



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 924/2015

In the matter between:

**STANDARD BANK OF SWAZILAND (PTY) LTD**

**Plaintiff**

And

**GCINA SANELE DLAMINI**

**Defendant**

**Neutral citation:** *Standard Bank of Swaziland (Pty) Ltd. v Gcina Sanele Dlamini*  
*(294/2015) [2015] SZHC 144 (04<sup>th</sup> September 2015)*

**Coram:** M. Dlamini J.

**Heard:** 28<sup>th</sup> August 2015

**Delivered:** 04<sup>th</sup> September, 2015

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Summary: By means of summary judgment application the plaintiff claims against defendant the sum of E1,258,601.43 as monies lent and advances together with interest. The defendant opposed the application on the basis that the sum advanced was liquidated by him.

Procedure adopted

[1] On the hearing date, having heard both Counsel's submissions, I referred the matter to trial on the aspect of whether defendant did pay the sum of E180,000 towards the debt. I ordered the parties to discover all documents necessary.

[2] Counsel for defendant objected strongly to this procedure on the basis that it is not provided by law. He stated that the procedure adopted by the court is not provided for in law. I intend to address this point before I deal with the merits of this matter.

[3] It is trite law that a court faced with a summary judgment application should be "*slow to close the door to a defendant if a reasonable possibility exists that an injustice may be done if judgment is granted*" as per **Beck JA** in **Mater Dolorosa High School v R. M. J. Stationary (Pty) Ltd, Civil Appeal No.3/2005**.

It is for this reason that I ordered that there be oral evidence.

[4] On the oral evidence date, Counsel for defendant informed the court that I should consider the affidavit resisting summary judgment together with a two page document reflecting payment of the sums of E130,000-00 and E50,000. He submitted that he would not call any witness. Out of the

abundance of caution, I ordered that Mr. Warring appear in court as the two page document was said to emanate from his office and was seriously disputed by plaintiff. I did this guided by Rule 32 (5) (c) which reads.

“32(5)(c)      *The court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.*”

[5]            Commenting on a similar Rule under **Superior Court Practice, Erasmus** at **B-231** stated on the words “*unconditionally or subject to ....terms*”

“*The terms imposed may include ordering .... or that the plaintiff be permitted to set the action down for trial before the close of pleadings.*”

Viva voce evidence

[6]            Joseph Ian Warring (Warring) on oath informed the court that he was a practicing Attorney of this court. He is a conveyancer as well. He was instructed by plaintiff to register the bond in issue. It turned out that the property against which the bond was to be registered was bonded in favour of Swaziland Building Society against Rosey Don Smith. In order for Warring to register a bond against the said property, the Swaziland Building Society had to be paid its debt before it could cancel the bond and release the property. It is then that defendant approached Warring and instructed him to receive money on behalf of Swaziland Building Society in order to cancel the bond and release the property which plaintiff had instructed him to register a bond against. Defendant made payments in installments which summed up to E354,661.45, He paid E140,000 to Swaziland Building Society, E82,000 as transfer costs, E21,935.00 for

stamp duty, E50,000 to Rose Don Smith as part of the purchase price, E50,000 as agents commission and the balance of E10,726.45 as legal costs.

[7] He also informed the court that the purchase price E1.4million plaintiff had instructed him to register a bond of E1,2600,000. Warring also alerted the court that the bond in favour of plaintiff was registered on 16 of June 2014 while defendant paid the sum of E140,000 (amount of clearing bond with Building Society) on 15 April 2014. This date is well before defendant became liable to plaintiff. In other words all payments received prior 16<sup>th</sup> June 2014 would not go to plaintiff.

[8] This witness was not cross examined by defendant's counsel. The defendant then applied for a postponement to 31August 2015 in order to call defendant to the witness stand. The plaintiff objected strongly to the application for postponement. I however postponed the matter to defendant's date but left room that should defendant be available in an earlier date, the parties may approach the court for such a date.

[9] On the 28<sup>th</sup> August, 2015 Counsel on behalf of plaintiff informed the court that Counsel for defendant had indicated that he shall not call any witness and the court should use the evidence before court to decide the matter.

#### Analysis of evidence

[10] The defence, as already highlighted, was that the defendant had paid a sum of E180,000 towards the capital debt. From the evidence adduced by Mr. Warring it is clear that there is no basis for this evidence by reason that the sum of E140,000 was firstly not directed to plaintiff but to Swaziland

Building Society as a means to cancel the bond held against the seller of the property. Secondly it could not by any stretch of imagination as it was paid well before defendant became indebted to plaintiff. No wonder the affidavit resisting summary judgment application is silent on the amount paid by defendant towards liquidating the debt with plaintiff. It is further not clear as to how much defendant assert is the balance. The evidence of Warring was never contested. Worse still, the defendant requested for a postponement in order to come to court but failed to do so on the eleventh hour. To me all this were delaying tactics by the defendant meant to frustrate the plaintiff.

[11] In the above, I enter the following orders:

1. Summary judgment application is granted.
2. Defendant is ordered to pay plaintiff:
  - 2.1 The sum of E1,258,601.43;
  - 2.2 Interest at 9% per annum;
  - 2.3 Costs of suit.

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**M. DLAMINI  
JUDGE**

**For Plaintiff: N. D. Jele of Robinson Bertram**

**For Defendant: P. Simelane of M. P. Simelane Attorneys**