



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No: 1500/11

In the matter between:

**STANDARD BANK SWAZILAND LIMITED**

**PLAINTIFF**

and

**OVERSEAS INVESTMENTS (PTY) LIMITED**

**1<sup>ST</sup> DEFENDANT**

**MAHOMED DAUD**

**2<sup>ND</sup> DEFENDANT**

**ADAMGI MOHAMED IOONUS**

**3<sup>RD</sup> DEFENDANT**

**Neutral citation** : Standard Bank Swaziland Limited and Overseas Investments (Pty) Limited Dlodlu N.O. and 2 Others (1500/11) [2012] SZHC 224 (28 SEPTEMBER 2012)

**Coram** : MABUZA J

**Heard** : 16 AUGUST 2012

**Delivered** : 28 SEPTEMBER 2012

**Summary** : Commercial Law – Banking – Foreclosure on bank loan – Summons for recovery of loan amount issued – Applicant invoking Rule 33 bis of Rules of Court for early trial – Procedure to be followed – Formal application as opposed to informal request – Application dismissed.

[1] During December 2011 the Plaintiff herein issued summons against the Defendant for payment of the sum of E15,356,101.11 (Fifteen Million three hundred and fifty six thousand one hundred and one Emalangeni eleven cents). The Defendants filed their plea on the 1<sup>st</sup> June 2012. The Plaintiff has filed its discovery affidavit. What remains outstanding is the Defendants' discovery affidavit; a pre-trial conference; filing of a minute thereof and request for a date of trial and a book of pleadings.

[2] The Plaintiff would like the matter to be heard soon and not to await the normal process that takes place when pleadings have closed and a date of trial has been requested from the Registrar of the High Court. The process of set down takes long and the Plaintiff wishes to avoid this delay and wishes to be heard expeditiously. To this end the Plaintiff has opted to invoke Rule 33 bis which if granted would allow the Registrar to allocate an early date of trial

[3] On the 13<sup>th</sup> July the Plaintiff's attorneys filed a notice in terms of Rule 33 bis. This notice was served on the same date on the Defendant's attorneys.

[4] The notice is addressed to the Registrar of this Court and makes application to the Chief Justice for an order in the following terms:

(a) Declaring the above matter to which (sic) to be dealt with in terms of the provisions of the Rule 33 bis.

(b) Any further and or alternative relief.

[5] The reasons for the application appear on page 2 of the notice referred to in 1 here above are stated as follows:

(a) The matter is of serious and commercial importance as the claim involved is of the capital amount of E15 356 106-11 for both the loan and the overdraft amount and hence it is not only of paramount importance to the plaintiff but it is in the interest of justice that the matter be finalized as a matter of urgency; and

(b) The Plaintiff contends that because of the first defendant's breach it was entitled to foreclose both the loan and the overdraft and hence it is looking for the whole amount owing, failing which an order to declare the security executable.

Wherefore the parties pray that the Chief Justice grants an order authorizing the above matters to be dealt with in terms of the provisions of Rule 33 bis in order to bring them to a speedy conclusion.

The notice is dated 12<sup>th</sup> July 2012 and is signed by the Plaintiff's attorney.

[6] The application is opposed by the Defendant and to that end Mr. Mahomed Daud, the Managing Director of the 1<sup>st</sup> Defendant who is also the 2<sup>nd</sup> Defendant filed two affidavits in response thereto, a main affidavit deposed to on the 9<sup>th</sup> day of August 2012 and a supplementary affidavit deposed to on the 13<sup>th</sup> August 2012.

[7] The Defendant has raised various pertinent issues in opposition to the Plaintiff's application namely that it is premature in that:

- (a) Normally once pleadings are closed, the parties would then approach the Registrar to allocate a date of trial in terms of Rule 55 A (1) and (2). Similarly Rule 33 bis envisages that the pleadings should be closed and instead of approaching the Registrar in the prescribed manner, the party concerned approaches the Chief Justice in the manner prescribed by Rule 33 bis.

- (b) In *casu*, the Defendant argues that the pleadings have not been concluded, because there has been no full discovery and compliance with Rule 35 has not been done. Rule 35 makes provision for discovery, inspection and production of documents and tape recordings.
- (c) Furthermore the mandatory pre-trial conference required in terms of Rule 37 has not been held. Such conference is held after the close of pleadings and before the request to the Registrar to have the matter enrolled in terms of Rule 55 A (1) which states that after the close of pleadings in an action and subject to Rule 37, any of the parties thereto may deliver a notice requesting the Registrar to allocate a date of hearing.
- (d) The Defendant says that it is only after all the above conditions have been concluded that Rule 33 bis can be invoked.

[8] With due respect I disagree with Mr. Howe's submissions because Rule 33 bis (1) to (3) makes provision for special procedures that the Judge must prescribe once the matter has been declared as requested. Section 33 bis (3) provides as follows:

“(3) Where the judge accedes to the application, the judge may in consultation with the party, then prescribe –

- (a) the procedures and steps to be taken to prepare for trial, including, but not confined to -
  - (i) the filing of pleadings;
  - (ii) the making of discovery and the production of documents;
  - (iii) the exchange of summaries of expert evidence;
  - (iv) any other matters whether provided for in the rules or not: Provided that if no specific prescription is made in respect of any matter the provisions of these rules shall apply;
- (b) the time limits for all the steps to be taken in the litigation, provided for in these rules; and
- (c) the date for trial on which the matter is to be heard”

[9] The Defendant further contends that Rule 33 bis can only be invoked by way of an application supported by an affidavit in terms of the Rules of this Court. The affidavit would then set out fully why there has to be a departure from the usual procedure that governs all pleadings requiring an early date of trial. The supporting affidavit shall set out that on account of its commercial or other importance or which because there has been undue

delay in it coming to trial, it should be dealt with in accordance with special procedures.

[10] The Defendant further says that the failure by the Plaintiff to file an affidavit in support of the application has deprived the Defendant of the opportunity to respond to factual allegations supporting the application. In short the Defendant says that the procedure that the Plaintiff has used is wrong.

[11] The Plaintiff does not agree that the procedure it has used is wrong. The Plaintiff does concede that the pleadings are not closed but that only the discovery stage has not been concluded. Once that has been done, a pre-trial conference and other processes should not take much time thereafter.

[12] Mr. Motsa further contends that the application envisaged in Rule 33 bis is an interlocutory one. Let us put his argument to a test. Assuming a Plaintiff issues a simple summons and the Defendant files a notice of intention to defend. Rule 33 bis says that a Plaintiff can approach the Chief Justice anytime after the filing of a notice of intention to defend. If the Plaintiff does approach the Chief Justice at this juncture of the pleadings and uses the procedure that the Plaintiff has used in *casu*, then the information or facts

available before the Court at this point of the pleadings would be insufficient to assist the Court make an informed decision. What procedure would a Defendant follow in the event it is opposed to the procedure used by the Plaintiff? In the present case the Defendant was obviously hamstrung and decided to go ahead and file answering affidavits notwithstanding that there was no founding affidavit because it needed to present its side of the story.

[13] A good example of an interlocutory application is that of an application for summary judgment; which is also brought on notice with a supporting affidavit. The Plaintiff states its case and the Defendant files its response and more often than not the Plaintiff is allowed to file an answering affidavit and the issues are sharply defined without going deeply into the merits. If the response from the Defendant is good the application fails and the parties have to go for a full trial.

[14] I agree with Mr. Howe that in order for the Court to make an order declaring the case to be one which should be dealt with in accordance with special procedures on account of its commercial or other importance, or which because there has been undue delay in it coming to trial a formal application supported by an affidavit should be filed through the Registrar. This



application should comply with the Rules of Court in particular Rule 6 (1) which provides that:

“... every application shall be brought on notice of motion supported by an affidavit or affidavits as to the facts upon which the application relies for relief”.

[15] Further to the above an affidavit would have brought into sharp focus salient and necessary averments and the relief sought. This would have prevented the Court from reading voluminous documents some of which were not necessary to enable me to reach my decision.

[16] I further wish to bring the following words found in Rule 33 bis to the attention of the parties:

**Subsection 1**

“... **apply**” to the Chief Justice ...

“... to deal with the **application** ...”

“... to have the case **declared** ...”

**Subsection 2**

“... on receipt of the **application** ...”

“... at which the **application** can be considered.”

**Subsection 3**

“where the judge accedes to the **application**...”

[16] The word “**application**” is repeated four times and “**apply**” once; which leaves no doubt that the procedure to be followed in invoking Rule 33 bis should be by way of application. To have a matter “**declared**” implies that an order of court is being sought and “**declare**” is a prayer being sought and this can only be achieved through a notice of application accompanied by a supporting affidavit. The form which the Plaintiff followed is not provided for in the Rules of court, otherwise litigants with pending matters would be entitled to approach the Chief Justice in the most unorthodox manner and not in an orderly fashion as provided by the Rules of Court.

[17] In the event the application in its present format is hereby dismissed with costs.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Plaintiff : Mr. K. Motsa  
For the Defendant : Mr. L. Howe