

THE HIGH COURT OF SWAZILAND

SHISELWENI INVESTMENTS (PTY) LTD

VS

SWAZILAND DEVELOPMENT & SAVINGS BANK

Cm Trial No. 2391/96

Coram SAPIRE, CJ

FOR APPLICANT P. M. SHILUBANE

FOR RESPONDENT MR. L. KHUMALO

JUDGMENT (29/10/99)

The applicant in this matter originally approached the court on notice of motion to seek relief against respondent as follows:-

1. That the judgment obtained by respondent against the applicant dated 24 January 1997 be rescinded alternatively varied as follows: "Payment of the sum of E150 000.00"
2. That the respondent render a detailed statement of the applicant's account it has with respondent at its Nhlngano Branch from 5 February 1990 to date within 21 days.
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 application was commenced by Notice of motion on the 12th July, 1999. It was argued, and points in limine were raised. These points related only to prayer 1 for rescission of judgment. Two of the points in limine were upheld thus disposing of the relief claimed. But the relief claimed under prayers 2 - 6 of the notice of motion were however unaffected by this decision.

The applicant then set the matter down again and in effect it now seeks debatement of its account with the respondent.

It appears that the applicant was formerly the owner of the property which was sold through the joint efforts of the applicant and the respondent to satisfy the debt owing by the applicant to the respondent.

In its replying affidavit the respondent has in fact purported to account for the monies presently standing in the applicant's account and claims that it has already accounted to the applicant's attorneys. The account which is itemized in paragraph 19 of the respondent's affidavit appearing at page 25 of the record reflects that the respondent received E368 304.69 of which it appropriated E320 466.16 extinguishing the applicant's indebtedness. Thereafter it has charged a further amount of interest of E10 484.65 and yet a further amount of E9 233.26 in respect of legal costs. After deducting these two amounts a balance owing to the applicant of E28 120.62 remains.

In the following paragraph the respondent states that it therefore tenders to the applicant the amount of E28 120.62. Although the word "tender" is used no cheque or cash has been offered to the applicant. The tender is not complete in this respect. In fact it is not a tender at all. The amount of E28 120.62 is clearly owing and unpaid. There is however a no agreement in regard to the amount of interest and legal costs to which I referred earlier. Debatement of these two items is necessary.

I therefore order.-

1. that respondent pay the amount of E28 120.62 together with interest at the same rate that it

- charged the applicant *tempera mora* to date of payment.
2. that the balance of the account be debated in the following manner:-
    - (a) each of the parties is to file an affidavit setting forth its contentions in regard to the disputed items and
    - (b) that the matter will thereafter be set down for argument to determine whether these amounts have been correctly debited to the applicant's account.
  3. Respondent is to pay the costs up to this point, save as otherwise previously ordered.

S. W. SAPIRE, CJ