IN THE HIGH COURT OF SWAZILAND

a:Leomaziya

LEO MAZIYA

vs

SWAZILAND DEVELOPMENT & SAVINGS BANK

CIV. TRIAL NO. 2361/1995

Coram S.W. SAPIRE, A C J

For Applicant Mr. L. Mamba

For Respondent Mr. P. Flynn

JUDGMENT

(05/06/98)

The Applicant is the judgment debtor in action who seeks to have the judgment entered against him set aside. The plaintiff who is the respondent in this matter is a bank from which it is common cause the applicant has received large sums of money and there appears to be no issue as to why this money should now be repaid. The amounts which the applicant had received from the bank had not been paid or serviced as they should have been and the respondent issued summons claiming repayment of several amounts set forth in the various claims in its combined summons.

In its particulars of claim the cause of action is for repayment of the monies lent and advanced either on overdraft or open account as well as the balance of an amount owing on an advance to acquire a motor vehicle. The fifth claim was to declare certain property executable. The properties were hypothecated by the applicant to secure all his indebtedness to the bank.

When the summons was served the applicant instructed his attorneys who acting on those instructions, gave notice of intention to defend. Negotiations took place on a without prejudice basis to settle the matter. In any event these negotiations or discussions came to naught and the respondent was constrained to make the application for summary judgment.

The application was served in the normal way upon the applicant's then attorney and no

a:Leomziya

response thereto was made. The matter came before the Court and as it was unopposed judgment was granted on the 31st May, 1996. Only when an attempt was made by the respondent to execute on the movable properties in terms of the judgment did the applicant move to bring this application. In the affidavit in support of his application, applicant claims that he was unaware that the summary judgment had been granted or that his attorneys had failed to inform him of the service of the application. The application generally is weak in this respect in that one requires an explanation particularly from the attorney involved as to why he did not oppose the application for summary judgment.

If as it appears there may have been the falling out by the applicant with its former attorney there should

at least be something in the affidavit to explain why an affidavit was not filed attested to by the attorney in question as to the reasons for the non-appearance on behalf of the applicant.

This is the negative aspect of it. The positive aspect is that as far as the attorney is concerned, and I refer only to the letters which emanated from his office it is clear that the applicant did not contest his liability for the several claims until much later stage.

For these reasons and on these grounds alone the applicant must fail in his application. There is no excuse or reason offered for Applicant's default. His attempt to comply with the other requirement of an application for rescission namely to show some sort of defence or triable issue failed dismally as well. The affidavit contains a number of allegations of the defence which the applicant would seek to raise should rescission be granted and should the matter go to trial. It raises the fears that the loans made by the bank were ultra vires its founding document and therefore although Applicant received the money from the bank the bank cannot recover the money on this cause of action. It does not lie in the mouth of the applicant to rely on such irregularity which may have occurred. It is difficult to see that any irregularity did in fact occur. The bank made a loan to the applicant as it was entitled to do acting as a bank and it acted quite as a bank could normally do in making these loans. There is no substance at all in this particular defence.

As regards the further defences raised one of them was that the bonds copies of which were attached to the summons did not specifically relate to the bonds mentioned in the facility document written by the respondent to the applicant at the time of the granting of the loan. This too is a specious defence. The bonds in themselves are clearly general covering bonds to cover any indebtedness up to the amounts stated in the bonds which may be owing by the applicant to the respondent for whatsoever course arising. The judgment debt in this matter is clearly such an indebtedness and its terms clearly fall within the provisions of the bonds.

A further defence which was raised is that the loans were not made to the applicant but were given to him for the purpose of funding some activities by companies in which he may have been involved. This too does not bear even investigation. The documents attached to the

summons clearly show contracts between the applicant personally and the respondent. That defence too must fail.

There is nothing in the affidavit which indicates a bonafide defence or any defence which has any prospect of succeeding in defending Respondent's claims..

For these reasons the application for rescission falls.

As to the question of costs these will normally follow the event but I am of the view that this application is vexatious, and frivolous and an abuse of the process of the Court. Counsel for Applicant has not been able to advance any reason why this conduct of the Applicant should not be visited with a special order as to costs. The costs payable in this matter may be taxed on the scale applicable to attorney and own client. Cost of counsel in terms of rule 68.2 will be included.

S W Sapire

Acting Chief Justice