as it were, on a separate cause of action does not qualify as a valid ground

for resisting summary judgment. That sub rule is complementary to Rule 32 (4) (b)."

[32] The reasoning and rationale espoused by the Court in the **Swaziland Development & Savings Bank** matter (*supra*), in my view, hit the nail on the head in terms of clarifying the issues and in outlining the standard required of a Defendant who intends to raise a counterclaim or raise a triable issue in proceedings of this nature. In summary, all that is required of a Defendant resisting a summary judgment application is that he must plead to the Plaintiff's claim and, within that scope, raise his counterclaim or the triable issue applicable to the facts.

[33] Having totally failed to contest or deny Plaintiff's claim against it as pleaded on the papers, Defendant is, on this ground alone, liable to make good of its obligations in terms of the contract it entered into with Plaintiff. Courts have time and again emphasized on the sanctity of contracts. In **Structra Group (Pty) Ltd v Van Niekerk and Others (06923/2019) [2022] ZAGPJHC 219 (11 April 2019)**, the High Court of South Africa (Johannesburg) stated as follows;

"[11] **It is a trite principle of our law that the privity and sanctity of a contract should prevail and the Courts have been enjoined in a number of decisions to enforce such contracts. Parties are to observe and perform in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that the contract is tainted with fraud or a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy."**

[34] The failure by Defendant to demonstrate to the Court how it can be said that the contract which was freely and voluntarily entered into by the parties during the month of February 2022 is legally tainted in one way or the other, means Defendant is bound by the contract and must accordingly be liable for the consequences resultant from its breach.

DEFENDANT'S COUNTER-CLAIM

[35] A second critical consideration is whether or not Defendant has raised a valid or legally-sound counter-claim. It is important to evaluate Defendant's counter-claim in that some legal authorities seem to

suggest that a Defendant is entitled to raise an independent counter-claim against Plaintiff's cause in a summary judgment application. What Defendant has raised in the affidavit resisting summary judgment is clearly not a proper counter-claim. A counter-claim is essentially a legal claim raised by the other party within the context of an ongoing claim by the dominant party. A counter-claim must contain all the requisites of a valid legal claim *inter alia*, the facts upon which the cause is founded, the cause of action (legal foundation of the claim) and the specific relief sought.

[36] The Defendant's 'counter-claim' falls far too short of the standard required for a valid or proper legal claim. If therefore, as passionately urged by Defendant's counsel, the matter were to be referred to trial, the Court is asking itself what the purpose of referring the matter to trial would be in such circumstances. Surely the Court cannot be seen to be entertaining a request for a referral to trial if the purpose thereof is to deal with a 'speculative claim'. I say it is speculative because the Defendant has not made out any specific claim against the Plaintiff except to 'suspect Plaintiff of foul play.' As a matter of fact, the Defendant has pleaded that its defence to the application for summary

judgment is based on an 'intended counter-claim'. The Court cannot rely on a speculative claim to deny a party of its entitlement to a judgment, especially if the Plaintiff's claim is uncontested.

[37] In the affidavit resisting summary judgment, Defendant points out that its loss, allegedly caused by the 'fraudulent payments' amounts to about E 20 Million and that this figure might increase depending on the outcome of its 'forensic audit'. There is no specific amount claimed against Plaintiff. The Defendant also does not specifically identify the Plaintiff as the perpetrator of the alleged fraudulent payments, and if so, in what manner i.e negligence or fraudulent misrepresentation or breach of contract, it is to be held liable. The Court acknowledges that Defendant mentioned in its papers that when the payments were made, the Plaintiff did not have;

(a) authorization from the Defendant to make such payments;

(b) the signatures of the directors, in particular that of Bobby Makhanya, on the written payment instructions, were fraudulently and electronically implanted; and

(c) the signatures were not confirmed by Plaintiff with the Defendant's directors (as allegedly agreed) before any payment could be made.

[38] In the Replying Affidavit, Plaintiff was able to attach all documents of written authority given to it to make payment against the transactions complained of. The allegation of lack of authority in the payments made is therefore lacking in merit insofar as the Court was shown all the letters of authorization issued to Plaintiff to back the payments complained of.

[39] On the allegation of the directors' signatures being implanted electronically on the written authorizations, nothing was shown to be untoward in this practice. In the affidavit resisting summary judgment, it is alleged by Defendant that;

> "**4 (b) It is defendant's case that in order for the draw down or payment to be made, it appointed two of its directors being Mathew Sprague and Bobby Makhanya to authorize payment. Such authorization being made electronically, was**

to be confirmed with the authorized signatories by the bank."

[40] What this means is that payment could be made based on instructions submitted electronically as stated by the Defendant. In such a case, all that Plaintiff was required to do was to internally confirm or verify that the signatories in the letters of authorization are in line with the mandate submitted to it by the directors of the Defendant.

[41] On the allegation that Plaintiff was required to first verbally confirm payment instructions with the Defendants' directors prior to making any payment, the onus was upon Defendant to show or refer the Court to the relevant legal instrument which backs this argument i.e is this assertion founded on the written finance facility agreement between the parties?; is it founded on an oral agreement between the parties?; or is it perhaps founded on common bank practice? Defendant's counsel was unable to assist the Court with the legal foundation of this aspect of the matter.

[42] It would therefore be an exercise in futility if the Court were to refer this matter to trial. Without setting out a proper cause of action and applying for a specific relief in its 'counter-claim', the Court would still be required to issue judgment in favour of the Plaintiff. The Court's judgment in the **Swaziland Development & Savings Bank matter** (supra) is still relevant on this aspect of the matter. The Court in this judgment held;

> **"[41] The defendant's averments although not fully articulated with sufficient particularity as to disclose the existence of a genuine counterclaim suggests that he contemplates the bringing of such counterclaim. Even if it were otherwise and he had fully set out such a claim that would at best portend a claim in reconvention as envisaged by Rule 32 (4) (b)."**

[42] In my view, there is nothing stopping the Defendant from conducting a proper forensic audit on its bank account and, once it has an outcome of the investigations, to then institute proper legal proceedings against any party liable in terms of its findings for any

loss it may have suffered. By its own admission, it is premature to be pointing fingers at any one as investigations are ongoing. It may be that if the allegations are true, the culprit may be amongst the directors themselves or management or even other third parties. In retrospect, the directors may even recall that it was actually them who authorized the payments complained of once the investigations are through. This is more so because evidence was presented in Court to demonstrate that some of the payments complained of were actually directed to other companies owned by the very same directors of the Defendant.

VARIENCE ON DATES OF CONTRACT

[43] On behalf of the Defendant, it was contended that there is a variance on the exact date of conclusion of the finance facility agreement in the simple summons and the Plaintiff's Declaration. According to Defendant, in the simple summons, it is alleged that the monies were lent and advanced to it between 2021 and 2022 and yet in the Declaration it is said the agreement was concluded in February 2022. This, according to Defendant, is prejudicial to it especially because even the bank statement makes reference to transactions dating way back to the year 2019. According to Defendant, the period of 2019,

2020 and 2021 are not covered by the finance facility agreement as same was said to have been concluded in February 2022.

[44] The complaint by Defendant is that by categorizing the agreement as having been concluded in February 2022, it (Defendant) is prejudiced in that it would be legally prevented from complaining about illegalities in its bank account that took place prior to February 2022. Defendant also complained that Plaintiff is claiming a global figure without categorizing the various sums of money issued and the periods such various sums were issued.

[45] The finance facility agreement which is attached to Plaintiff's Declaration was signed between the parties in February 2022. Legally, by signing the agreement in February 2022, the Defendant was in fact confirming and rectifying all transactions leading up to the overall debt in the sum of E 76, 422,897.68. By signing the contract in February 2022, the Defendant was acknowledging that this sum of money was correctly disbursed to it by Plaintiff. This Court agrees with Plaintiff's counsel when he argued that by signing for the loan sum in February 2022, and by not disputing that it (Defendant)

received this sum of money, in law that should be the end of the matter.

[46] Despite acknowledging receipt of the loan amount, Defendant has decided to go back to transactions of previous years and to question how certain sums were disbursed. It is important to note that the Defendant's complaint is not that it did not receive the full portion of the money referred to in the written finance agreement but it rather complains or questions how a portion of the said loan amount was disbursed in the past.

[47] The Defendant was, despite the firm principle on sanctity of contracts, nonetheless allowed to pursue and argue all issues relating to past transactions in opposition to the application for summary judgment. As already alluded to herein above, none of the issues complained of by Defendant appear to have substance. The loan issued to Defendant is what is referred to in commercial terms as a 'revolving loan.' The standard practice is that such loan is not given as a lump sum but is given in stages, normally when a certificate is issued and approved by the project manager. The Court is not aware of any legal authority that

stipulates that such agreements ought to be signed for before commencement of the project. In this case, the parties elected to endorse the contract at or after the conclusion of the project, thus signifying that the project was conducted smoothly in accordance with the wishes of the parties.

[50] It was up to the Defendant to raise an exception, notice in terms of Rule 30 or any preliminary point or points of law against Plaintiff's pleadings, but it chose not to do so. All of these issues, as correctly pointed out by Plaintiff's counsel, were raised for the first time in Defendant's heads of argument. This is procedurally not permitted but, as already pointed out, Defendant was allowed to argue on all of these issues but failed to convince the Court otherwise.

MORTGAGED PROPERTY IS SUFFICIENT SECURITY?

[51] It was also argued on behalf of Defendant that in terms of the decided cases in this jurisdiction, if the Defendant offers sufficient security to cover the creditor's loan, then the Court is bound to decline summary judgment and is enjoined to refer the matter to trial. According to

Defendant's counsel, the mortgaged property is more than sufficient to cover the Plaintiff's loan.

[52] The Defendant's argument on the issue of security appears to be founded on Rule 32 (5) (c) which provides;

"The court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

[53] There is nothing in this rule which gives leeway or suggests that upon Defendant providing independent security, the Court would then be obliged to refer the matter to trial. What I understand the rule to be saying is that the Court may exercise its discretion and refer the matter to trial on whatever condition there may be which seeks to give security to a Plaintiff's claim. Of course if the Defendant avails independent security, the Court may consider such. The important thing to note in such circumstances is that the referral to trial is not

automatic. The fundamental issue for determination will still remain whether or not there is need for the matter to be referred to trial.

[54] The security referred to in Rule 32 (5) (c) can be any form of security that protects the interests of the Plaintiff in circumstances where the Court concludes that the matter is to be referred to trial. The Court may for instance, order that Defendant's bank account be frozen pending finalization of the matter or that all rentals be paid to a separate account pending determination of the matter at trial. This is what I consider 'referral of the matter to trial upon giving security' to mean.

[55] In clause 1.2 of the written finance agreement between the parties, it is stated that;

"**1.2 In contemplation thereof the Borrower;**

1.2.1 Agrees to recognize Eswatini Bank [Plaintiff] as the owner of the immovable assets, movable goods/ equipment as declared in paragraph 1.1 above."

[56] The Defendant cannot, in any event, offer assets as security under Rule 32 (5) (c), which already belong to Plaintiff. This point, in the Court's conclusion is also bound to fail. Even if Defendant's counsel were to be correct in arguing that the availing of security covering the entire loan is sufficient to have the matter referred to trial, such security, all facts considered, ought to be independent security because it would make no sense to put up assets belonging to the same Plaintiff in order to have the matter referred to trial.

DOUBLE PAYMENT TO SAME ENTITY

[57] During argument of the matter, Defendant's counsel submitted that from the bank statement, a sum of E 2,338,099.50 was paid twice to the same company, namely GTE 11 of 2019 (Pty) Ltd on the 4th October 2019 and on the 25th October 2019.

[58] Defendant's counsel argued that ostensibly, this was an unauthorized double payment made against the Defendant's account, much to the latter's prejudice. I must say that I was prepared to refer this component of the matter to trial. However on close scrutiny of

Defendant's affidavit resisting summary judgment, I noticed that Defendant has alleged as follows on this issue;

"Two payments of E 2, 338,099.50 in the total of E 4, 676,199.00 were made by the bank to the above entity. The defendant wrote the plaintiff [sic] seeking to ascertain the purpose of the payments and who authorized it. The bank gave an unclear answer. The signature that was used to make the payment was fraudulent as it was electronically implanted."

[59] It is thus clear that just like in the other transactions complained of, Defendant is complaining about the alleged 'unauthorized payments' due to alleged 'forged signatures' being appended on the electronic instructions. Just like in the other claims, Defendant is not alleging fraud against the Plaintiff or that it (bank) was in one way or the other negligent in making the said 'double payment'. Similarly there is no specific prayer demanding a refund of these monies. As already alluded to herein above, a proper counterclaim ought to embody all of these matters otherwise there would be no point in informing the Court about all the issues of complaint.

[60] As already highlighted herein above, the Defendant ought to give itself time to investigate all of the payments it is complaining about and, once it has all the necessary information at its disposal, formulate a proper legal claim for its loss, if any. As matters stand, there is nothing in law to stop Plaintiff from obtaining judgment as claimed in the papers.

[61] In the circumstances, summary judgment is hereby granted as follows;

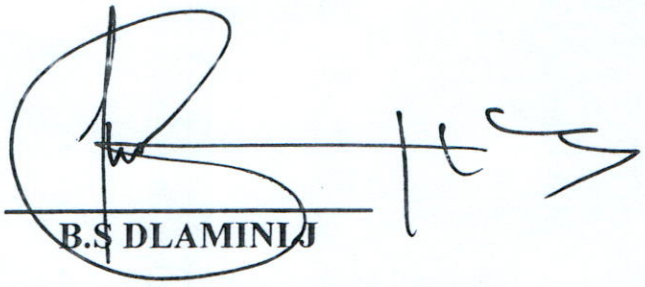
(a) Defendant is directed to pay to Plaintiff the sum of E 84,372,990.12 (Eighty Four Million Three Hundred and Seventy Two Thousand Nine Hundred and Ninety Emalangeni and Twelve Cents).

(b) Defendant is directed to pay interest on the said sum of E 84,372,990.12 at the rate of prime plus 2% per annum calculated from the 10th March 2023 to date of fulfilment of this judgment.

(c) **Defendant is directed to pay costs of suit on the scale as between attorney and own client including collection commission.**

(d) **The immovable property described as Portion 10 (a portion of Portion 3) of Farm Valentia No.273 situate in the urban area of Manzini, District of Manzini, Eswatini, measuring 9839 square metres and held by the mortgagor under Deed of Transfer No. 632/2019 dated 20th day of August 2019, is hereby declared executable in satisfaction of prayers (a), (b) and (c) above.**

(e) **The property described as Portion 15 (a Portion of Portion 2) of Farm Valentia No.273 situate in the District of Manzini, Eswatini, measuring 1607 square metres and held by the Mortgagor under Deed of Transfer No. 810/2019 dated 24th day of October 2019, is hereby declared executable in satisfaction of prayers (a), (b) and (c) above.**



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Plaintiff: ***Attorney Mr. K. J Motsa***

(Robinson Bertram Attorneys)

For Defendant: ***Attorney Mr. S. Madzinane***

(Madzinane Attorneys)