IN THE HIGH COURT OF SWAZILAND

Dumisa Mbusi Dlamini	First Plaintiff
Swazi Inn (Pty) Ltd	Second Plaintiff
Dumisa Sugar Corporation (Pty) Limited	Third Plaintiff
The New George Hotel (Pty) Ltd	Fourth Plaintiff
Mackay Investments (Pty) Ltd	Fifth Plaintiff
Uncle Charlie Hotel (Pty) Ltd	Sixth Plaintiff
The Property Company (Pty) Ltd	Seventh Plaintiff

And

Swaziland Development and Savings Bank Defendant

Cm Trial No. 1292/95

Coram	S. W. SAPIRE
For Plaintiff	Mr. C J. Hartzenberg S C
For Defendant	Mr Wise. S C with him
	Mr. P. Flynn –

JUDGMENT

(19/03/99)

The central figure as far as the Plaintiffs are concerned is the First Plaintiff. He is a well-known businessman in Swaziland. He has operated through the medium of the Third Plaintiff in the local sugar industry, and has the reputation of having become a wealthy man. More recently, he has acquired interests in the Hotel business, which include controlling share holdings in the second fourth fifth sixth and seventh plaintiffs.

DUMISA MBUSI DLAMINIFIRST PLAINTIFF 2

The Defendant is a bank incorporated in terms of Kings Order in Council No 49 of 1973.

The First Plaintiff and his companies, as they have been referred to, have been customers of the Defendant for many years each plaintiff operating one or more accounts. For the most part these accounts are in debit. The plaintiffs are it appears debtors of the bank in amounts which at the institution of the action may have been less but in respect of which the Defendant now claims more than E60 000 000.00 having regard to accrued interest.

In June 1995 the plaintiffs joined in instituting the present action against the Defendant. Whether in terms of the Rules of Court the joinder was proper is open to doubt, but as no objection seems to have been taken by the Defendant, to this aspect of the procedure no more need be said about it.

After the citation of the parties the plaintiffs allege that "at all relevant times hereto" the plaintiff operated and still operates accounts with the Defendant in terms of oral agreements. In the plea which was eventually filed the Defendant disputes only that the agreements governing the conduct of the accounts was oral. This is perhaps an obscure way of alleging that the agreements were in writing

The identity of the accounts operated by the Plaintiffs including the relative account numbers has

been established in the pleadings.

The plaintiffs further alleged, and it is not denied (at least in regard to the current accounts) that the Defendant was obliged to furnish monthly statements in respects of operations on such accounts. There is some dispute as to the extent to which the accounts were to be supported by vouchers. The Plaintiff alleges that the Defendant was to furnish vouchers in support of debits and credits reflected in the statements of account should Plaintiffs require the same. Defendant says no request therefor was ever made.

DUMISA MBUSI DLAMINIFIRST PLAINTIFF 3

Plaintiffs allege that despite demand defendant failed to render monthly statements of account, supported by vouchers in respect of each of the accounts. Plaintiff continue in the same paragraph to state that the Defendant

"..... alleges that the Plaintiffs together are indebted to Defendant in the amount of Emalangeni 42 000 000, alternatively Emaiangeni 50 000 000"

(Paragraph 11 of the summons)

In the following paragraph the plaintiffs say that they are unable to verify the "amounts indebted to the Defendant" (my underlining) without a full statement of account, supported by vouchers, in respect of each of the aforesaid accounts. The statements of account for this purpose are, the plaintiffs claim, to cover the full "life span" of each and every account. In answer to a question asked by way of request for further particulars the Defendant has indicated that the lifespan of at least some of the accounts started in 1972. How the plaintiffs have conducted their businesses and compiled their annual accounts throughout the period they were customers of the defendant, without regular statements, and in ignorance of the amount of their respective indebtednesses to the Defendant, may have been explained in evidence, had the trial run its course.

There is no mention or suggestion in the particulars of the summons that the Defendant owes the Plaintiffs or any one or more of them, anything on balance. The allegations made are confined to an inability on the part of the plaintiffs, without the defendant rendering complete accounts covering the whole period of plaintiffs' being customers of the bank, to determine the amount of the Plaintiffs' present admitted indebtedness. This indebtedness, is clearly substantial, if not of extraordinarily large proportions.

The relief sought by the plaintiffs in the light of this is remarkable. After claiming that the Defendant render full accounts, supported by vouchers for the full lifespan of the operations thereon, (a period of more than twenty-five years) and debatement thereof, a claim is made for payment of whatever amount appears to be due to one or more of the plaintiffs.

Having regard to the statement in paragraph 12 of the particulars of claim

DUMISA MBUSIDLAMINIFIRST PLAINTIFF 4

"Plaintiffs are unable to verify the amounts indebted to the Defendant without a full statement of account...."

a claim for payment by defendant to the plaintiffs is surprising and an illogical non sequitur.

There is however an alternative to this claim namely

"A declariter indicating the amount or amounts due to defendant in respect of each account, in which case the Plaintiffs tender payment to Defendant of the amount or amounts found to be due."

The defendant in its plea has in effect, while maintaining that accounts and statements have been regularly sent to the plaintiffs, accepted a duty to produce accounts justifying the amounts it claims, and has done so. These accounts reveal large debit balances.

The Defendants plea concludes thus

"WHEREFORE Defendant, accepting the tender of payment of the plaintiffs, prays that the action of the plaintiffs be dismissed with costs and that judgment be entered against the plaintiffs in the sums set out in 7 above, together with interest on each sum as claimed"

(Paragraph 7, is the paragraph in which the defendant set forth the amounts owing on each of the accounts in respect of which he has been called upon to render.)

The plea was filed in October 1995. The Defendant did not make a separate claim in reconvention, but the plea clearly contemplates that it expected to be paid what ever balances should be demonstrated to be owing once any objections to the accounts which may have been raised by the Plaintiffs had been resolved. The Plaintiffs did not object to or complain of any irregularity constituted by this manner of in effect introducing a counterclaim. The issues were thus clearly formulated. The Plaintiffs were to pay whatever amounts were demonstrated to owe on the accounts produced by the Defendant.

Discovery by both the plaintiffs and the Defendant was made. This took place more than two years ago. Defendant's discovery included a complete statement

in respect of each account conducted by each of the plaintiffs. Since 4th of July 1996 copies of these accounts have been in the possession of the Plaintiffs' attorney. In other words the Defendant had at least by then rendered the accounts which were the subject matter of the Plaintiffs' claims, together with all relevant documentation in Defendants' possession. In the words of Plaintiffs summons, they the Plaintiffs were then in a position to verify the Defendant's claims. There is nothing in the papers to suggest that plaintiffs or any of them have challenged any one-item appearing in the accounts.

There have been charges and counter charges of incomplete discovery. Plaintiffs gave notice, made and withdrew applications under Rule 35(20) (see page's 131-135 of the proceedings). The Plaintiffs have not identified any one or more particular voucher or vouchers, which have not been discovered and called for production thereof. The position as to discovery by Defendant is that the oath of the deponents to the Defendants affidavits must be accepted and that full discovery has been made.

It follows that Plaintiffs have for a long time been able to assess their respective liabilities to the Defendant. None of them have honoured or completed the tender made in the summons by paying as much as one cent on account thereof.

The Plaintiffs made no move to call a pre-trial conference, to debate the accounts, or to set the matter down for hearing.

The Defendant, which had greater reason than the Plaintiffs to seek finality in the matter, and prompted by this greater feeling of urgency, availed itself of the provisions of Rule 33 bis which had been introduced last year. The purpose of the rule is to facilitate and expedite the hearing of commercially important and long outstanding civil matters.

The Plaintiffs' attorney, Mr. Simelane, Mr. Flynn and Mr. Henwood, the latter two representing the Defendant, were present at a conference called by me at the request of defendant's attorneys to determine the future course of the litigation. It seems that the action had been dormant all this time. It was not possible to identify

and curtail any of the issues which were to be dealt with at the trial. None of the parties had produced any statements of experts they proposed calling to offer opinions as to the correctness of the accounts or possible irregularities therein. The basis of the Plaintiffs' objections to the accounts, if any, was not disclosed

At the conference and as contemplated in the relative rule I allocated a trial date for the matter and

made provision for a hearing which was expected to continue over many days. For a number of reasons including, my seniority, my advantage of greater experience in the commercial field than some of the other judges, and what is known as the high profile of the case, I considered that I should hear the trial myself. I accordingly allocated dates to suit my convenience, having regard to my commitment to hear other cases then pending. The dates which were provisionally agreed upon were confirmed the following day after the Plaintiffs attorney had enquired from counsel who he intended briefing whether he would be available. No question of the Plaintiffs being unhappy at me hearing the case was raised. There was no intimation of any intention on the part of the Plaintiffs not to proceed with the case. All this took place nearly two years after pleadings had been closed and after the Plaintiffs had been in possession of the complete accounts furnished, without which they had alleged they were unable to determine their liability.

During the week before the scheduled opening of the hearing, the court file was brought to me to allow me to prepare for the trial, which was to commence on the Monday of the next week. I saw that nothing further had been done about identifying points of dispute on the statements. I, through the registrar invited the parties to a further pre trial conference in terms of rule 37. Defendant's Senior Counsel, his junior and their instructing attorney presented themselves at my chambers at the appointed time. Mr. Simelane I was told by court staff had indicated that he was consulting with counsel in the Republic and will not be able to attend. I refused to see Defendant's counsel in the absence of a representative of the other side and suggested that it would be helpful if a meeting could be arranged for the following morning. This was not to be as Mr. Simelane had not by then returned from the Republic. The prospect of embarking on what was forecast to have been a fourteen-day hearing without any meaningful pre trial conference having been held loomed.

This foreboding did not materialise. During the late afternoon on Friday, the Plaintiffs delivered a notice purporting to withdraw the action. Plaintiffs' attorney was either oblivious of, or disregarded the provisions of Rule 41.

This rule reads as follows and is to the same effect if not identical to the corresponding rale governing procedure in the High Courts of South Africa: -

"41. (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in which events he shall deliver a notice of withdrawal.."

The Defendants attorneys when receiving delivery of the notice endorsed it with words indicating their objection thereto and made reference to the non-compliance with the rale. The notice of withdrawal was indisputably irregular as the matter had long been set down and neither the leave of the court nor the consent of the defendant to the withdrawal had been obtained. The notice of withdrawal was therefore irregular and of no force and effect. Accepting this the Plaintiffs filed and served an application for leave to withdraw which in the event was never moved, because of what transpired when the matter was called on Monday morning.

The morning commenced with the handing down of a number of judgments in other matters, I had prepared during the previous week. Included among them was one in which Dumisa Dlamini, the First Plaintiff in this matter, and some of his companies were concerned in a dispute with the Swaziland Electricity Board. I do not propose here repeating the details of that litigation. What is of importance is that at the hearing of an interlocutory proceeding, application was made by the present first plaintiff and some of his companies for my recusal. I refused to accede to this application and said that my reasons for so doing would follow. The reasons were contained in the judgment I delivered.

This is relevant, because when this matter was called a little later in the morning, and after I had read out my judgment, counsel for the Plaintiffs rose and enquired whether I proposed to hear the matter. I told him that this was so. He then produced a written application for my recusal. The application consisted of an affidavit to which was attached a copy of the affidavit which had been used in the

previous application. The contents of the latter were incorporated as the basis of the present application on which I had just delivered judgment. The contents of the letter were incorporated as the basis of the present application. Little further evidence was placed before me. Such as was, confirmed that in regard to Dlamini's claim that I summoned him to my house, and attempted to intimidate him into signing what he saw as an incriminating document, relating to his alleged contempt of court, his allegations were a distortion of the facts so as to constitute a complete untruth. This aspect of the matter had been fully dealt with in my earlier judgment.

There was little advanced by way of argument, which had not already, been said by Mr. Du Toit in the other case. My previous judgment I believe disposes thereof.

Moreover there were now further compelling reasons why I should not recuse myself in this case.

1. Before the court was an action which had been pending for a long time. It had been enrolled at the Defendant's instance, with the consent of the Plaintiffs as to the date of the hearing. It was enrolled in the knowledge that I would probably hear the case myself in view of the considerations previously mentioned. Yet no suggestion was made to me, at the conference held in terms of rule 33bis, that I should not allocate the matter to myself. This conference took place after the important incident on which the Plaintiffs rely to motivate the allegation of cause for reasonable suspicion in the mind of Dlamini that I would not give him a fair hearing, had occurred.

2. In the instant case the Plaintiffs had already purported to withdraw the action and all that was now left was to exercise a proper judicial discretion whether to permit such withdrawal. Such discretion would have had to be exercised in accordance with established criteria.

(see Pearson and Hutton, NNO v Hitzeroth and others 1967 (3) SA 539.) There was no room for the operation of a perception of bias. This is

particularly so having regard to the palpable absence of dispute or triable issue.

3. 3 On the other hand there is much to be said for the proposition that the application was made not because of any real and bone fide perception on the part of Dlamini that I would not give him a fair hearing even on the limited issue of permission to withdraw the action. The realisation that neither the law nor considerations of fairness were in favour of the plaintiffs was perhaps the real motivation. The Defendant had already been kept at bay for years in seeking repayment of the large amounts admittedly owing to it while this action was pending, having regard to the pleadings and discovery there were really no outstanding issues. Any that there may have been were capable of arithmetic or accounting reconciliation. As I have observed no issues have really been identified and no attempt at debatement was made. This must have become apparent at the latest in consultation with counsel in preparation for trial. What perhaps is most significant is that the accounts have not been serviced by the payment of interest let alone capital for many years.

4. Plaintiff's reason for wanting to withdraw the action could only have been, to avoid the day of reckoning, when the determination of the amounts owing by them, by declariter as prayed for by the plaintiffs themselves, or by judgment as sought by the defendant, was at hand. The effect of withdrawal of the action would have been for the defendant to be required to institute a fresh action against each of the plaintiffs to enforce the admitted indebtedness of each. Having regard to the history of this matter, this operation could entail a delay of months if not years.

5. As much as one would be inclined not to hear a case where one of the parties expressed some apprehension of bias, the impression must not be created that a litigant by making such an application on flimsy or contrived grounds is able to have a case heard by the judicial officer who he perceives is more likely to find for him than the judicial officer to whom the case has been allocated. The public, which has an interest in such matters, must not suspect that

manipulation of the courts in this manner

DUMISA MBUSI DLAMINIFIRST PLAINTIFF 10

takes place. This is especially important in a small jurisdiction like Swaziland.

Seen against this background the recusal application can legitimately be seen as no more than a further ploy to delay and obfuscate the course of justice.

For much the same reasons as are given in my judgment in the Electricity Board case and the further considerations, which I have outlined, here, I considered that it would be improper for me to accede to the application. I accordingly declined to do so. Whereupon Plaintiffs' counsel and attorney withdrew and left the courtroom announcing that there mandate had been terminated or withdrawn.

Defendant's counsel remained in the case and the situation, which now arose, was that governed by Rule 39(3). This rule reads:

"If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour, and the court, if so satisfied, may grant such judgment."

This is what took place in this case and the counsel for defendant sought Judgment in terms of the plea. I required that the necessary evidence be produced and indeed evidence was produced that the accounts had been delivered to the plaintiff's attorney and a letter acknowledging receipt of those accounts dated 4th July, 1996 was proved. The accounts themselves, copied in some 8 volumes were produced and placed before the court as well as a schedule indicating and analyzing the debit balances in respect of each plaintiff.

I considered whether it would be proper to grant judgments in these amounts having regard to the fact that there was no formal counterclaim before the court. I say formal counterclaim because there is in fact a claim for judgment. The very manner in which the plaintiffs presented their case combined with a tender to pay the outstanding balances would make it proper for this Court to grant judgment against each of the plaintiffs for the amount which they have been shown to owe to the defendant.

DUMISA MBUSI DLAMINIFIRST PLAINTIFF 11

I will deal with each of the plaintiffs in return. In the case of the 1st plaintiff, the individual, Mr. Dumisa Dlamini, there are three accounts, which are in debit. The amounts involved are Ell, 149,490.61 on one account, on the second account the amount owing is El76, 867.48 and on third account E2, 600,000.00 is owing. In his case there is also an account which is in credit to the extent of E65 452.76.

The total amount owing by him to the bank as at the date of judgment is E13 860,905.23. There will be judgment against the 1st plaintiff in this amount together with interest and costs.
In the case of the 2nd plaintiff, i.e. the Swazi Inn, there are two accounts, the first is indebted to the extent of E595 975.56 and the second account is indebted to the extent of E682 534.65, a total of El 278 510.21. There will be judgment against the 2nd plaintiff in this amount together with interest and costs.

The 3rd plaintiff, is Dumisa Sugar Corporation? Here there are four accounts indebted in the following amounts:-

a) The first account is E25, 699,480.45.
b) On the second account E16,461,934.28.
c) The third account has no balance.
d) The forth account has a debit sum of E70,038.25 and
e) This plaintiff also has an account in credit to the extent of E2, 991.87.

Accordingly the total amount owing by this plaintiff is E42, 228,399.11. There will be judgment against the 3rd plaintiff in this amount together with interest and costs.

The 4th plaintiff was The New George Hotel or a company under which this business was conducted. The 4th plaintiff was shown to be indebted to the defendant on three accounts.

a) The first was El, 400,998.01.
b) The second account was E2,824,506.48, and
c) The on the third account it was indebted to the defendant in the amount of E961, 309.30.

DUMISA MBUSI DLAMINIFIRST PLAINTIFF 12

There were no credit balances for this plaintiff and it was accordingly indebted to the defendant in the amount of E5, 186,813.79. There will be judgment against the 4th plaintiff in this amount together with interest and costs.

The 5th plaintiff was Smokey Mountain Village, Only one account in this matter which was indebted to the extent of E766, 925.52 but there is also a credit balance to the extent of E661.74 There will be judgment against this plaintiff for E766,263.78. together with interest and costs.

The 6th plaintiff Velebantfu Hotel has one account indebted to the extent of E369, 754.79 and there will be judgment against this plaintiff to the amount of E369, 754.79. together with interest and costs

The 7th and last plaintiff is Mgenule Motel where there are two accounts. First indebted to the amount of E745,412.01 and the second account is indebted to the amount of E2,858.49. There will accordingly be judgment against this plaintiff for an amount of E748,270.50. together with interest and costs.

S. W. SAPIRE

CHIEF JUSTICE