

**IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE**

Civil Case NO. 3381/09

In the matter between:

Mandla James Dlamini

Applicant

And

**Select Management Services (PTY) Ltd
The Accountant General
The Attorney General**

**First Respondent
Second Respondent
Third Respondent**

CORAM

MCB MAPHALALA, J

For Applicant

Mr. N.M. Manana

For First Respondent

Mr. S. Zikalala

**JUDGMENT
17th February 2011**

[1] The Applicant instituted proceedings against the Respondents for the following relief:

- 1. That an order be and is hereby issued declaring that the agreement entered into by and between the applicant and First Respondent on the 9th January 2007 is null and void.**

2. That an order be and is hereby issued declaring that the clause relating to the collection fee in the agreement between the applicant and the First Respondent is wrongful and unlawful.

3. That an order be and is hereby issued directing the First Respondent to stop forthwith from deducting the sum of E722.00 (Seven hundred and twenty two Emalangeni) from applicant's monthly salary which is categorized as a collection fee.

4. That an order to be and is hereby issued directing the First Respondent to refund all monies deducted from applicant's salary classified by the First Respondent as a collection fee.

5. That an order be and is hereby issued directing that the interest fee on the principal debt charged by the First Respondent is wrongful and unlawful.

6. That an order be and is hereby issued directing that the deduction of the sum of E2 040.00 (Two thousand and forty Emalangeni) on a monthly basis from the applicant's salary by the Second Respondent is wrongful and unlawful.

7. That an order be and is hereby issued directing the Respondents to pay costs of this application jointly and severally.

8. Further and / or alternative relief.

[2] The applicant has deposed to an affidavit stating that he concluded a Loan Agreement with the First Respondent on the 9th January 2007 for an amount of E38 000.00 (Thirty eight thousand Emalangeni). He further alleges that the total amount payable on the loan is E73 440.00 (Seventy three thousand four hundred and forty Emalangeni) inclusive of collection commission of E25 992.00 (Twenty five thousand nine hundred and ninety two Emalangeni) and a fixed interest of E9 448.00. (Nine thousand four hundred and forty eight Emalangeni).

[3] According to the Applicant, the clause relating to the collection fee is wrongful and unlawful; and, that he was not aware of this fact when he concluded the loan agreement. He further argues that the collection fee has no basis in law. Similarly, he argues that the interest fee charged on the principal debt is in contravention of the Money Lending and Credit Finance Act of 1991 as being excessive.

[4] Thirdly, he argues that the monthly deductions from his salary of E2 040.00 (Two thousand and forty Emalangeni) is unlawful because it leaves him with less than one-third of his salary contrary to the provisions of the Employment Act No. 5 of 1980.

[5] This application is opposed by the First Respondent; it has filed a Notice of Intention to Oppose as well as a "Notice In Terms of Rule 30" and a "Notice to Raise Points of Law". With regard to the Rule[^] 30 Application, it is argued that the application .constitutes an irregular step or proceeding because it was not served on the First Respondent in terms of Rule 4 (2).

[6] The First Respondent has also raised the following Points of Law:

6.1. Inasmuch as Applicant seeks an order directing the First Respondent to deduct the sum of E722.00 (Seven hundred and twenty two emalangeneni) from Applicant's monthly salary and inasmuch as the First Respondent has at no point made any such deduction, the order being sought is impossible to either make or enforce.

6.2. Further that so far as the present dispute is one that relates to deductions by the Applicant's employer being the Swaziland Government, such employer ought to have been joined as a party to the proceedings and that the matter may not be properly entertained without such joinder of the Swaziland government

6.3. Further that insofar as the present dispute relates to the Employment Act of 1980 and is essentially between an employer and an employee, the above Honourable Court does not have jurisdiction to hear the matter as it is the

Industrial Court that has exclusive jurisdiction to hear and determine the matter.

[7] In addition, the First Respondent has deposed to an affidavit in which it denies the allegations made by the Applicant. In particular it contends that the loan amount is E33 000.00 (Thirty three thousand Emalangeni), the interest charged is E8 184.00 (Eight thousand one hundred and eighty four Emalangeni), the collection fee is E22 572.00 (Twenty two thousand five hundred and seventy two Emalangeni), and, the monthly payment is E1 771-00 (One thousand seven hundred and seventy one Emalangeni). It denies that payment of the Commission is unlawful.

[8] During the hearing, the First Respondent abandoned Point of law 2.2 relating to non-joinder of the Swaziland Government as a party to the proceedings.

[9] The First Respondent argues that prayer 3 is misconceived because there is no deduction of E772.00 (Seven hundred and twenty two Emalangeni) with regard to the commission; however, it does not say how much collection commission is deducted on a monthly basis. The First Respondent only states the total monthly deductions inclusive of Commission, interest and capital as being E1 771-00 (One thousand seven hundred and seventy one Emalangeni). What applicant alleges is that the total monthly deductions are E2 040-00 (Two thousand and forty Emalangeni) made up of commission of E722.00 (Seven hundred and twenty two Emalangeni) and E1 318.00 (One thousand three

hundred and eighteen Emalangeni) being interest and capital. From a perusal of the salary advice slip of the applicant, it is apparent that the monthly deductions are E2 040.00 (Two thousand and forty Emalangeni). I am unable to uphold this point of law.

[10] The First Respondent also challenges the jurisdiction of this court to hear the matter. It argues that the matter in so far as it relates to salary deductions for a garnishee order, it should be heard by the Industrial Court. It relies on Section 8 (1) of the Industrial Relations Act No.

1 of 2000 which provides that:

"The Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at Common Law between an employer and employee in the course of employment or between employers' association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof."

[11] It is apparent from the above section that the Industrial Court has exclusive jurisdiction in matters relating to employer/employee relations at the workplace; it should relate to a "dispute" as envisaged in section 2 of the Industrial Relations Act of 2000. The present application relates to the deductions on the salary of the applicant made by the First Respondent in conjunction with the Second

Respondent; it has no bearing on the contract of employment between the applicant and his employer. For this reason, this court has the requisite jurisdiction to hear this matter. It is common cause that this matter arose from a loan Agreement, and the garnishee order was issued pursuant to the failure by the applicant to repay the loan. The order was issued by this Court; hence, it is logical that this application is heard by this court.

[12] The First Respondent also filed a Rule 30 Notice claiming that the application is an irregular step or proceeding on the ground that the application was not served upon the First Respondent in compliance with Rule 4 (2). There is an affidavit of service deposed to by an employee of Applicant's Attorney. According to the affidavit, service of the application was made at the Nhlanguano Branch of the First Respondent on the 14th September 2009; this has not been denied by the First Respondent. In addition, the First Respondent, subsequent to the Notice In Terms of Rule 30 proceeded and filed an Opposing Affidavit. Rule 30 (1) provides that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application. Accordingly, the First Respondent cannot insist on the irregularity after taking the further step of filing the Opposing Affidavit; hence, the Rule 30 Notice is dismissed together with the Points of Law.

[13] From a reading of the salary advice, it is apparent that the monthly deduction is E2 040.00 (Two thousand and forty Emalangeneni); furthermore, the applicant has a basic salary of E6 437.83 (Six thousand four hundred and thirty seven Emalangeneni eighty three cents), but after deductions, he is left with a net pay of E180.47 (One Hundred and eighty Emalangeneni forty seven cents). Clearly, this is unlawful and contrary to Section 56(4) (c) of the Employment Act 5/1980 which provides that:

"The total amount which may be ...attached under any law shall not exceed one third of the wages due to the employee in respect of that pay period."

[14] There is a dispute with regard to the amount of collection commission which has been charged by the First Respondent; however, it is common cause that the Applicant is charged collection commission. The applicant argues that the Money-Lending and Credit Financing Act of 1991 does not make provision for the First Respondent to charge the Commission; the basis of his submission is that it is the Second Respondent which collects money from his salary and pays it to the First Respondent. However, it is apparent from the pleadings that the Commission was agreed-upon by the parties when they concluded the written agreement. Clause 7 of the said Agreement provides that in the event of default by the Applicant and judgment is entered against him, he shall pay to the Lender "the costs of any letter of demand or collection charges, tracing fees and costs at Attorney and client scale". Clause 8 provides that "all payments made by the

borrower shall be apportioned firstly to the payment of interest, secondly to payment of collection fees, thirdly, to payment of Administration Fee and finally to repayment of the Loan "amount". As expected clause 18 provides that the Agreement constitutes the sole record of the agreement between the parties and that no addition to or variation of this Agreement shall be of any force or effect unless in writing and signed by the parties.

[15] The applicant does not deny that he concluded the said agreement with the First Respondent in which he bound himself to pay the collection commission, finance charges inclusive of interest, the balance of the Loan account as well as costs at Attorney and client scale. The reason advanced by the Applicant in challenging the Collection Commission is that it is unlawful in so far as it is not provided for in the Money Lending and Credit Financing Act of 1991. This argument does not take applicant's case any further. He is bound by the agreement to pay the commission as agreed in the same way that he is bound to pay the costs at Attorney and client scale, that depends on the legality of the contract.

[16] The applicant has also challenged the interest paid on the principal debt as being unlawful. According to him the interest is E9 448.00 (Nine thousand four hundred and forty eight Emalangeni); this is denied by the First Respondent in his Opposing Affidavit who puts the interest at E8 140.00 (Eight thousand one hundred and forty Emalangeni). The applicant has not filed a Replying Affidavit disputing

this. Section 3.1 (b) of the Money-Lending and Credit Financing Act No. 3 of 1991 provides:

"Where in respect of any money-lending or credit transaction the principal debt exceeds E500-00 ... no lender shall charge an annual interest rate of more than 8 percentage points or such amount as may be prescribed from time to time... by the Central Bank...."

16.1. Clearly the fixed interest of E8 140.00 (Eight thousand one hundred and forty Emalangi) exceed 8% of the principal debt of E33 000.00 (Thirty three thousand Emalangi). The First Respondent is only entitled to charge the applicant interest of 8% on the principal debt; any additional amount paid as interest should be refunded.

16.2. Section 6 (1) of the Act provides that:

"Any agreement in connection with any money-lending or credit transaction that is not in conformity with the provisions of this Act shall be null and void, and shall not be enforceable against the borrower or the credit receiver by the lender."

16.3 In the present circumstances the capital amount being claimed is E33 000.00 (Thirty three thousand Emalangi) and the fixed interest of E8 184.00 represents 24.8%; this interest is clearly above the 8% annual interest provided for in Section 3 (1) (b) of the Money-Lending and Credit

Financing Act No. 3 of 1991. This Section overrules the Common Law Principle of "*in duplum rule*"; according to this rule no interest runs after the amount of interest is equal to the amount of the capital. At

that stage the right to further interest is extinguished. Accordingly, the courts in enforcing this Roman Dutch rule refused to enforce a contract where the interest exceeded the capital.

See the following cases dealing with the "*in duplum rule*":

- **Swaziland Development and Savings Bank v Mark Mordaunt and Walter Quinton Mordaunt High Court Civil Trial No. 1836/97.**
- **Union Government v Jordaan's Executor 1916 TPD 411 at 413.**
- **Van Coppenhagen v Van Coppenhagen 1947 (1) SA 567 (T) at 518-582.**
- **Reckson Mawelela v MB Association of Money Lenders and Deputy Sheriff of the Lubombo District, Civil Appeal Case No. 43/99, Court of Appeal Swaziland Page 9-10.**

[17] In the circumstances, I make the following order:

(a) That the fixed amount of interest of E8 140-00 (Eight thousand one hundred and forty Emalangeni) charged on the principal debt is unlawful as being in excess of the 8% rate of interest reflected in Section 3 (1) (b) of the Money-Lending and Credit Financing Act No. 3 of 1991.

(b) That the monthly deductions of E2 040.00 (Two thousand and forty Emalangeneni) on Applicant's salary is unlawful and contrary to Section 56 (4) (c) of the Employment Act No. 5 of 1980.

(c) The agreement entered into by and between the applicant and First Respondent on the 9th January 2007 is null and void.

(d) The garnishee notice issued herein and served on the Second Respondent is set aside.

(e) It is ordered that any and all deductions made by the Second Respondent from the salary of the Applicant be refunded to him forthwith by the First Respondent.

(f) A "*restitutio ad integrum*" is hereby ordered as between the parties, and Applicant is directed to refund the First Respondent of the amount of the loan of E33 000.00 (Thirty three thousand Emalangeneni)

(g) Each party will pay his and/or its own costs.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT

