IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3541/08**

In the matter between:

STANDARD BANK (SWAZILAND) LIMITED **Plaintiff**

And

MMELENI INVESTMENT CORPORATION

(PTY) LIMITED **1st Defendant**

MMELENI MMISO PAYII DLAMINI **2nd**

Defendant

NTOMBI NOMPUMELELO DLAMINI **3rd**

Defendant

Date of judgment: 10 June, 2009.

Mr. Attorney K. Motsa for the Plaintiff

Mr. Attorney M. E. Simelane for the Defendants

REASONS FOR RULING

MASUKU J.

[1] On 3 April, 2008, I granted the Plaintiff herein leave to file a replying affidavit in response to an affidavit filed by the Defendants resisting summary judgment. The Defendants have indicated that they require reasons for the said Order which I provide herein below.

[2] I should, however, state at the| that matter is confined the reasoning adopted in this solely to the the instant attendant circumstances of case. I was not nascent stage of the Ruling addressed in full on the implications of the relevant Rule, with regard to researched and well prepared argument.

[3] It would no doubt redound to clarity at this stage to briefly state the background that gives rise to this Ruling. This action was commenced via a simple) the Plaintiff sued the above 2008. In that summons, summons dated 11 September, Defendants jointly and severally for the payment of a sum of

E732, 566. 19, in respect of monies lent and advanced to the

1st Defendant at the latter's instance. The Plaintiff further applied for interest thereon, costs on the punitive scale and a declaration that portion 45 of Farm 1205, situate in the District of Manzini is specially executable.

Upon the Defendants filing a notice to defend, the Plaintiff filed its declaration, followed by an application for summary judgment, which was resisted by the Defendants. I must mention that the 2nd and 3rd Defendants were cited in their capacity as sureties and co-principal debtors with the 1st Defendant.

The matter served before me on 3 April aforesaid and on which date the Defendants delivered their affidavit resisting summary judgment, and it would appear, this was shortly before the matter was to be heard. With the said affidavit having been filed, the Plaintiff thereupon applied for leave to file an affidavit in reply, in terms of the provisions of Rule 32

> (5) (a) of the Rules of this Court. That sub-Rule has the following rendering:

> "A defendant may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and, with the leave of the court, the plaintiff may deliver an affidavit in reply." (Emphasis_added).

It is the underlined portion of the above sub-Rule that loomed large on the date in question and necessitated the Ruling.

[6] In this regard, the Defendants contended that the Plaintiff should file a formal application for leave to file that said affidavit, the Plaintiffs Counsel, submitting to the contrary, that since they had recently been served with a copy of the affidavit, there was nothing wrong with an application for leave being made from the bar, without a need for a formal application.

[7] The one thing to observe about this sub-Rule, is that in the first instance, it does not state the manner in which the leave to file the replying affidavit must be applied for. It is therefor unclear from the nomenclature employed whether the leave must be sought in a formal manner or that an applicant therefore may move the application orally from the bar. The second issue of note is that the latter part of the said sub-Rule is rather unusual for the reason that it seems to destroy the very requirement in summary judgment that the plaintiff must have an

unanswerable case. I say so in the light of the possibility of a plaintiff having to reply to an affidavit resisting summary judgment.

[8] According to my research, there are no Rules or Orders in other jurisdictions which have an equivalent or similar provision. For that reason, no useful guidance may be elicited from case law in other jurisdictions. In the premises, the Court shall be required to bite the bullet as it were and decide what the position should be, as I have said in the context of the present matter. I am certainly aware that there were intimations some six or so years ago on the part of the Bench, particularly at the Court of Appeal level, to have the latter part of the sub-Rule amended by deleting the matter relating to the filing of a replying affidavit.

[9] Without necessarily deciding what the procedure should be in all other cases, what occurred in the instant case was that the 2nd Defendant in the affidavit resisting summary judgment, apart from other matters, deponed that one of the Plaintiffs employees, a Mr. Gama, had coerced him into paying some

money in respect of interest and had further advised the 2nd Defendant (wrongly he would appear to contend) that the *in duplum* rule does not apply to an overdraft facility. The 2nd Defendant deponed that the aforesaid coercion was unlawful.

[10] Mr. Motsa submitted that in the light of the allegations of coercion leveled at the said bank official, together with the advice attributed to him, it was necessary for the Plaintiff to be granted leave to reply, for the matters deponed by the 2nd Defendant are serious and border on allegations of impropriety, which it would be in the interest of the Plaintiff to have its version in that regard properly placed before Court. I agree with that submission.

In a case like the present, where the Plaintiff was served with the affidavit resisting summary judgment, literally on the door step of the Court, thereby being denied the time necessary before the hearing to make up its mind and to actually prepare the necessary application for leave to reply, if so minded, is it not reasonable for such a party to make an oral application for leave, even if from the bar?

I am of the considered view that it would be reasonable in the circumstances, to make an oral application as the Plaintiff did from and from the bar. In particular, it is important to note, as did Mr. Motsa, that to insist on a formal application necessarily has an impact on the question of costs, which if the Court, after a formal application is made and granted, the defendant will be expected to settle and most likely at the punitive scale because that is what most of written agreements, including the one under scrutiny, would provide for.

Furthermore, a fastidious and inflexible requirement for leave to be sought in every case, tends, in my opinion, to delay the matter and may cause what may in some cases be needless exchange of papers, further interlocutory hearings which do not resolve the primary issue, and an unnecessary clogging of an already inundated and overwhelmed Court, which can certainly do with a less fastidious and formalistic approach to these matters. I say so particularly as in the instant case, the need to reply on the part of the Plaintiff was obvious in the light of the new and possibly damning allegation raised by the 1st Defendant as stated above.

[14] It is worth considering that the Court must be placed in charge of the entire process in respect of procedural matters such as the issue under scrutiny. I am of the considered opinion that the Court must not be unnecessarily shackled in its quest to dispense justice in as fair, speedy and inexpensive a manner as possible by yielding to a fixation on sterile formalism when such fixation does not at the end of the day advance the cause or the interests of justice.

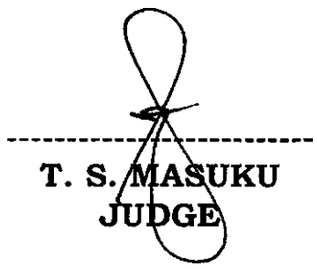
[15] The Court must particularly be placed in a position to decide on the particular facts of the case before it whether a formal application is necessary or not. I say so because in many cases, the defendant does not contest the granting of an oral application for leave to file the replying affidavit. Where the need to reply is in doubt, after an oral application, only then in my view, should the Court insist on a formal application and to which the defendant may reply.

as a result of the Court granting the Plaintiff leave, even on the basis of an oral application. The approach I took commended itself to me for the reason that no delay or prejudice would be occasioned to either party and that when the application for summary judgment is finally heard, all the allegations and respective positions of the parties are poignantly placed before Court without the need to shuffle a flurry of paper in the build-up to the summary judgment hearing. To do otherwise in every case may delay the resolution of the all-important matter i.e. the summary judgment application. Furthermore, it has the propensity, as I have pointed out, to run up costs caused by the exchanging affidavits and increased number of hearing thus clogging an inundated Court system that is already bursting at the seams so to speak.

I should mention in conclusion, that I was unable, on account of other pressing and urgent matters, some of which were due for judgment earlier than the instant matter, to write this Ruling earlier as had been specifically requested by the Defendants' Counsel.

The foregoing, constitute the reasons for the order I issued on 3 April, 2009, granting leave to the Plaintiff to file a replying affidavit in the summary judgment.

DELIVERED IN OPEN COURT ON THIS THE 10th DAY OF JUNE, 2009.



Messrs. Robinson Bertram for the Plaintiff Messrs.

Mbuso E. Simelane for the Defendants