IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE CASE NO. 18/99

In the matter between:

DUMISA DLAMINI 1st APPELLANT

SWAZI INN (PTY) LIMITED 2nd APPELLANT

DUMISA SUGAR CORPORATION (PTY) LIMITED 3rd APPELLANT

THE NEW GEORGE HOTEL (PTY) LIMITED 4th APPELLANT

MACKAY INVESTMENTS (PTY) LIMITED

T/a SMOKEY MOUNTAIN 5TH APPELLANT

UNCLE CHARLIE HOTEL (PTY) LTD

t/a PRINCE VELEBANTFU 6TH APPELLANT

THE PROPERTY COMPANY (PTY) LIMITED

t/a MGENULE MOTEL 7th APPELLANT

And

SWAZILAND DEVELOPMENT AND SAVINGS

BANK RESPONDENT

CORAM BROWDE, J A

VAN DEN HEEVER, J A

SHEARER, J A

JUDGMENT BROWDE, J A

The appellants were the plaintiffs in the court below and the respondent was the defendant. It will be convenient to refer to them in this judgment as the "plaintiffs" and "the bank" respectively.
It is common cause that at all relevant times the plaintiffs were customers of the bank and each operated one or more banking accounts. In their particulars of claim the plaintiffs alleged that the agreements between them and the bank were

orally concluded but the bank pleaded that the agreements were in writing. Ultimately the plaintiffs conceded this.
The relief sought by the plaintiffs was an order in these terms:-

1. "1. That defendant render a full account in respect of each of the accounts (referred to by their numbers in paragraph 9 of the particulars of claim) for the period covering the total life span of each account, supported by vouchers.
2. Debatement of the accounts;
3. Payment of whatever amount appears to be due to one or more of the plaintiffs, alternatively a declarator indicating the amount or amounts due to defendant in respect of each account, in which case the plaintiffs tender payment to defendant of the amount or amounts found to be due;

4. costs of suit;
5. Alternative relief."

This relief was predicated on an allegation that it was an express, alternatively tacit, alternatively implied term of the agreements that the bank was obliged to furnish to plaintiffs monthly written statements of account in respect of all the accounts operated by the plaintiffs reflecting the amounts debited and/or credited with regard to interest; the amounts debited or credited with regard to service and bank charges; and the debit or credit balances on the accounts from month to month. The plaintiffs also alleged that the bank was obliged to furnish vouchers in support of the debits and credits reflected in the statements of account should plaintiffs require same. Finally, the plaintiffs alleged that despite demand the bank had failed to render monthly statements supported by vouchers in respect of each of the accounts and that the bank "alleges that the plaintiffs together are indebted to (the bank) in the amount of E42m alternatively E50m."

The bank, in its plea, admitted that it agreed to furnish monthly statements of current accounts recording details of the operation of those accounts but stated that since it was not requested to furnish vouchers it was not required to do so. The bank then averred that it had been instructed by the plaintiff to deliver statements of account to the plaintiffs' accountants which instruction it duly complied with, but that no demand for vouchers had been made.

The bank, after denying that it had made the allegations regarding the amount owing to it as referred to in the particulars of claim, set out in detail what the position was with reference to each of the current accounts operated by the plaintiffs. These showed that the plaintiffs were lawfully indebted to the bank in large sums of money plus interest calculated as at 30 September 1995 — it appears to have been common cause that the first plaintiff opened his first account with the bank in approximately 1972 and that the other accounts were opened from time to time thereafter.

The bank's plea concluded with the following prayer:-

"Wherefore defendant, accepting the tender of payment of the plaintiffs, prays that the action of the plaintiffs be dismissed with costs and that judgment be entered against plaintiffs in the sums set out in 7 above (this referred to the paragraph in the plea setting out the indebtedness of the plaintiffs as already referred to) together with interest on each sum as claimed. "

Between the close of pleadings and the day of trial there were several interlocutory applications concerning discovery and an application to amend the particulars of claim. The latter sought to substitute the relief above referred to by a new claim which, had it been granted, may have had the effect of withdrawing the tender, which, of course, had already been accepted, to pay to the bank the amounts which might be found owing to it. This proposed amendment was served on the bank and elicited an objection to a clause in which it was alleged that the plaintiffs were entitled to a full and proper account by virtue of what was said to be the "fiduciary relationship existing between each of the plaintiffs and [the bank]." Once the objection was lodged the plaintiffs, if they wished to pursue the amendment, were required by the provisions of Rule 28(5) of the High Court Rules to apply to court for leave to amend. This was not done and consequently no more need be said about the proposed

amendment which is pro non scripto.

On 12 March, 1999 the plaintiffs filed a notice purporting to withdraw the action. This step was invalid since neither the consent of the bank nor the leave of the court was obtained as required by the provisions of Rule 41 of the Rules of Court. The plaintiffs then prepared a substantive application seeking leave to withdraw their action which application was served on the bank's representatives on the day on which the trial was due to commence, i.e. 15 March, 1999. It would be charitable if one referred to the reasons given for the withdrawal as specious. For example the first reason relied on by the plaintiffs was that the agreement between the parties in respect of each account was in writing and not oral as originally pleaded. They came to this conclusion, so they alleged, after "mature consideration" of the plea, further particulars and discovered documents. The documents were delivered during June 1996 which renders the reason unacceptable and also makes one dubious as to the motive for their conceding that they were not entitled to an accounting from the bank and therefore wished to withdraw the action..

As I have said the trial was set down for hearing on 15 March 1999. The date had been fixed by Sapire, CJ on or about 26 November 1998 after consultation with the parties' legal representatives at a meeting held in terms of Rule 33 bis.

When the matter was called an application was made for the recusal of the learned Chief Justice. The application was refused. As nothing is made of that by the appellants in this appeal the merits of the application need not be dealt with in this judgment, save to say that I agree entirely with the approach to the application adopted by the learned Chief Justice. It seems to me that the application was a stalling tactic which in the words of Sapire, CJ "can legitimately be seen as no more than a further ploy to delay and obfuscate the course of justice. "

When the application for recusal was refused counsel and attorney for the appellants withdrew and left the courtroom after announcing that their mandate had been terminated. The application for leave to withdraw the action was not moved and consequently the situation which arose was that the action was ready for hearing but there was no appearance for the appellants. Rule 39(3) thus applied. It reads as follows:-

"If when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour, and the court, if satisfied, may grant such judgment. "

In the absence of the plaintiffs' representatives the learned Chief Justice heard the evidence tendered by the bank. It was clearly demonstrated that full and proper accounts had been furnished to the plaintiffs by June 1996 and that not a single item had been challenged. The trial before Sapire, CJ was to have been the opportunity for the plaintiffs to debate those accounts if they queried their accuracy but instead of grasping that opportunity the plaintiffs withdrew the mandate of their counsel and left the court. In my view that constituted a waiver of their right to debatement and that therefore the learned Chief Justice was justified in granting judgment against each plaintiff.

It was common cause before us that the record prepared for the appeal was seriously defective. There were, for example, the following omissions from the record:-

i. The documents handed into the court a quo by the bank's witness were not included in the record;
ii. Several affidavits are missing and one affidavit by the first plaintiff refers to an application by the bank which is not before us;
iii. A certificate signed by the bank's acting managing director was handed in but is not

before us;

iv. Letters which were handed in as exhibits in the court a quo are not in the record, nor are other exhibits which may have been significant.

Mr. Segal who commenced argument on behalf of the appellants informed us that despite the defects in the record he was instructed to argue the matter on the record as it is. In the absence of all the documents which were before Sapire, CJ this court is not in a position to say that the quantum of the judgments in respect of each appellant was not justified. It was of course for the appellants to show that the amounts were not justified if they wished to succeed on this aspect of the appeal. This they did not do. Mr. Segal was engaged in arguing this aspect when his mandate was also withdrawn. Thereafter the first appellant requested a postponement of the appeal. This was refused and first appellant argued the matter himself. He referred us to an internal memorandum of the managing director of the bank of December 1992. This memorandum contained an apparent instruction to close one of Mr. Dlamini's personal accounts. However its identity is left blank and consequently no significance can be attached to it. There is also an instruction which indicates an intention to limit overdraft facilities granted to

the first and third appellants to an "overall limit" of E21 million. Whatever the intention may have been in 1992 that instruction was apparently not carried out.

The only figures which needed adjustment from those pleaded by the bank were the following:-

1. It was explained to Sapire, CJ that in the plea the debits of the first and third appellants had been erroneously transposed. The correct amounts as demonstrated in the documents placed before the trial court, which had been available to the appellants by reason of discovery, was that the larger sum was owed by the third and the smaller by the first appellant. Judgment was granted as established by the evidence.
2. The bank's senior counsel Mr. Wise very properly informed us that it was discovered after judgment in the court a quo had been delivered that a sum of E2.6 million had wrongly been debited in the court's order to the account of the first appellant which should have been debited to the account of the third appellant, on the strength of counsel's erroneous submissions, not of the evidence given.

The first appellant accepted that this rectification should follow and praised defence counsel as being "a very honest man".
Consequently the judgment of the court a quo falls to be altered in the following respects:-

1. The judgment against the first plaintiff is altered to read Ell 260.905.23 together with interest and costs.
2. The judgment against the third plaintiff is altered to read E44 828 399.11 together with interest and costs.

Mr. Segal had argued that the trial judge had erred in hearing the matter at all, where the appellants had wanted to withdraw it: he should have exercised his discretion in their favour; or granted absolution. His argument ignored the fact that the appellants sued for a statement of account which the preliminary procedure in the litigation had afforded them to the full, and had tendered to pay their debt if satisfied as to what was due. That tender was formally accepted in the plea. The appellants could not unilaterally withdraw it.

He also urged that the evidence tendered had been insufficient to prove the quantum claimed. In my view proof was strictly required only in regard to items disputed (during debatement) by the appellants. In any event on the defective record it is impossible to say that the evidence tendered was deficient.

In the result apart from the rectification set out above the appeal is dismissed with costs including the costs of two counsel.

BROWDE, J A

I AGREE van den HEEVER, J A

I AGREE SHEARER, J A

DATED AT MBABANE THIS 3rd DAY OF DECEMBER, 1999