IN THE COURT OF APPEAL OF SWAZILAND

DRAFT

HELD AT MBABANE Appeal Case No. 50/99

In the matter between

SHISELWENI INVESTMENTS (PTY) LTD Appellant

vs

SWAZILAND DEVELOPMENT AND

SAVINGS BANK Respondent

Coram LEON, J.P.

TEBBUTT, J.A.

SHEARER, J.A.

For Appellant Mr. P. M. Shilubane

For Respondent Mr. L. M. N. Khumalo

JUDGMENT

TEBBUTT, J.A.

On 24 January, 1997 the respondent bank applied for, and obtained, default judgment against the appellant in the following terms:-

1. payment of the sum of E212 604.35;

2. interest thereon at the rate of 22.5% per annum calculated from 30th April, 1996 to date of final payment;

3. costs of suit.

By Notice of Motion dated 12 July 1999, the appellant in the High court, in terms of Rule 42 of the Rules of Court, sought the following order:-

"1 That judgment obtained by respondent against the applicant dated 24 January, 1997 be rescinded alternative (SIC) be varied as follows: "Payment of the sum of E150.000.00. "

2. That the respondent renders a detailed statement of the applicant's account it has with respondent at its Nhlangano Branch from 5 February, 1996 to date within 21days.

3. Debatement of the said account.

4. Payment to applicant of whatever amount appears to be due to applicant upon debatement of the account.

5. Costs of suit in the event the respondent opposes this application.

6. Alternative relief".

The learned judge a quo upheld two points in limine raised by the respondent namely:-

1. That the application did not fall within the ambit of Rule 42, and

2. That the application for rescission of judgment had not been brought within a reasonable time, i.e. sixteen months after the appellant became aware of the judgment having been granted against it.

The court held that the inaction by the appellant showed that it accepted the judgment or that it was guilty of inordinate delay.

The Court a quo consequently refused the application. The default judgment accordingly remained undisturbed as set out above.

It is with the refusal to rescind or vary the default judgment that this court, on appeal, is concerned.

The appellant is a customer of the respondent, its banker. In its founding affidavit to its notice of motion, it avers that on the 5th February 1990 respondent lent and advanced to the appellant the sum of E75 000.00 payable within 48 months at the rate of E2 000.00 per month plus interest thereon at the rate of 22.5% per annum. A letter from the bank granting the loan refers to its purpose being "to amalgamate and convert all the other overdrafts and loan amounts with upper limit of E75 000.00 to a loan (Business)"

In an opposing affidavit on its behalf the respondent admitted these facts but said that the letter did not constitute the only loan liability the appellant had with it and that its claim for E212 604.35 was in respect of only one of appellant's accounts with it. Other amounts which it had

claimed and received from the appellant were set out in the affidavit. Details of these are that a total amount of E368 304.60 had been paid to the respondent by the appellant less an amount due by the latter of E320 466.16 less interest from 1.7.98 to 18.9.98 of E10 484.65 less legal costs and related court charges of E9 232.26. These amounts left a balance in favour of the appellant of E28 120.62 which the appellant had apparently overpaid the respondent. The figures reflected that the respondent owed the appellant the amount of E28 120.62.

In so far as the loan of E75 000.00 is concerned it was averred by the appellant that, in accordance with the in duplum rule, once the interest reaches the amount of the capital sum it cannot be increased further. The appellant accordingly admitted owing the respondent E150.000.00 i.e. a loan of E75 000.00 and interest of E75.000.00. It was this that caused the appellant to aver that it would be "fair and just" to vary the judgment of the court a quo by

substituting the sum of E150 000.00 for the sum of E212 604.35 granted in the default judgment, which appellant would then pay to respondent.

The appeal, which was not only directed against the refusal to vary the amount of the default judgment but was primarily directed against the upholding by the Court a quo of the points in limine, originally came before this court during the session of the Court in May 2000. It was then informally suggested to the parties that they should themselves discuss the amounts each said was owed to the other and resolve what amount the appellant owed to the respondent. The matter was inconsequence postponed to the present session of this court.

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When the matter was called for hearing last Thursday the court was informed that, despite its suggestion, the parties had not met to resolve their dispute. It would appear, however, that other events had occurred in the interim to which I shall refer later herein.

The Court then also informed Mr. Khumalo, counsel for the respondent, that whether it upheld the decision of the Court a quo on the points in limine or whether it reversed it, the fact remained that the original default judgment in the amount of E212 604.35 could not be sustained and would have to be varied. On the respondent's own affidavit it owed the appellant an amount of E28 120.62 so that, at best for it, it could get judgment against the appellant for E184 483.74 being E212 604.35 less E28 120.62. If the appellant was correct, on its reliance on the in duplum rule, by reason of which it averred that it owed the respondent no more than E150 000.00, the respondent, if the appellant's contention was upheld, could only get judgment for E150 000.00.

Mr. Khumalo submitted that the Court should remit the matter to the High Court so that the appellant's account with the respondent could be debated and the amount of the appellant's indebtedness to the respondent determined. He submitted that the question of the costs of appeal be, at that stage, decided by the High Court.

To the utter amazement of this Court it was, however, informed by Mr. Shilubane, for the appellant, that in a judgment by Sapire, CJ in the High Court given on 29th October, 1999, i.e. between the previous session of this Court and the present one, the respondent had been ordered to pay

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the appellant E28 120.62 - which respondent had done - and the matter had, for the rest, been ordered to go to the High Court for debatement of account. Pursuant to that order the appellant's attorney filed an affidavit averring that the accounts showed that the appellant had overpaid further amounts and that the respondent owed it an additional amount of E19 717.91. In response to this, in a letter dated 8 February, 2000, signed by Mr. Khumalo himself, an offer of settlement on behalf of the respondent that it would pay the sum of E19 717.91 to the appellant was made, which the appellant accepted on 10 February 2000. That amount, too, had since been paid by the respondent, the Court was told.

I must express the Court's dismay at Mr. Khumalo's suggestion that the matter be referred back to the High Court for debatement of account and that the costs of appeal be decided then, when he knew full well - or ought to have known - that such debatement had already occurred and had been settled. Mr. Khumalo's explanation was that he had forgotten about this and about the judgment of Sapire, CJ. I find this difficult to accept as his client had paid the E28 120.62 ordered by Sapire, C.J. to be paid by it and it was he who had written and signed, in respect of the debatement issue, the letter on behalf of his client offering to pay to the appellant the sum of E19 717.91. His submissions to this Court were, to say the least, disingenuous and would appear to

be designed to prevent an adverse finding by this Court against his client on costs.

As set out above, the appellant submits that it only owes the respondent the sum of E150 000.00. The respondent's averments in regard to this are singularly lacking in particularity. In Commercial

Bank of Zimbabwe v W.M. Builders Supplies (Pty) Ltd 1997(2)285® the following passage is quoted as to what should be shown by a bank:

"The amount of the capital due, the total amount of interest due thereon as at a specified date, whether or not interest on the total amount is claimed and, if so, the amount in respect of which the interest is claimed and the date with effect from which the interest will run in the case of a claim relating to a bank overdraft, the papers should show the total amount of the debt claimed and, separately, the total capital amount loaned by the bank to the client, the total amount of interest due thereon as at a specified date, and if appropriate the total amount due in respect of bank charges, cheque books etc and the interest, if any, due thereon at a specified date. If the client has made any payments in respect of the overdraft account, the papers should specify the total amount paid and also indicate how the payments have been appropriated".

The respondent does not in the papers even set out the amount which it actually lent to the appellant: let alone any of the other details referred to above.

In Standard Bank of South Africa Ltd v Oneate investments (Pty) Ltd 1988(1) SA 811 (SCA) the court dealt, inter alia, with the in duplum rule. It held that the rule, which provides that interest stops running when unpaid interest equals the outstanding capital, is a rule based on a public policy designed to protect borrowers from exploitation by lenders. As such it cannot be waived by borrowers, and cannot be altered by banking practice. The practice by bankers of capitalising unpaid interest does not result in interest losing its character as interest, and certainly not for the

purposes of the in duplum rule (see the judgment of Zulman J.A. at p 828 D - E and E - I and the cases there cited).

On the papers before this Court the appellant's averment that, applying the in duplum rule, it owes the respondent only E150 000.00, i.e. E75 000.00 on the loan and E75 000.00 in interest is unanswered.

No other amount of indebtedness by the appellant is alleged.

The amount of the judgment obtained on 24 January 1997 must therefore be altered from E212 604.35 to E150.000.00.

The Court was informed from the bar that the appellant has, pursuant to the default judgment against it, paid the sum of E212 604.35 and interest to the respondent. It is therefore entitled to recover from the latter the amount overpaid, viz E62,604.35.

I turn to the question of costs. The respondent is obviously entitled to its costs in the default judgment proceedings. On the appeal, having succeeded in obtaining a variation of the judgment amount, as was its alternative prayer in the notice of motion, the appellant is entitled to its costs of appeal. In regard to the costs of the rescission proceedings in the Court a quo, this Court has not considered or come to a conclusion of that Court's decision of the points in limine. The

learned judge should, however, as was clear from the figures before him, have varied the amount for which judgment had been granted. It seems to us, therefore, that the fairest order for this Court to make in respect of those proceedings is that each party should bear its own costs.

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The following order is therefore made:-

1. The appeal succeeds to the extent that the amount of the default judgment granted against the appellant is varied;

2. The appellant is declared to be indebted to the respondent in the sum of E150.000.00

3. The respondent is ordered to repay to the appellant from the amount of E212 604.35 paid by the appellant to it, the sum of E62. 604.35 together with interest thereon a tempore morae from date of this judgment to date of payment.

4. As to costs:

(i) The appellant is ordered to pay the costs involved in the default judgment application;

(ii) The respondent is ordered to pay the costs of appeal;

(iii) In respect of the costs in the rescission proceedings in the Court a quo, each party is to bear its own costs.

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P.H. TEBBUTT, J A

I AGREE

R.N. LEON, JP

I AGREE

D.L. SHEARER, J A

Dated at MBABANE this .13th.....day of December, 2000