IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Civil Case No. 3276/2003

In the matter between

STANDARD BANK OF SWAZILAND LIMITED Plaintiff

and

BHEKIWE VUMILE HLOPHE 1st Defendant
SANDILE DLAMII 2nd Defendant

Coram For Annandale, ACJ

Plaintiff Adv. Wise instructed by Robinson Bertram Attorneys

For both Defendants Mr. P.M. Shilubane

JUDGMENT 19
November 2004

This matter concerns a claim for the repayment of monies which the plaintiff credited to a third party on strength of a cheque drawn by the first defendant, a customer of plaintiff bank, while the defendant did not have

- sufficient funds to cover the cheque, nor a formalised overdraft facility. The bank's case is that it treated the cheque as if it was a tacit request for overdraft facilities which causes defendant to be liable for repayment of the monies and interest, while the defendant's case is that there was no request for any overdraft facility, that if money was disbursed to the third party it was not on her behalf, that she does not owe anything to the bank and therefore is not liable to pay the claim.

The issue to decide, to determine if the first defendant is liable to the bank for the amount of her cheque and interest, is whether her cheque should have been treated by the bank as an overdraft request or not.

It is common cause that the plaintiff was the banker of first defendant. The bank is a registered financial institution in Swaziland, formerly known as Barclays Bank of Swaziland Limited, prior to its amalgamation with plaintiff bank. The second defendant enters the arena as husband of the first defendant, supplementing her lack of *locus standi* in so far as her legal capacity to be sued may come into play. It is further beyond dispute that the first defendant is the drawer of the cheque in issue, in favour of Computronics Systems in the amount of E73 400, dated the 30^{lh} January

* 1998. The plaintiffs bank is its Matsapha branch and plaintiff alleged that she did not have funds to cover the amount of the cheque, which is admitted, but defendant avers in her plea that she stopped payment of the cheque.

The bank says that it treated the cheque as a tacit request for overdraft facilities, which it granted and that it effected payment in terms of her instructions, on its usual terms. These terms are claimed to be that all overdrawn sums would be payable on demand, that interest is payable at the bank's usual rate, compounded monthly and also the usual or customary banking charges.

To this, the defendant denies requesting an overdraft and denies any tacit agreement to that effect as plaintiff alleges.

A crucial averment by the plaintiff is that it disbursed and paid out on behalf of the defendant the sum of E73 400, the amount of the cheque drawn by

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the first defendant, in the alternative that it lent and advanced that money to the defendant. The defendant pleads that she denies that the bank disbursed any monies on her behalf or that it lent and advanced it to her, either as alleged or at all.

At the hearing of the matter, the plaintiff called two witnesses to supplement its case on the papers, the admitted pleadings and the uncontested documents. The defendant chose not to testify and adduced no evidence, save for the pleadings.

There is very little in the way of a factual dispute. The cheque which forms the core of the dispute is common cause with both parties. It is an instruction by the first defendant to Barclays Bank to pay the sum of E73 400 to Computronics, which amount ended up in their account. It is not in dispute that Barclays Bank merged with the plaintiff bank.

As part of his evidence, First National Bank's (FNB) Manager of Operations, Mr. Pringle, handed in exhibit "A", the original cheque deposit slip reflecting the deposit of the first defendant's cheque into the payee's account with F.N.B. on the 30th June, 1998.

His further evidence is that thereafter, the account of their client, Computronics, was credited with that amount as a consequence of the cheque deposit. He stated that the banking practise at that time was that

.cheques of a clearing bank had 7 days to be rejected by the drawer's bank and that by the time the cheque concerned was rejected on the 24th July, it was too late to repudiate it, therefore Computronics remained with the funds.

The defendants' attorney took issue with this witness on his reliance on microfiche statements which he used for his evidence, also that he did not himself prepare the bank statements, which are computer processed, to conclude as he did.

Mr. Pringle however confirmed, when viewing a full-colour photocopy of the cheque, that it is endorsed as being "referred to drawer" twice, on the 11th July and the 3rd August 1998, both dates outside the 7 day clearing window. Further endorsements are that the cheque had gone stale by the 14th August, again so on the 1st September 1998. He said that the endorsements of "refer to drawer" in normal banking parlance means that the drawer does not have funds to cover the cheque.

Plaintiff also called Mr. Nhleko to testify. He has been with the plaintiff bank for some sixteen years and is head of operations. As custodian of documents and records relating to this matter, he confirmed the pleadings

"to the effect that first defendant is the account holder of the cheque concerned. On being shown the deposit slip (exhibit "A"), he confirmed that her cheque was deposited into the Computronics account with FNB on the 30th June.

His further evidence, given with the aid of a computer generated printout of the first defendant's account with his bank, which he readily admits not to be the author of namely an A3 size sheet of paper marked "1.1", is that following the deposit of the cheque, it was cleared by FNB to Standard Bank, where her account was debited with the amount of the cheque. However, there was no money on her account to cover the debit as she was already overdrawn at the time, owing El 026.59 to the bank. Due to this, the entry was reversed on the 11th July, being a credit entry of the amount of the cheque recorded against first defendant's account - the cheque was thus "reversed out of her account", to quote his words.

However, at that time the banking practise was that this had to be done within seven days after the deposit was made, in order for the depositor's bank to withdraw the deposited funds from the Computronics

-account and their bank, FNB, refused the reversal, as it fell outside the agreed "window period" of seven days.

The nett result was that in the final instance FNB remained with the credit of E73 400, which it had already passed on to Computronics, but that the plaintiff bank debited its own internal accounts with that amount to balance their books and that in effect, money of Standard Bank was used to pay FNB, the bankers of the payee of the cheque, Computronics, instead of taking it from the first defendant's account, as she did not have funds to meet it. To date, it remains the same, with the money still not recovered.

The same cheque now in issue was also the subject matter in other litigation than the present. In civil case 2984/2000, Protronics Networks Corporation (Pty) Ltd sued Standard Bank Swaziland Limited for the same amount of this cheque. Very briefly, the facts were alleged that Standard Bank improperly deducted this amount from its account, with the bank stating that Computronics (the payee of the present cheque) having raised invoices payable by Protronics, in September 1998. A partial payment was said to be made, leaving a balance of E73 400 - the amounts of both claims in both matters, Protronics versus Standard Bank and Standard Bank versus

Bhekiwe Hlophe and Sandile Dlamini. In the other -matter, the defendant further alleges in its affidavit resisting summary judgment, deposed to by the same Mr. Nhleko of the bank, that Protronics tendered one and the same cheque as in the present case, drawn by the first defendant herein, Bhekiwe v Hlophe, in favour of Computronics.

Nhleko proceeded to state in the affidavit that since Hlophe's account had insufficient funds to cover the cheque and although Standard Bank endorsed it "refer to drawer", the cheque was not returned or delivered to the payee in time, i.e. within the clearing period (of seven days). Upon expiry of the clearing period, Standard Bank was obliged to honour it on insistence of the payee's bank FNB.

He further stated that as consequence, the liability of Protronics to Computronics was extinguished, without Computronics spending any money in the process, that its debt was settled at a time when it (Protronics) had insufficient funds in the account on which the cheque was drawn and that Computronics was unjustly enriched at the expense of Standard Bank.

An obvious mistake herein is that the cheque was not drawn by Protronics but by Bhekiwe Hlophe, in favour of Computronics. Also worthy of note is that in the summary judgment application, the plaintiff's declaration was deposed to by its managing director, Sandile Dlamini. He is stated to be the husband of Bhekiwe Hlophe, the first defendant in this matter, with himself being the second defendant. It is her cheque, which was payable to Computronics, which features in the case by Protronics, said to have been used at the expense of the Standard Bank, offsetting a debt between Protronics and Computronics. The recording of this evidence which relates to a different matter was solicited by the plaintiff's counsel and used by defendant's attorney in trying to discredit Nhleko.

The issue canvassed for this purpose was to try to demonstrate that Standard Bank is at odds with itself in debiting two different accounts, that of Protronics and of Bhekiwe Hlope, with the same amount emanating from the same cheque. Nhleko explained how it came about, referring to the background set out above, emphasising that it was at different times and for different reasons. He did admit though that the problematic reversals and book entries were essentially caused by FNB refusing to accommodate Standard Bank in respect of the seven day clearing window to reject

* payment of a cheque from an account with insufficient funds. However, in the present matter, it does not form the plaintiffs case on that basis, but with Standard Bank suing on the basis that it (eventually) regarded the first defendant's cheque as a tacit overdraft loan request, inferred by the bank.

In the pleadings, the defendant avers that she stopped payment of the cheque in question. It was put to Nhleko that she verbally told the manager not to pay the cheque, in August 1998. Nhleko replied that there is not any record of it with the bank and in any event, the cheque "had gone stale" by then, rendering anything to such effect impossible by then, it having a validity of only six months.

Defendant's attorney, Mr. Shilubane, uses the argument that the plaintiff bank did not base its case on a tacit agreement between the bank and Hlophe, and did not plead so, but instead that the claim actually arose from the instance of FNB to adhere to the seven day clearing period, which had expired by the time that it was made aware that there were no funds to meet the cheque in the drawer's account.

The position regarding a tacit loan agreement is'set out in paragraph 9 of plaintiffs (amended) particulars of claim, alleging that **"the defendant tacitly agreed to the terms and conditions of the overdraft facility as granted by the plaintiff."** The following paragraph reads that: **"pursuant to the foregoing, the plaintiff disbursed and paid out on the defendant's behalf certain sums of money, alternatively, lent and advanced certain sums of money to the defendant."**

It is therefore, he argued, that the plaintiffs claim discloses no cause of action. Quoting from Amler's Precedents of Pleadings, 6th edition at pages 94 and 95 (being the pages Mr. Shilubane provided to the court, and not pages 229 and 56 which he referred to in his heads of argument), defendant's attorney states as trite law that **"if a party intends to rely on a tacit contract, it is necessary to plead that fact. In order to establish a tacit contract, it is necessary to allege and prove unequivocal conduct that establishes on a balance of probabilities that the parties intended to and did in fact, contract on the terms alleged."**

For this position, reliance is placed on Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en andere 1984(2) SA 261 (WLD) where Coetzee J. stated at 267-A (my own translation) that:-

> "It is therefore not the case that where one, in an existing contract, whether oral or written, by implication should read into it certain terms with the supposition that it was tacitly agreed to. In the case where a person relies on such a contract, he must allege and prove certain conduct or a course of conduct which, either individually or accumulative, leads to only one conclusion, namely that between these parties, a tacit contract came into existence."

For this finding, Coetze J relies on what Corbett JA held in Standard Bank of South Africa Limited and Another v Ocean Commodities Inc and others 1983 (1) SA 276(A) at 292:-

> "Moreover, I do not think that the tacit agreements alleged can be inferred from the facts on record. In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem".*

In Triomf at 267, Coetze J goes on to hold that: (my own translation)

> "It is therefore not sufficient generally, in a matter like this, to refer to a large body of facts or evidence. The person who relies on a tacit agreement must allege a catalogue of action and specific conduct. Each such action or specific conduct must then be proved by him. On top of that, he has to aver that he relies on the thus proven tacit contract, from which stems the remedies he now seeks to enforce."

It is these requirements that the defendant alleges to be absent from the pleadings. The question is whether it is so, or not. The contention by the defendant's attorney cannot form the basis for an adverse finding against the plaintiff on this basis. As already set out above, the plaintiff pleads that the first defendant was a customer of plaintiff bank, maintaining a current account at its Matsapha branch and that she "issued" a cheque in the amount of E73 400 to Computronics Systems. This is acknowledged. Plaintiff avers that by doing so, she "issued instructions to the plaintiff to pay the amount reflected on the cheque." To this, first defendant pleads that she "admits that she issued the cheque in question but avers that she subsequently stopped payment of the said cheque." She does not deny the averment of instructing plaintiff to pay the cheque and also does not state when or how she "subsequently" stopped payment. She did not give any evidence at the trial either, but her attorney put it to the bank's head of operations, Mr. Nhleko,

that she verbally told the branch manager not to pay "the cheque in August 1998. He replied that such instruction, if there was one, was not recorded and moreso, the cheque had gone stale by August, by which time no effective stopping of payment can be made anymore.

The plaintiff further pleads and avers that since the first defendant's account did not have sufficient funds to cover the cheque, it treated the instruction to be a request for an overdraft facility, which was granted and duly effected payment in terms with her instructions. Plaintiff then specifies the terms of the overdraft facility as being that all sums overdrawn would be payable on demand, the liability for interest at the banks usual rate on such overdraft as it stood from time to time on all sums overdrawn plus the usual or customary banking charges. All of this is denied by the defendant, who further denies the averment that she "tacitly agreed to the terms and conditions of the overdraft facility as granted to her by the plaintiff."

It is common cause that the plaintiff did not have either sufficient funds or a pre-arranged overdraft facility at the time the cheque was presented for payment. Plaintiff alleges a tacit request for an overdraft facility by way of her drawing a cheque and which cheque was presented for

payment. Plaintiff not only alleges a tacit request for" an overdraft, but also the terms of such facility. The bank avers that the conduct of the first defendant established her tacit request - it is this conduct that the bank wants to have declared as justifying a reasonable inference, on a balance of probabilities, as the intention between the parties, a *consensus ad idem,* to tacitly contract and agree to the overdraft facility.

For this, the bank *inter alia* relies on ABSA Bank Limited v J.W. Blumberg and Wilkinson 1997(3) SA 669(SCA). Therein, a firm of attorneys deposited cheques into its trust account and before the effects were cleared, drew cheques on the same account. The bank honoured the cheques of the firm and sued it for the amount thereof when the deposited effects were not paid. There was no agreement entitling the firm to draw cheques against uncleared effects, no overdraft arrangement. The firm denied that the bank was entitled to debit their account with the relevant amount. Essentially the facts in ABSA are very much the same as in the present case, where the bank honoured a cheque and now claim the amount.

At pages 675-1 to 676 - D, Zulman JA states that:

"The fact that the appellant might have permitted -the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for, (my emphasis) It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This can not be so. (Compare Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk 1976(4) SA 677(A) at 687E-688C; Trust Bank of Africa Ltd v Wassenaar 1972(3) SA 139(D) at 142G-143A and 143E-F. As pointed out by Cozens-Hardy MR in Cuthbert v Robarts, Lubbock & Co (1909) 2 Ch 226 at 233:

> "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."
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> (See also Halsbury's Laws of England 4th ed vol 3(1) at 242 para 298, Paget's Law of Banking 10th ed at 183 and Willis Banking in South African Law at 33.) The fact that the respondent's account was a 'trust banking account' is irrelevant for this purpose."

The defendant's plea that she countered her instruction to the bank to pay the amount of money to Computronics by issuing an instruction to stop payment, does not hold water. As stated above, her plea is a bare assertion which when put to plaintiff's Nhleko, was disposed of on two grounds, and her version that it was in August that she instructed stopping of payment, takes it outside the validity period of the cheque. On the facts, as well as the pleadings, this defence stands to be dismissed. The result remains that indeed she issued an instruction to her bankers to pay the amount stated on her cheque, and indeed the bank did pay, or honour the cheque, despite the absence of an overdraft facility.

The evidence of both Mr. Pringle and Mr. Nhleko is that the plaintiff bank "paid the cheque." This was not challenged in cross examination. The gist of their evidence is that on deposit of the cheque, the account of the first defendant was debited when it was received from the payee's bank, FNB. By then, FNB had already credited the account of Computronics, which left seven days to clear the cheque, after which normal banking practise at that time caused it to become *fait accompli.* Since the cheque was not returned to FNB in the seven day period, FNB refused to extend the returning period and plaintiff bank was back to square one. In effect, it had paid money on behalf of the defendant to a third party, which amount, plus interest and costs, she now refuses to pay, on the basis that she had neither a loan agreement or an expressly prearranged overdraft facility. Accordingly, she wants the bank to foot the bill, or. to give her a "free lunch", in American parlance. This is in stark contrast to English law.

> "Tn English law it is clear that generally speaking, drawing a cheque or accepting a bill payable at the bankers where there are not funds sufficient to meet it amounts to a request for an overdraft' - Halsbury, 3rd ed., vol 2, p 228, para 425. While English decisions are not invariably a safe guide in banking matters, the principles in so far as they are relevant to this question appear to me to be the same in our law"(per Milne J in Trust Bank of

Africa Ltd v Wassenaar 1992(3) SA 139 at 142 - H a decision referred to with approval in ABSA *supra* on the same principle).

The fact that the plaintiff bank has since the event unsuccessfully tried to recover the funds through other avenues does not alter the picture. The bank unsuccessfully tried to debit the Protronics account, as aforesaid, it also tried unsuccessfully to have the entries of FNB on the Computronics account reversed. The fact that still remains is that acting on the written instruction of the first defendant, endorsed on her cheque, the plaintiff bank paid the stated sum of money to Computronics. This instruction was not stopped, at least not timeously, if at all.

The defendant's argument, enumerated above, that there could be no tacit agreement or request for an overdraft facility places undue contortions on the premise that the bank did not accede to such a request as it tried to resolve the issue with FNB, to reverse the entries, and that it tried to rectify its payment by debiting the Protronics account, also unsuccessfully. Thus, the efforts by the bank to try and recover its potential (and real) losses elsewhere, is argued to negate a tacit acceptance of a (denied) tacit request for an overdraft in the amount of the cheque. This is based on the evidence

of Mr. Nhleko who essentially admitted in cross examination that the cheque was honoured because of the instance of FNB. Ultimately, it may have been so, but the opposite side of the same coin is that the bank actually and literally honoured the cheque, despite the absence of funds to cover it or a pre-agreed overdraft facility. The position that FNB took does not dispose of this factual position, which the plaintiff bank pleads to be a tacit request for the facility. The bank was not obliged to honour her cheque, it was under no express contractual duty to do so. Yet, it is this obligation that plaintiff bank incurred on the instructions vis-a-vis the defendant's cheque that she now wishes to renege. This cannot be so.

To come to this finding, which I do, does not require that I extensively deal with the secondary argument raised by the defendant's attorney, namely that the court should disregard the evidence of both Nhleko and Pringle, due to them referring to statements of account of both FNB and Standard Bank. Mr. Shilubane argues that insofar as Mr. Pringle is concerned, he referred to copies made from a "microfiche". The bank practise is to make photographic copies of records, like account statement which requires vastly less storage space than the original papers. This is common knowledge. However, he contends that since there was no evidence to prove that the

original documents were lost or destroyed or not available or that it was searched for and could not be found, it would be inadmissible for the court to have regard to reproductions of the microfiche records. In any event, so the argument continues, Pringle was not the author of the original records, the reproductions are relegated to secondary evidence and furthermore, the plaintiff did not cause the "payee of the cheques to produce the originals." He therefore argues that Pringle's evidence should be dismissed, relying on Barclays Western Bank Ltd v Creser 1982(2) SA 104(T) as authority. On pages 106 and 107, Eloff J (as he then was) held:

> "The best evidence rule is that no evidence is ordinarily admissible to prove the contents of a document except the original document itself. The exception to the rule is that on proof, ***inter alia,*** of the destruction of the document the contents of the document may be proved by secondary evidence. The only significance of the fact, if fact it is, that the party concerned deliberately destroyed a document, is that, if it appears that that was done in contemplation of legal proceedings, possibly with a fraudulent objective, the court may decline to dispense with the requirement of production of the original. There was no question of anything of that sort in the present case. Litigation was not contemplated when the original was destroyed. And the destruction was done in the ordinary course of business."

Wigmore on Evidence vol 4 para 1199 at 353 says:

> "But it is obvious that there may be many cases of intentional destruction which do not present the above extreme features. The intentional destruction may have been natural and proper or it may have been merely open to the bare suspicion of fraudulent suppression and in such cases the evidence of its contents should not be received subject to comment on the circumstances."

And furtheron Wigmore states, again at 354 and 355:

> "the view now generally accepted is that a destruction in the ordinary course of business is sufficient to allow the contents to be shown as in other cases of loss."

(See Hoffmann South African Law of Evidence 3rd ed at 306 and May South African Cases and Statues on Evidence 4th ed para 123 at 72.)

It has, I think, been judicially recognised that systematic recording in the ordinary course of business is a feature of modern commercial procedures (see Barker v Wilson (1980) 2 All ER 8). In that case the following was said by CAULFIELD J:

> "The magistrates came to their conclusion and they put their conclusion in these terms, that they adopted some robust common sense that section 9 does not include microfilm which is a modern process of producing bank records. It is probable that no modern bank in this country now maintains the old-fashioned books which we maintained at the time of the passing of the 1879 Act, and possibly maintained for many years after 1879."

That matter concerned the production of a microfiche copy of a time purchase agreement where the original was destroyed due to lack of office space. Section 9 of the Bankers Books Evidence (Amendment) Act of 1879 regulated English law insofar as it defined what is meant by "bankers books", including ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank. It did not include, in 1879, "microfiche records", nor photocopies, nor computer generated statements. It was therefore that Eloff J held that the magistrate *a quo* should have received a copy of the high purchase agreement, which was accompanied by an affidavit of an employee of the bank to explain why that document was not the original. This being secondary evidence, it was incorrectly not received by the magistrate, whose ruling was overturned on appeal.

I have a difficulty with defendant's argument that on the same basis, Pringle's references to the microfiche documents must be dismissed. True, there is no evidence that the original documents were destroyed and yes, Pringle was not the person who generated, with a computer, the statements in the first place.

In perspective, one must also have regard to what is actually the evidentiary value of the 13 microfiche copied papers that Pringle produced, statements of account of Computronics Systems with FNB over a 3 months period. All that Pringle testified, with reference to the statements, is that "on the 30th June 1998, E73 400 is an entry as a consequence of the cheque that they (i.e. Computronics) deposited." All that it does is to show that the original deposit slip (exhibit "A"), reflecting the exact same transaction, had actually been acted upon. It introduces nothing new at all.

To hold that Pringle's evidence be ruled inadmissible and discount it would not be justified. To disregard his evidence pertaining to exhibit "B", the microfiche statement of the Computronics account with FNB, which reflects a cheque deposit of E73 400 on the 30th June 1998, is of no

- consequence to the merits of the present matter and does not require further enquiry into its admissibility or otherwise.

The further ruse that defendants raise is to move the court to discount the evidence of Mr. Nhleko of plaintiff bank, which has been alluded to above. During his evidence, Mr. Nhleko referred to a document marked "1.1". This is an A3 size paper, headed "Detail Account Enquiry" of Standard Bank Swaziland. It pertains to the account of the first defendant.

From this 'computer printout', he testified that on the first date thereon, 29 June 1978, her (i.e. first defendant) account was overdrawn by El 808 10, a debit balance, meaning that she owed money to the bank. On the 4th July 1998, cheque No. 400 (see the first page of the book of discovered documents or annexure STB 1) was debited to her already overdrawn account. Immediately before that, she was overdrawn by El 026.59 and accordingly there were no funds to meet her cheque. The amount of the cheque was reversed out of her account on the 11th July, 1998. These are the essential details of his evidence, over and above some other procedural details.

The complaint against this is that it is a computer.printout which he used, with Nhleko not being the author of the document, despite his evidence that as Head of Operations at the bank he has the documents relating to this matter "under (his) jurisdiction." The objection is based on the absence of a Computer Evidence Act in Swaziland.

Mr. Shilubane relies on Narlis v South African Bank of Athens 1976 (2) SA 573 (AD) as authority to reject the evidence of Nhleko which is founded on the computer printout. Part of the headnote reads that:-

> "Although in terms of Section 28 of the Civil Proceedings Evidence Act, 25 of 1965, entries on bankers' books are admissible in certain cases, in terms of Section 32 the provisions of Section 28 do not apply (my underlining) in a case in which the bank is a party. Although section 34(2) of Act 25 of 1965 gives the person presiding at any civil proceedings a discretion to admit, in certain circumstances, certain statements as evidence, before that discretion can be exercised it is essential to note that Section 34(2) deals only with such a statement as it is referred to in Sub-section (1), and sub-section (1) refers only to 'any statement made by a person in a document.' A computer is not a person. It was held that as the computerised bank documents handed in by the manager of the respondent bank giving evidence did not

> money was owing, that the respondent bank had failed to discharge the ***onus*** on it of proving that this was so."

The headnote is an accurate summary of the judgment by Holmes JA on the above aspects, where the learned Justice of Appeal analysed the South African law, based on English law, regarding the admissibility of a document like "1.1" and its probative value.

The present matter is distinguishable and on a different footing when regard is given to the pleadings.

It was averred and admitted that at the time the first defendant's cheque was deposited by the payee, her account did not have funds to meet it. This is also the foundation and essence of the evidence of Nhleko. Document "1.1" does not form the basis of proof by the plaintiff that the first defendant did not have the funds to meet the cheque. It is already admitted in the pleadings. If this document is to be totally disregarded, it still would not suffice to say that the plaintiff has failed to prove its claim in so far as the insufficiency of funds to cover a cheque she had issued and which was

paid by the plaintiff bank to the payee's bank, caused the plaintiff bank to regard her instruction as a request for an overdraft.

Due to the view I hold on the evidence, the pleadings and the law, the secondary defence of the defendants also has no merit. I therefore need not deal with the persuasive argument to the contrary of Advocate Wise in respect of the secondary defence.

I now turn to the issue of interest.

The claimed rate of interest is 28.75% per year as from the 30th January 1998 to date of payment. When cognisance is taken of the *in duplum* rule, it really becomes academic as to what the amount of interest is at even date of this judgment, as the amount of interest has exceeded the amount of capital claimed quite some time ago. Once interest reaches the same amount as that of the initial unpaid capital, the courts will not enforce repayment of any excess. The upshot of this is that effectively, the claimed amount, save for costs, is limited to double of the amount of cheque.

In Standard Bank of South Africa v Oneanate Investments (in liquidation) 1998(1) SA 811 (SCA), Zulman J7 A, after a careful analysis of the relevant authorities, set out the justification for and the proper application of the *in duplum* rule at 834 B-H as follows:-

> "It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how **a** creditor, who has instituted action can be said to exploit **a** debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double. Since the rule as formulated by *Huber* does not serve the public interest, I do not believe that we should consider ourselves bound by it. A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process.
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> The present case is a good illustration of such delays. Summons was served in November 1990, the trial commenced in June 1993, the final judgment of the Court *a quo* was given in May 1995. This appeal

should not apply all of 'the old Roman-Dutch law. to modern conditions where finance plays an entirely different role' (per Centlivres CJ in Linton v Corser 1952 (3) SA 685(A) at 695H). See also the remarks of Kotze JA in West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 196-7 dealing with the question ***of*** *mora.)*

Once judgment has been delivered the question again arises as to what the public interest demands. It is arguable that the creditor is in duty bound to execute and bring to a close the further accumulation of interest. That can be achieved by accepting the approach adopted in the Commercial Bank case ***supra*** at 300G-I that interest on the amount ordered to be paid may accumulate to the extent of that amount, irrespective of whether it contains an interest element. This would then mean that (i) the ***in duplum*** rule is suspended ***pendente lite,*** where the ***lis*** is said to begin upon service of the initiating process, and (ii) once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment."

The date from which interest could accrue, if indeed the bank were to be successful in its claim, cannot in any event be from the 30th January 1998, as it claims. This date is as it is endorsed on the cheque itself, but it is common cause, from exhibit "A", the deposit slip of the payee, Computronics, that the cheque was presented for payment much later, on the

30th June 1998. It was only on the 4th July 1998 that the bank first debited the first defendant's account with the amount of E73 400. It is therefore incorrect to claim interest on an overdrawn account from the 30th January 1998. At best, interest comes into play from the 30th June, the date of the deposit, if not from the 4th July, the date of debiting the drawer's account.

However, this will be an academic exercise due to the long lapse of time which effectively cuts off the accrual of further interest once it equals the capital sum.

The plaintiff avers in paragraph 13 of its particulars that the rate of interest on overdraft facilities, such as that of the first defendant, was 28.75% *per annum* at the 30th January, 1998. It claims (in paragraph 14) that that rate of interest should be awarded on the capital sum, calculated from the 30th January, 1998 to date of payment.

For the abovestated reasons this cannot be done in respect of the date, and it also cannot be granted in respect of the rate of interest.

During the trial, counsel of both parties agreed to- place before court exhibit "C", a comparative table of applicable interest rates of Swaziland and South Africa. It indicates the prime lending rate during 1998 to be 21%, down to 15% in 1999, 14% in 2000, 12.5% in 2001, 16.5% in 2002 and 11.5% in 2003. It also lists the monthly variations from 2001 through to April 2004. It is this table of interest rates that is to be used to determine the applicable interest rates as ordered hereunder.

It is for the abovestated reasons that the court finds in favour of the plaintiff which succeeds in its claim against the first respondent. The second respondent is only notially cited in his capacity as husband of the first defendant to "duly assist" her in the proceedings. No relief was sought against him.

It is ordered that:-

1) Judgment be entered against the first defendant in the amount of E73 400, together with interest calculated at the prime lending rate of interest of the plaintiff bank, as applicable from time to time, as from the 4th July 1998, until date of payment provided

that from the date that the aggregate of interest equals the capital sum aforesaid, further accrual of interest shall stop.) The first defendant is ordered to pay the plaintiffs taxed costs, which costs are to include the costs of counsel, which is certified in terms of Rule 68(2).

J.P. ANNANDALE ACTING

CHIEF JUSTICE