

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2730/05

In the matter between:

STANDARD BANK SWAZILAND LTD

PLAINTIFF

VERSUS

BHUTANA MAURICE SATCH KHUMALO

DEFENDANT

CORAM:

MAMBA AJ

FOR PLAINTIFF:

MR K. MOTSA

FOR RESPONDENT:

MR P.M. SHILUBANE

JUDGEMENT

20TM June, 2006

[1] By summons dated the 26/7/05 the plaintiff claimed against the defendant certain amounts of money made out of three claims in respect of monies loaned and advanced by the plaintiff to the defendant in 1990, 1991 and 1995 respectively. These loans were secured by a mortgage bond over the defendant's property described as portion 75 of Farm 1117 situate in the Mbabane area, which property the plaintiff now wants to be declared executable.

[2] On the 17th day of August, 2005 the plaintiff applied for and was granted default judgement by this court in respect of all three claims and the mortgaged property was declared executable. Incidentally on the same date the defendant filed with the Registrar of the High Court and served

on the plaintiffs attorney his notice of intention to oppose the action, but as it would appear judgement had already been granted in favour of the plaintiff.

[3] What followed was that on the 15th September, 2005 the defendant filed an application to rescind the default judgement. This application was initially resisted by the plaintiff until on the 3rd day of March 2006, following negotiations between the parties, the plaintiff made an undertaking in court to abandon the default judgement. In fact by letter dated the day before that, the plaintiffs attorneys had informed the defendant's attorneys that plaintiff was abandoning judgement and certain proposals were offered to the defendant to liquidate its indebtedness to the plaintiff, namely the defendant had within 2 weeks from the 3rd day of March 2005, to undertake to pay at least a sum of E1000-00 per month in respect of the claims. If the defendant failed to make this undertaking within the 2 weeks, the plaintiff threatened to file its declaration to its simple summons and prosecute its claims further. This declaration was subsequently filed on the 25th April 2006 and was later followed by an application for summary judgement two days later.

[4] The defendant opposes this application for summary judgement on one ground only, and that is:

"In law the plaintiff cannot again claim the same amount claimed in the judgement which it had abandoned."

And this is the point I have to decide whether or not such submission is in the circumstances of this case as outlined above invalid in law.

[5] One notes from the outset that the plaintiff did not abandon its claim. It abandoned its default judgement and insisted on it being paid by the defendant. In reality the plaintiff opted to abandon the default judgement in its favour rather than continue with the rescission application. This abandonment had, in my judgement this limited effect and was certainly not an abandonment of the plaintiffs claim.

[6] This abandonment fell outside rule 41 (2) of the rules of court. I am unable to agree with the defendant's submissions that the abandonment of the judgement in the terms described above had the effect of a judgement in favour of the defendant.

[7] Plaintiffs attorney referred me to the case of **VAN RENSBURG v REID 1958 (2) SA 249 at 252** where **De Villiers JP** said :

"It is clear from the record and the events in the instant matter that the plaintiff never intended to abandon his rights under the settlement. He intended merely to admit that the magistrate was wrong in refusing to recognise the defendant's opposition to the granting of judgement on settlement."

[8] The aim of the abandonment was to get the default judgement and rescission application out of the way and have the defendant make monthly payments to the plaintiff.

[9] The letter of abandonment has been filed by the defendant.

[10] I have since listened to the tape recording of the proceedings during

motion court on the 12th May, 2006 and no application was sought and granted to the plaintiff to file a replying affidavit in the summary judgement application. Its filing was therefore irregular and it is struck out. Nothing much turns on me contents of this affidavit though.

[11] In the result, the defendant's defence is dismissed and judgement is entered for the plaintiff as prayed in the application for summary judgement (in respect of all three claims)

MAMBA AJ