APPEAL CASE NO.56/99

In the matter between:

D.Z. CIVILS AND BUILDING (PTY) LTD **1st Appellant**
DAVID ZIETSMAN **2nd Appellant**

VS

STANDARD BANK OF SWAZILAND LIMITED **Respondent**
(Formerly BARCLAYS BANK OF SWAZILAND LIMITED)

Coram: **LEON J.P.**
VAN DEN HEEVER J.A.
BECK J.A.

For the 1st Appellant and
2nd Appellant: **B.G. SIMELANE**
For the Respondent: **L.N. KHUMALO**

JUDGMENT

Van den Heever J.A.

In this matter the appeal was allowed, with costs, at the hearing of the matter, reasons to follow. They do now.

For the sake of convenience I refer to the appellants as "the Company" and "Zietsman" respectively, and to the respondent as "the Bank".

The appeal is aimed against a judgment dated 23rd July 1999, refusing rescission of a default judgment which had been granted against the Company and Zietsman in January of 1998. The grounds are simple: rescission had already been granted, by consent, by Matsebula J. on 12 February 1999. The order refusing rescission had simply not been sought by the Bank.

Instead of abiding this court's decision on the appellants' seeking cancellation of the unsought benefit which the court *a quo* had bestowed on the Bank, the latter inexplicably opposed the appeal. The grounds advanced want to put form before substance and money in the lawyers' pockets, without achieving any object I can think of, to benefit the Bank. Its counsel's heads are crisp. He admits that the judgment in issue was given in an application that was never made, having already been disposed of earlier. Therefore, he argued, the judgment is a nullity, alternatively should be rescinded in terms of Rule 42. It is not a matter

"appropriate" for appeal. We were not referred to any limitation on the jurisdiction of this court, which compels a litigant in a case like this to follow another route as being the only one available to it by which to set aside a judgment of the High Court which was not correctly made. That the appellants should ask for an unequivocal order with that effect, is understandable. The conduct of the Bank towards the appellants in the past has been sufficiently questionable for it to be strange that no special order for costs has yet been claimed against it. The history may be summarized as follows:

The company had various accounts with the Bank. On 30 April 1996 Zietsman signed a document printed in the finest font in which he bound himself as surety and co-principal debtor for the Company's debts to the Bank. The many clauses set out are so biassed in favour of the Bank that the document alleges that Zietsman even renounced the benefits of the *senatus consultum velleianum* and the *authentica si qua mulier* – which the law did not accord him.

On 10 December 1997 the Bank issued summons against the Company and Zietsman, jointly and severally, for-

1. payment of E39 742-09 being the balance as at 31 October 1997 of the Company's overdraft during 1996 and 1997, carrying interest at 31.25% compounded monthly

2. interest at this rate, compounded monthly, from 1 November 1997 to date of payment

3. costs.

There are three annexures to this summons: a page from the ledger of the Company's current account, no 3033306, dated 1 April 1997 and covering the period 3 August 1996 to 27 March 1997 which reflects a debit of E46 737-46; an "interim statement" relating to this account dated 18 November 1997, reflecting only the figure claimed in the summons as a debit; and the "Suretyship (guarantee)" signed by Zietsman on the 30th of April 1996. This summons was addressed to the Sheriff or his Deputy for the district of Manzini. We have no return of service in the appeal record, but in the application referred to in the next paragraph Zietsman deposed to its having been served on him in Mbabane on the late afternoon of the 15th December 1997 by the Deputy Sheriff for Hhohho.

On 13 January 1998 the Bank's attorneys signed a notice of set-down for 23 January of an application for default judgment, this notice being filed the following day, and being prophetic: it alleged that the time for filing notice of intention to defend, not "would expire" but "expired", on 21 January 1998. Judgment in default of appearance was granted on 23 January 1998. We have no copy of the order because the court file went astray, but learn of its existence from the application launched on 26 January by the Company and Zietsman for rescission of the default judgment and interim stay of execution. They filed notice of intention to defend on the same date. The grounds advanced in Zietsman's affidavit are that service of the summons had been effected by the wrong person; and that set-down had been premature since the time allowed for entry of appearance to defend was suspended by the Court's vacation closure. Moreover the amount claimed was far more than the company owed, nor had any agreement been concluded that interest would be payable at the rate of 31.25%.

The Bank promptly gave notice that it intended opposing the application for rescission. There is no indication that it ever filed affidavits justifying this move and disputing the appellant's evidence that the Bank was claiming an excessive amount and interest at an excessive rate. On 2 February by consent Dunn J ordered that execution be stayed pending finalization of the application.

The Bank's next move suggests that it no longer relied on the judgment by default it had obtained in January in terms of the summons of 10 December 1997, set out above, or even acknowledged that, or knew whether, it had done so. It namely filed a Declaration which alleges –

> "In the belief that judgement by default was granted against [the Company] on the 23rd January 1998, [the Company] instituted proceedings for the rescission of such judgement by notice dated 27th January 1998 under the same case number as the present proceedings" (my emphasis).

Why the Bank alleges that it had obtained judgment only against the Company and that only that entity sought rescission is equally strange. But of importance is that in the Declaration the Bank admits that there was merit in the appellants' criticism as voiced in the rescission application, of its claim as formulated in the summons;

> "8. Subsequent to that contention being raised, [the Bank] has revised [the Company's] account and annexed hereto marked "C 1" and "C2" is a ledger record showing the credit in refund to [the Company] of the sum of E8 877.96. The account as set out in the annexed revised ledger statement is then based on interest charges at a fixed rate of 3% plus prime, presently 17.75% p.a.
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> 9. In the circumstances the amount due and payable by [the Company] to [the Bank] and on which [the Bank's] claim is now based is the sum of E44.136.84 as at the 27th June 1998 together with interest at 17.75% per annum compounded monthly from 28th June 1998 to date of final payment". (my emphasis)

The two further annexures, C1 and C2, do not in fact show a refund of E8 877.96 at all, but of E4 127,75: the alleged difference between interest which had been wrongly calculated at E13 005.71 – we do not know over what period – and interest recalculated and charged. The prayer is now for judgment jointly and severally against the company and Zietsman, and costs against Zietsman "on the scale between attorney and his own client including collection commission" by virtue of one of the many clauses in the suretyship agreement, and on the party scale against the Company.

Adding to the costs and the confusion, the Bank then came to court on 2 September 1998 seeking summary judgment on this declaration, without any amendment of the summons on which it purports to be based and despite the admission that it had made mistakes in its figures in the past, the extent of which are certainly not clarified in anything placed before us, and despite the fact that it was already armed with a default judgment which was the subject of an application for rescission. The application for summary judgment, was, understandably, opposed. *Inter alia* Zietsman deposed that the Bank official to whom he had protested that interest was charged on a basis to which the Bank was not entitled, had refused to give him a print-out of the relevant accounts.

On 10 December 1998 the matter came as an opposed one before Maphalala J. Instead of dismissing the application for summary judgment with costs, he declined to deal with it as being premature: the application to rescind had first to be dealt with. He made no order as to costs. Those proceedings are not before us, but his approach seems, with respect, to have been clearly wrong. The application for summary judgment was not premature, it was incompetent: one cannot ask for two judgments on the same cause of action, and the Bank was already armed with a default judgment in its favour. Its approach to court for summary judgment as having an unanswerable case was moreover either inept or arrogant, in the light of its admission in the very papers on which it sought a second judgment, that it was not infallible, and what *prima facie* appear to be contradictions or errors between the annexure and the declaration. The learned Judge was, of course, quite correct that the pending application for rescission could not merely be ignored and should be disposed of *ante omnia.*

It was set down as being an uncontested application for rescission of judgment by the Bank's attorneys by notice dated the 9th, for the 12th of February 1999; and also for the same date by the attorneys for the Company and Zietsman. The notice of the latter says what the order sought was: for rescission of the default judgment; that writs pursuant to the judgment be set aside; and for costs on the scale of attorney and client.

We do not know what happened in court on the 12th of February 1999. An order under the seal of the registrar, with an indecipherable signature, records that on that day by consent of the parties who appeared before the Hon. Justice Matsebula, he ordered rescission of the default judgment of 23 January 1998; that all writs pursuant to that judgment be set aside; with no order as to costs. Why this order was signed and sealed by the Registrar only on the 29th September 1999, is not explained.

The opposed application for summary judgment was, according to Zietsman, argued on the 26th February 1999 and judgment was reserved. Zietsman on the 26th October 1999 deposed that, to the best of his knowledge, judgment had not yet been given, but the Bank had issued a writ against himself and the company, based on the default judgment obtained on 23 January 1998. A copy of that writ, dated September 1999, is part of the record before us. It says expressly that it is based on the judgment of 23 January 1998, and is not guilty of a mere misprint in regard to the date: the writ is for the amounts of capital and interest as claimed

initially, despite the Bank having subsequently admitted that these were wrong. The Bank went further and on 14 October issued a "Notice in terms of Rule 45 (13) (i) "based on that very judgment, in terms of which Zietsman was to appear before the court on 29 October 1999 for an inquiry into his financial affairs.

Zietsman's testimony referred to above, is contained in an urgent application, which should have been quite unnecessary to set aside this writ and this notice. It was so ordered on 27 October 1999. It smacks of either negligence or ineptitude or harrassment, to run tandem actions based on the same summons against the opposition.

Apparently after this latest application, the appellants for the first time became aware of a judgment by Sapire C.J; against which the present appeal is launched. It is the final document adding to the confusion in the matter. It is dated 23 July 1999 but does not state on what date it was supposed to have been heard; and according to the Notice of Appeal against it, it was only "made available" on the 16th of November 1999. It is not a judgment in the matter in which the Chief Justice is alleged to have reserved judgment, that is the application in which the Bank asked for summary judgment; in which the prospects of success are as I have suggested above, slim. It does not deal with the application for summary judgment at all, but refuses rescission of the default judgment of 23 January 1998. The objection to service by the wrong deputy sheriff is brushed aside as of no moment: Zietsman received the summons and was not prejudiced by the irregularity. As regards calculation of the period within which to enter an appearance, though the court was on vacation "the only suspension effective during the prescribed period relates to the filing of pleadings as provided for in the rule." The objection on the merits, that Zietsman never agreed to pay interest at 31.25%, is dismissed on the ground that Zietsman does not say what rate **was** agreed. That he admits to owing money, but only E29 000, is not dealt with at all save to be dismissed as not constituting a bona fide defence, one does not know why. A defence to only portion of a claim is entitled to a hearing, and the effect of this order, should it stand, would be to grant the Bank something other than that which on recalculation it claims to be entitled to. But it is not wrong only in its content but in having been given at all, having been preceded by one granted earlier by agreement between the parties granting that very rescission which now purports to be refused.

I have detailed the history preceding the appeal to underline that the approach of appellant's counsel in opposing the appeal at all and then on a procedural point, was a vivid example of the Biblical beam and mote.

For the above reasons the appeal was allowed, with costs (no special order in regard thereto having been sought by the appellants) and the judgment refusing rescission of the default judgment set aside.

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VAN DEN HEEVER, J.A.

I agree

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LEON, J.P.

I agree

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BECK, J.A.

Delivered in open court on the day of May 2000