

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1097/92

In the matter between:

UNION BANK OF SWAZILAND LIMITED

Plaintiff

and

GOODWILL B. SIMELANE

Defendant

CORAM:

S.W. Sapire A.J.

FOR THE PLAINTIFF

Mr. Khumalo

FOR THE DEFENDANT

Mr. H. Fine

Judgment

(14/9/95)

On the 8th December 1989 respondent entered into a written lease agreement with the applicant which was then known as the UNION BANK. There is evidence that the applicant has since changed its name and is known as STANBIC Bank. In terms of the agreement the applicant leased a motor vehicle to the respondent, who was to have paid thirty six monthly instalments of E1,133.12 during the period of the lease . No specific provision is to be found in the lease as to what was to have happened to the vehicle when the lease terminated by effluxion of time. Presumably the applicant was then entitled to return thereof, but I do not close my eyes to common commercial practice and take judicial knowledge that in this type of lease the lessor frequently does not insist on return of the vehicle.

The lease did not run its course without trouble and litigation has taken place between the parties since April 1992 when the applicant made an unsuccessful application to enforce its rights under the agreement.

2

- 2 -

The respondent took advantage of one or more defects in the applicant's papers and the proceedings were withdrawn. The applicant was ordered to pay the respondent's costs.

The respondent encouraged by this success did not take the opportunity of making payment of the arrear instalments then outstanding and the applicant was constrained to reinstitute proceedings afresh.

The present position is that it is common cause that the vehicle has long ago been disposed of by the respondent. The issue is in this respect whether or not he did so with the prior knowledge and consent implied or express of the applicant. Little now turns on this as the applicant does not persist in its claim for the return of the vehicle, and seeks only judgment for the outstanding rental, interest and costs.

The lease in its original terms has long terminated by effluxion of time, and the respondent remains indebted to applicant for unpaid rentals, interest and other amounts in terms of a certificate given under the hand of a manager of the applicant in an amount of E28,263.74. Provision for proof of respondent's indebtedness in this way is provided for in the lease the lease.

The respondent contends that at some stage after withdrawal of the first application he negotiated a

rescheduling of payments - it was argued that this was a valid defence to respondent's claim for payment of all amounts in arrear at the termination of the lease including interest.

The defence must fail on several grounds. Firstly the lease contains a provision that no variation of its terms is valid or binding unless in writing signed by both parties. There being no written agreement as to the rescheduling of payments, the respondent cannot rely on its terms.

Moreover even in such terms of alleged rescheduling of payments the respondent should have made payment of his outstanding debt long ago but has not done so.

3

- 3 -

If it were necessary so to do I would find on the probabilities that no such rescheduling agreement was concluded.

The respondent has given no reasonable or acceptable excuse for non payment and has not raised any issue placing the accuracy of the certificate in question.

It follows that the applicant has proved the respondent's indebtedness to it in the amount of the certificate. No further relief apart from interest and costs was sought in view of the lease having terminated and the vehicle being for all practical purposes being irrecoverable.

The appropriate rate of interest is 18% per annum. In terms of the agreement not only party and party costs but attorney and client costs are recoverable. I see no reason having regard to the history of this matter not to order that costs be paid on such scale.

There will be judgment for applicant as follows -

Respondent is to pay to the applicant (a) the sum of E28,263.74

(b) Interest therein calculated at 18% per annum from 17/3/95 to date of payment

(c) Costs of the suit to be taxed as between attorney and client.

S.W. SAPIRE

ACTING JUDGE