

**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**CASE NO. 607/2021**

**In the matter between**

**THABSILE DAPHNE MKATSHWA**

**PLAINTIFF**

**And**

**ESW INVESTMENT GROUP LIMITED**

**DEFENDANT**

**Neutral Citation:** *THABSILE DAPHNE MKATSHWA v ESW INVESTMENT GROUP LIMITED (607/2021) [2021] SZHC 162 (12 JULY 2021)*

**Coram: MAMBA J.**

**Heard and Delivered : 25 JUNE, 2021**

**Reasons Handed Down: 12 JULY 2021**

- [1] The plaintiff is Thabsile Daphne Mkatshwa, an adult female Liswati of Tubungu Estate in Matsapha, within the Manzini Region. The defendant is ESW Investment Group Limited, a company duly incorporated and registered in terms of the companies laws of the Kingdom of Eswatini and carries on business as an investment company in Eswatini. It has its principal place of business in Mbabane.
- [2] In or about August 2017 and at or near Mbabane in the District of Hhohho, the plaintiff and the defendant entered into an oral agreement whereby the plaintiff paid and invested a sum of E500,000.00 with the defendant. The said investment was for a period of five (5) years, with the plaintiff having the right or option to withdraw and or redeem the said investment together with all interest accrued thereon, on the completion of three (3) years. The said investment was classified as a Growth Fund Investment. The plaintiff was allocated account number 00699.

- [3] Whilst the rate of interest is not stated in the plaintiff's particulars of claim, the amount due owing and or payable to the plaintiff, as per the summons herein is a sum of E770263.60. This is common cause.
- [4] It was a material term of the said agreement that in the event the plaintiff was to apply for the withdrawal of her investment, she would give at least three (3) months' notice of such intention to the defendant.
- [5] It is also common cause that in August 2020, after the completion of three (3) years, the plaintiff opted to withdraw or redeem her investment with the defendant. She duly notified the defendant of her decision. The defendant undertook to make the necessary payment by the 30<sup>th</sup> day of November, 2020. However, defendant failed to do so. This failure prompted the plaintiff to send a letter of demand to the defendant to pay the invested amount together with the agreed interest. This letter of demand was received by the defendant on 18 February 2021.

[6] By letter dated 19 February 2021, the defendant acknowledged and accepted that:

6.1 The plaintiff invested a sum of E500,000.00 with the defendant under its Growth Fund;

6.2 That the withdrawal date was the 30<sup>th</sup> day of November, 2020 and

6.3 The redemption value of such investment was a sum of E770,263.60.

The defendant stated further that:

‘We reiterate that the granting of the request for early withdrawal of the aforementioned redemption subsist and the [defendant] remains committed to fulfilling its obligations to clients, [you] included.’

The defendant thus made an unequivocal undertaking to

‘--- pay all redemptions due to [plaintiff] within the next 21 (twenty-one) working days, and as such we kindly seek your – indulgence until then.’

The requested indulgence was implicitly granted, it would appear, as the plaintiff did not take any action against the defendant until after the expiration of the said period of twenty-one working days.

[7] After the expiration of the twenty-one days referred to above, the defendant failed to make payment to the plaintiff. The plaintiff thus issued summons for such payment and such summons is dated 29 March 2021.

[8] Following the filing of the Notice of Intention to Defend by the defendant, the plaintiff has filed this application for summary judgment, wherein the plaintiff seeks judgment as follows:

- ‘1. Payment of the sum of E770,263.60.
2. Interest accrued on the sum of E770,263.60 at the applicable percentage of instalment value per month calculated from the 1<sup>st</sup> December 2020 to final payment.
3. *Mora* interest on the capital debt at the rate of 9% per annum a *tempore morea* calculated from date of issue of payment to final payment.’

[9] In her application for summary judgment, the plaintiff states that she believes that the defendant has no *bona fide* defence to her claim inasmuch as ‘the defendant has unequivocally acknowledged its indebtedness to me [and has] agreed to pay but failed to do so ---.’ She states further that the defendant has entered appearance to defend solely for purpose of delaying the payment demanded.

[10] In its defence to the application, the defendant states, *inter alia*, as follows:

‘5.1 I do not deny that I am in default to the plaintiff in the sum of E770,263.60 --- I state, however, that based on the agreement between the parties [,] the defendant is not in breach of the terms of the agreement as clearly set out in the prospectus which details the guiding terms of the agreement between the parties. I state that the amounts that have been invested with the defendant are not due, owing and payable as alleged by the plaintiff.’

The defendant states that it is undergoing restructuring and is now under new management and the effect of such restructuring “means that the defendant’s assets are there, but are not liquid as the

rebuilding process of the defendant includes refinancing of the defendant and its processes. This as a result handicaps the defendant's ability to service its client's redemptions that have fallen due as in the case of the plaintiff.'

In simple terms, the defendant admits that the plaintiff's redemptions are now due, owing and payable. The defendant further avers that it has no money to meet its obligations towards the plaintiff and this is due to its restructuring process which requires refinancing. The plaintiff admits further that it is in default of payment. The rest of the seemingly technical and verbose assertions by the defendant are meaningless and constitute no defence at all to the plaintiff's claim. It does not constitute a triable issue at all.

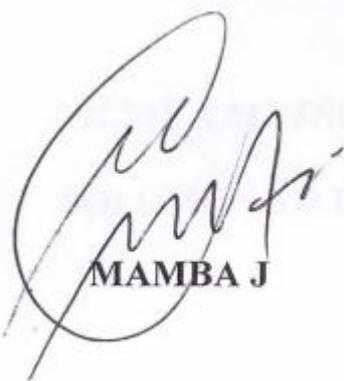
[11] The defendant avers that in terms of the agreement between the parties, '--- in the event the defendant is in default, the linked loan units will be converted into ordinary shares, after a client has notified the defendant that there has been a default' and the plaintiff has not made such notification to the defendant. This again offers no defence to the plaintiff's claim inasmuch as the plaintiff has opted to withdraw its investment and her election has been accepted by the defendant.

The defendant made an undertaking to pay within a specified period, but failed to honour this undertaking. Impecuniosity or inability to pay cannot be a defence in such a case; or a triable issue in an application for summary judgment.

[12] In any event, the acknowledgement of debt referred to above fully or unequivocally acknowledges the defendant's indebtedness to the plaintiff in the amount claimed herein. This action and the resultant application for summary judgment is founded on this acknowledgement of debt. The original agreement is mere background information and surplusage.

[13] The facts in this case are substantially on all fours with those in *Nomcebo Olivia Simelane v ESW Investment Group Limited* (663/2021) [2021] SZHC 115 (12 July 2021) and both cases were heard and decided on the same date. What is stated in *Nomcebo* (*Supra*) on some of the legal issues raised by the defendant is *mutatis mutandis* repeated herein.

[14] For the above reasons, summary judgment was, immediately after submissions, granted as prayed.

A handwritten signature in black ink, appearing to be 'MAMBA J', is written over a light blue rectangular stamp. The signature is cursive and stylized. The stamp is partially obscured by the signature.

**FOR THE PLAINTIFF: MR. S. SIMELANE**

**FOR THE DEFENDANT: MR. S. V. MDLADLA**