IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.18/01

In the matter between

BONKE MABUZA 1st APPELLANT

BONGANI MAZIYA 2nd APPELLANT

VS

NEDBANK OF SWAZILAND RESPONDENT

CORAM : BROWDE J A

: TEBBUTT J A

: BECK J A

JUDGMENT

Browde J A:

At all times material to this matter, the appellant was a customer of the respondent bank. He was at the same time, an employee of the respondent and kept two current accounts at the respondent's Mbabane Branch where he also had a savings account. It is alleged in the appellant's founding affidavit that in terms of the agreement between the parties, the appellant "would withdraw money from the accounts whenever he had any credit balance". He goes on to allege that in December 2000 he attempted to withdraw money from the said accounts but was informed by the official of the respondent that he could not withdraw any money on the accounts as they had been "frozen" on instructions of "higher authority" within the respondent. Averring that the balances in the accounts were respectively E6,645.34; E901.52 and E200.12 (which was not disputed) and that he was legally entitled to all the aforesaid amounts (which is denied by the respondent); the appellant brought an application before the High Court seeking an order directing the respondent

to re-open the said accounts and to release the money to him. The appellant also asked that the respondent pay costs on the attorney and own client scale.

The basis of the respondent's opposition to the order sought was that the funds appearing to be due to the appellant in the said accounts were part of certain funds which had been fraudulently acquired by the appellant in a "massive fraud" which had been ongoing within the respondent's institution involving the appellant and certain other members of respondent's staff. The head of the respondent's Management Services Operations also deposed to the fact that the funds which the appellant sought were directly linked to fraudulent transactions which the appellant had perpetrated against the respondent and its customers. In support of that allegation the respondent filed a report of its Internal Auditor from which, it appears that the appellant is alleged to have defrauded the respondent of the sum in excess of E341 299 34. It was to that fraud that the funds sought by the appellant are alleged by the respondent to be linked.

The learned Judge a quo, Annandale J, found that the appellant's claim was in the form of a "rei vindicatio". He stated that the authorities show clearly that the legal position of money held by the bank in the account of its customer is that the money vests in the bank and not in

the customer. Consequently the learned Judge found that this negated the prime requirement of a vindicatory action namely that the ownership of the res sought to be recovered must vest in the application seeking restoration. On that basis he found that the credit balances could not be claimed by a rei vindicatio and accordingly dismissed the application with costs. It Is against that order that the appeal has been brought before us.

As I have already pointed out, the appellant, in his founding affidavit, alleged that in terms of the agreement between him and the bank he was entitled to withdraw funds whenever there was a credit balance in his accounts. In its

answering affidavit the respondent stated that the correct nature of the relationship between the parties was that of customer/banker in terms of which the respondent bank undertook to pay any funds legally due, owing and payable by the respondent to the appellant. I have emphasized the phrase since in his replying affidavit the appellant agreed with it stating, "I... agree that I was respondent's employee and that respondent was supposed to pay on demand any funds legally due, owing, payable to myself from time to time, and the funds held in these accounts fall within this category". It seems clear therefore that on the affidavits filed of record there is a dispute between the parties which cannot be determined until the parties have given evidence in support of their respective versions. The dispute is simply this. The respondent has said on oath that the appellant has defrauded the bank of a very large amount (far in excess of the claims made by the appellant) and that this appears and is fully explained in the report already referred to. The respondent states further that the funds which the appellant now seeks to acquire are directly linked to the fraudulent transactions to which I have alluded above. In reply thereto, and in reference to the report upon which the respondent relies, appellant stated that those annexures are disputed and denies that he ever committed any fraud. Mr. Mabila, who appeared for the appellant, strenuously argued that the allegation that the appellant was not legally entitled to the amounts shown in appellant's accounts was a bald allegation and that therefore it did not raise a dona fide dispute of fact. There is in my opinion no substance in this submission. The report refers to certain customers of the respondent who assisted the appellant and certain other employees in carrying out the fraudulent transactions referred to and further sets out five methods which were allegedly used in committing the frauds. There is also the following paragraph included in the respondent's answering affidavit:-

"This fraud was discovered by an official of the respondent during October/November 2000. Upon discovery of the ongoing fraud the applicant and other staff members allegedly involved simply disappeared from their place of employment and have not been seen since. I am advised and verily believe that the appellant has been

formally charged with theft and fraud by the Royal Swaziland Police and the matter is pending before the courts".

In his reply, the appellant states,

"Save to admit that I have been charged with fraud (which offence I deny and shall plead not guilty thereto) contents of this paragraph are vehemently denied. It is worthy noting (sic) that the said contents are mere speculation without support of any facts or sources thereto",

Why it is "mere speculation" to allege that the applicant and other staff members disappeared from their place of employment and have not been seen since is difficult to understand. In my view, the failure to deny that allegation means that on the papers as they now stand there are clear statements of fraudulent conduct by the appellant as well as evidence of conduct which is susceptible to the inference that the appellant knew that he was involved in transactions adverse to the interests of the employer, the respondent. That conduct also gives rise to what

in my judgment is a clear inference namely that when the application was brought, the respondent must have known that his right to the money would be disputed and that the dispute would be based on allegations of fraudulent conduct on his part.

In accordance with the oft-cited judgment in ROOM HIRE CO. (PTY) LTD V JEPPE ST MANSIONS (PTY) LTD 1949(3) SA 1153 this was a proper case for dismissing the application leaving it to the appel ant, if he sees fit, to pursue his remedy by instituting an action. As that, in any event, is the effect of the judgment in the court a quo, it is only necessary for me to order, as I do, that the appeal is dismissed with costs. As the two appellants' interests are identical the order applies to both.

J. BROWDE Judge of Appeal

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P. H. TEBBUTT : I AGREE

P.H. TEBBUTT

Judge of Appeal

C. E. L. BECK : I AGREE

C. E. L BECK

Judge of Appeal

Delivered in open court on the November 2001.