IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 745/98, 746/98, 749/98,751/98

In the matter between

STANDARD BANK OF SWAZILAND LIMITED PLAINTIFF

And

UNION SUPPLIES (PTY) LIMITED & THREE

SIMILAR CASES RESPONDENTS

Coram S. B. MAPHALALA – J

For Plaintiff MR. J. HENWOOD

For Respondents MR. L. HOWE

JUDGEMENT (21/05/99)

Maphalala J:

In each of these four matters, the plaintiff, a commercial bank, instituted action by summons claiming the repayments of monies alleged to have been advanced on overdraft to the various defendants, all customers, together with interest alleged to have accrued on the amount outstanding in accordance with the bank's conditions of business. In case number 745/98, The Union Supplies (Pty) Limited case, the amount claimed is E103, 327-69 together with interest at the rate of 23.75% per annum calculated from the 3rd March, 1998 to date of final payment together with costs. In case number 746/98, the Hasvina Navin Trivedi case the amount claimed is E108, 917-88 together with interest at the rate of 23.75% per annum calculated from the 3rd March 1998 to date of final payment together with costs. In case number 749/98, the Zamokuhle (Pty) Limited case the amount claimed is El07, 000-92 together with interest at the rate of 22.5% calculated from the 3rd March 1998 to date of final payment together with costs. In case number 751/98, the Karleem Ashraf case the amount claimed is the sum of E107, 133-36 together with interest at the rate of 23.75% per annum calculated from the 3rd March, 1998 to date of payment with costs.

The plaintiff is all these matters is applying for summary judgement, which is opposed by the defendants.

The matter all came before me and it was agreed by the attorneys for both parties that case no. 745/98 be argued and the judgement in that case will apply in all the other three matters as the issues of fact and law were the same.

The defendant in its opposing affidavit avers that it is denies that the notice to defend the matter is solely for purposes of delay. That the notice to defend is bona fide and defendant has a bona fide defence to the plaintiff's cause of action.

Defendant, further denies that the plaintiff ever demanded the said sum from the defendant prior to the facility being withdrawn, and that plaintiff had no just reason and/or cause to withdraw the facility from the defendant. Defendant denies that it has ever refused to pay the sum claimed by the plaintiff for reasons that the sum is not due owing and payable and further the sum claimed is incorrectly calculated.

Defendant furthermore avers that in terms of the defendant's obligations as per the agreement between the plaintiff and the defendant, the defendant made regular payments and on a number of occasions they reduced its overdraft to zero and the defendant was in credit.

The plaintiff has charged a rate much higher than the agreed rate being prime plus 1% on all the sum overdrawn by the defendant. Defendant denies that it never objected to the interest rate being charged by the plaintiff on the monthly statements as alleged. On a number of occasions it objected verbally, notifying the plaintiff's representatives at the bank, being the Bank Manager at the time, and defendant was advised that the issue of interest charged would be attended to accordingly. Defendant denies that the sum claimed is correct as alleged.

It was argued for the plaintiff that the matter falls to be determined on three issues viz, whether or not demand was made, secondly whether defendant does not owe the plaintiff because the amount was in credit and the third issue relates to the question of the interest rate.

In addressing the first issue it is Mr. Henwood (for the plaintiff) argued that the issuance of summons on the defendant placed the defendant in mora. To support this proposition the court's attention was drawn on Herbstein and Von Winsen in The Civil Practice of the Supreme Court of South Africa (4th ED) at page 199 where the learned authors have this to say:

"In cases where demand is necessary, if no demand is made before the summons is issued, the debtor can avoid having to pay costs of the summons by paying or tendering an adequate amount within a reasonable time after the service of summons, which is treated as a letter of demand (my emphasis) (see Glouslyn Van Putten (1898) 15 S. C. 34).

He further referred to Erasmus on Superior Court Practice at B1 - 227 where it is stated that the defendant must disclose fully the "nature" and "grounds" of his defence and facts relied thereof. Mr. Henwood is of the view that the defendant's defence in this case is extremely sketchy. The court should exercise its discretion in favour of the plaintiff in the amount prayed for (see Jacobsen V. D. Berg S.A. Ltd vs Triton Yachting Supplies 1974 (2) S.A. 584) that in the latter case it shows what a defendant must show in its defence in the opposing affidavit. In that case it was held inter alia as follows:

"Rule of court 32 (3) requires the opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor so that the court is satisfied that the defendant has a bona fide defence, not merely that he "appears" to have a bona fide defence".

It appears Mr. Henwood failed to address the other two issues he had alluded to in his opening address. The court takes it, therefore, that the plaintiff is of the view that there was proper demand on the strength of the statement in Herbstein and Van Winsen (supra) and that defendant has not proved a bona fide defence as per the dicta in Jacobsen V. D. berg S.A. (Pty) Ltd (supra).

Mr. Howe for the defendant contended that the plaintiff has filed a Certificate of Balance in its replying affidavit. The defendant is now precluded in challenging it. That this ought to be struck out. Further that no leave of the court was granted before the replying affidavit of the plaintiff was filed. This according to the rales ought to have been applied for by the plaintiff.

Mr. Howe further submitted that there are certain agreements where a letter of demand is not necessary. To support this proposition he directed my attention to the case of Volkskas Beperk vs Van Aswenben 1961 (1) S.A. 493. He contended further that in an overdraft facility the bank has to make a demand and it cannot go straight to the issuance of summons. Demand in such cases is a condition precedent. To support this view he referred the court to the following authorities:

1. A. B. Fourie on The Banker and the Law (1993)
2. Herbstein and Von Winsen (supra)
3. R. H. Christie The Law of Contract in S.A. (3rd ED) at page 154
4. R vs Katz 1959 (3) S.A. 408

5. Commercial Bank of Zimbabwe Ltd vs MM Builders & Supplies (PVT) Ltd and others and three similar cases 1987 (2) S.A. 285.

Mr. Howe argued further that as the nature of a summary judgement is an extraordinary remedy and tends to shut the doors to a defendant who might have a defence the plaintiff has to strictly prove its case to get such a remedy. He referred the court to the case of Gulfsteel (Pty) Ltd vs Rank-Rite Bob (Pty) Ltd 1998 (1) S.A. 679 where the headnote reads as follows:

"In view of the nature of the remedy of summary judgement, the court must be satisfied that a plaintiff who seeks summary judgement has established its claim clearly on the papers and the defendant has failed to set up a bona fide defence as required in terms of the uniform rales of court. There are accordingly two basic requirements that the plaintiff must meet namely a clear claim and pleadings, which are technically correct before the court. If either of these requirements is not met, the court is obliged to refuse summary judgement. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the court to be satisfied that the plaintiff's claim has been clearly established and that its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgement, summary judgement should nevertheless be refused if the plaintiff's claim is not

clearly established on its papers and its pleadings are not technically in order and in compliance with the rales of the court".

In sum, Mr. Howe contends that in the instant case no proper demand was made, secondly, the issue of interest is a triable matter in that plaintiff has failed to prove a prime rate (see Appeal case No. 9/94 Moses N. N Dlamini vs National Motor Company Limited), plaintiff has failed to file papers which are technically correct as per the dicta in Gulf steel (Pty) Ltd (supra), defendant has proved a bona fide defence and lastly that the defendant was never given notice that its overdraft facility was to be withdrawn.

These are the issues before court. I have read the papers before me and also taken into consideration the able submissions by both counsel. I shall proceed to deal with the issues as alluded to by Mr. Henwood in his opening address in seriatim.

Firstly, on the issue of whether or not demand was made in this case, I am inclined to agree with Mr. Howe on the basis of the authorities he has cited especially AM. Fourie The Banker and the Law (supra) that when a banker makes arrangements for overdraft facilities, such arrangements are usually subject to various condition, inter alia that they are repayment on demand (my emphasis). Demand becomes a condition precedent to such arrangement. In the present case there is no indication that such was made except that summons were immediately issued and the facility withdrawn. It appears from the authorities that prior notice to the customer is necessary before termination of overdraft facilities except in exceptional cases. This is not an exceptional case.

On the second point pursued by Mr. Henwood my view is that the defendant has proved a bona fide defence and I agree entirely with the submissions made by Mr Howe in this connection.

On the other issue of interest which was not pursued by Mr. Howe although he mentioned it, my view on the matter is that here there is a material dispute of fact as to what is the correct interest in this matter and thus making the issue a triable matter which can only be properly ventilated in a trial. I agree with the dicta in Moses N.N. Dlamini (supra).

In the result, I rule that the application for summary judgement ought to fail and that defendant is granted leave to defend the matter at trial.

Costs to be costs in the course.

S. B. MAPHALALA

JUDGE