

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 3521/97

In the matter between

STANDARD BANK OF SWAZILAND (Formerly

BARCLAYS BANK OF SWAZILAND

GOVERNMENT

PLAINTIFF

And

D.Z. CIVILS & BUILDING (PTY) LTD

1st DEFENDANT

DAVID EDWIN ZIETSMAN

2nd DEFENDANT

Coram

S.B. MAPHALALA - J

For Plaintiff

MR L. KHUMALO

For 1st & 2nd DEFENDANT

MR H. FINE

JUDGEMENT

(10/12/98)

Maphalala J.

The plaintiff issued summons in this matter dated the 10th December, 1997 claiming from the defendant payment of the sum of E39,742-09 being monies due and owing and payable by the 1st Defendant to the Plaintiff in respect of monies lent and advanced by the plaintiff to the 1st Defendant by means of an overdraft facility in the years 1996 and 1997, and for which the second defendant stood surety for the first defendant, becoming co-principal debtor therewith in terms of a surety bond signed by the parties. First and second defendants are liable jointly and severally to pay this amount to the plaintiff together with interest at the rate of 31.25% per annum compounded monthly up to the 31st October 1997, which amount despite demand, the first and second defendant have failed, neglected and/or refused to pay to the plaintiff.

On the 23rd January 1998, the matter appeared for rescission of judgement on a certificate of urgency after plaintiff had prior obtained a default judgement in terms of Rule 31(2) of the High Court Rules. Though the matter was scheduled to be heard on the 29th January 1998, it could not proceed on that day because the court record had not been placed before a judge when court business commenced. The matter was subsequently enrolled and appeared before Dunn J and the following consent order

2

was registered "that the matter is removed from the roll to take its normal course and execution of the warrant stayed pending the outcome of the application for rescission of judgment" from the perusal of the papers pertaining to this matter it appears that the original court file with all the court endorsements got missing and there was later termed a "skeleton court file". But what seems to be clear is that the application for rescission of the default judgment obtained on the 23rd January 1997, was never finalized. Subsequent to that the plaintiff filed an application for summary judgement which was opposed thereafter

the plaintiff filed a declaration in terms of the law.

These are the pertinent facts in this case.

The matter came on the contested roll of the 23rd October 1998 where Mr. Khumalo contended that if the default judgment is still in place and there is an application to have it rescinded and plaintiff does not oppose it then it follows that the judgement be rescinded. In reply Mr. Fine took the view that there was no common error in this matter. The summary judgment should be dismissed with costs on attorney and client scale. Mr. Khumalo on points of law replied that Mr. Fine seem not to apply his mind on the issues. Defendant should have approached the court in terms of Rule 30. The court cannot order the dismissal of the summary judgment when it is not before court. Mr. Khumalo expressed concern that here we are confronted by a situation of a procedure that went wrong.

It appears to me that Mr. Khumalo is correct in his contention that the first thing to be done here is to deal with the default judgment which is for all intents and purposes is before court and there seem to be no opposition to it being rescinded by the plaintiff. If that is the correct position it means the plaintiff cannot therefore proceed by way of application for summary judgment because rescission of the default judgement granted on the 23rd January 1998 would entitle the defendants to file a plea and the matter takes its normal cause. It seems to me that at this stage it would be premature to deal with the application for summary judgment without first dealing with the pending matter of the default judgment. I am therefore not going to make any order in respect of the application for summary judgement and would urge the parties to have the matter enrolled for the determination of the rescission of the default judgement.

No order is made as to costs.

S.B. MAPHALALA

JUDGE