

**IN THE SUPREME COURT OF APPEAL OF SWAZILAND**

CIVIL APPEAL NO. 4/2006

In the matter between:

**SHELTON MANDLA TSABEDZE**

**APPELLANT**

**AND**

**STANDARD BANK OF SWAZILAND**

**RESPONDENT**

CORAM:                   BANDA           JA  
                              RAMODIBEDI   JA  
                              MAGID AJA

COUNSEL FOR APPELLANT       :       P.M. SHILUBANE

COUNSEL FOR RESPONDENT     :       ADV. P. FLYNN

**JUDGMENT**

Banda JA

This is an appeal against the order granted for summary judgment in favour of the respondent and against the appellant for payment of a sum of E440,464.82 in respect of an overdraft facility and a sum of E208,987.00 in respect of a mortgage loan. The respondent's declaration which was filed in court on 16<sup>th</sup> day of August 2005 alleges facts and materials which set out in detail the basis on which the respondent's claims are founded. The materials included bank statements and mortgage bonds which

were periodically sent to the appellant for his inspection and retention. The declaration alleged that the appellant had defaulted to make payment. We are accordingly satisfied that a valid cause of action was properly pleaded and filed in court by the respondent. We are also satisfied and find on the materials filed in court, that the appellant had timeously filed his notice of intention to defend.

The procedure for summary judgment is provided for in the High Court Rules and specifically in Rule 32. That Rule provides, inter alia, as follows -

*"Where in an action to which this rule applies and a combined summons has been served on the defendant or a declaration has been delivered to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to the court for summary judgment against that defendant."*

And Rule 32 (4) (a) provides in the following terms -

*"Unless on the hearing of an application under sub-rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that*

*there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed".*

Further Rule 32 (5) (a) provides as follows -

*"A defendant may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and, with the leave of the court, the plaintiff may deliver an affidavit in reply"*

It is trite that the summary procedure which Rule 32 introduces into the law provides "*an extraordinary and stringent remedy*" which provides for final judgment. Courts, have however, been warned to be slow to close the door to the defendant if a reasonable possibility exists that an injustice may be done if judgment is granted: **MATER DOLOROSA HIGH SCHOOL vs R.M.J. STATIONERY (PTY) LIMITED** Civil

Appeal No.3 of 2005 and **DAVID CHESTER VS CENTRAL BANK OF SWAZILAND** Civil appeal No. 50 of 2003.

We have therefore directed ourselves to the dangers of granting summary judgment where there is a reasonable possibility that an injustice might be occasioned. We have therefore carefully considered the materials and evidence which the respondent

pleaded to support his claims and we have also carefully considered the explanations and arguments which the appellant has advanced to support his submission that the application for summary judgment should not have been granted.

It is important, in this case, to briefly recapitulate the events which occurred up to the time the respondent filed its notice of application for summary judgment. That notice was filed on 17<sup>th</sup> day of August 2005 and the appellant was informed that the notice was returnable on Friday the 2<sup>nd</sup> of September 2005 at 9.30 a.m. The notice was served on the appellant on the 18<sup>th</sup> day of August 2005 at 9.45 a.m. A writ of execution was filed in court on 5<sup>th</sup> September 2005. There can be no doubt and we are prepared to find that by 2<sup>nd</sup> September 2005 when the application for summary judgment was returnable the notice of 10 days would have been satisfied.

Meanwhile and after summary judgment had already been granted the appellant's counsel informed the respondent that his client was not opposing the respondent's claim. There was therefore a clear admission of liability. On the following day which was 8<sup>th</sup> September 2005 counsel for the respondent replied to the letter of the 7<sup>th</sup> September and informed the appellant through his counsel that the respondent had already obtained judgment and that they had prepared writs of execution which they had handed to the Deputy Sheriff for execution. The respondent advised the appellant to come up with a firm offer at the end of business on that day and informed him that the

respondent would wait for the response until the following day. On the following day which was the 9<sup>th</sup> day of September counsel for the appellant wrote to the respondent asking the latter to stay execution because the appellant would make "a meaningful offer of settlement on conclusion of the trial between him and SIDC which continues on the 24<sup>th</sup> instant". It is to be observed that there is no time in this correspondence between the respondent and the appellant when the latter raises any defence to both claims.

On 12<sup>th</sup> September counsel for the respondent informed the appellant that they were consulting with their clients and that they would revert to him shortly. On 13<sup>th</sup> September 2005 counsel for the respondent wrote to the appellant informing him that his request to wait until 24<sup>th</sup> September had been agreed.

It would appear that on the same date of 12<sup>th</sup> September, the appellant filed a notice of appeal to this court. The grounds of appeal, in the notice, allege that the learned trial judge erred in holding that the respondent had satisfied the provisions of Rule 32 of the High Court Rules. The grounds of appeal, as stated in the notice of appeal, are as follows-

- 3.1 The *Court a quo* erred in law and in fact in holding that the appellant had not made out a case to set aside the said summary judgment in terms of rule 32 (11) of the rules of Court.

3.2 The *Court a quo* erred in law and in fact in approaching the appellant's application as if it were an application for rescission in terms of rule 42 of the rules of Court and not in terms of rule 32 (11) of the rules of Court.

3.3 The *Court a quo* erred in law and in fact in holding that the respondent's application for summary judgment had satisfied the peremptory requirements of rule 32 of the rules of Court in as much as

3.4 the application for summary judgment was granted before the 10 days notice had expired as required by rule 32 (3) (c) of the rules of the High Court;

3.5 the deponent to the affidavit annexed in the application for summary judgment did not verify the facts on which its claims were based as required by rule 32 (3) (a) of the rules of the High Court.

It will be observed that none of the grounds raised any issue of defence to the claims. The only issues raised are points relating to notice under Rule 32 (3) (c) and to the verification of an affidavit annexed to the application for summary judgment under

rule 32 (3) (a).

The appellant has filed Heads of Argument comprising twelve (12) paragraphs. We have carefully considered them all together with the oral arguments which counsel for the appellants made before us.

The purpose of summary judgment is to enable the plaintiff to obtain final judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or is unable to raise a triable issue which ought to be tried. Where a judge is satisfied not only that there is no bona fide defence but that no fairly arguable point or issue to be argued on behalf of the defendant has been raised it is the duty of the court to give judgment for the plaintiff. As a general principle when a defendant shows that he has a fair case of defence or reasonable ground for setting up a defence or even a fair probability that he has a bona fide defence he should be given leave to defend. However where it is clear that there is no real defence or substantial question to be tried judgment must be granted. The policy underlying the procedure for summary judgment is to prevent unnecessary delays in cases where there is no defence. Once the court concludes that there is no defence or triable issue or question that for some other reason there ought to be a trial, it will ordinarily give judgment for the plaintiff. The defendant must show that he has a reasonable ground of defence to the action.

After carefully considering the chronology of events and steps taken by the parties in the case together with the relevant law, we are satisfied that there is no bona fide defence nor do the facts adduced by the appellant or the respondent raise any issue which ought to be tried. There has been no point at which the appellant has alleged that he has any defence to the claims. Indeed even at the time counsel for the appellant was arguing the appeal he conceded that there was no bona fide defence to the respondent's claims. The only point he argued

was the issue of the notice. He contended that the promulgation of a public holiday had destroyed the 10 days notice which had been given. He also submitted that the affidavit annexed to the application had not properly verified the facts supporting the claims. We had some difficulty in appreciating the point learned counsel was trying to make because the affidavit was quite clear in verifying the facts supporting the claims. And again at the time the public holiday was promulgated, the ten (10) days notice had already been given by the respondent and had been duly received by the appellant. We do not think there is any merit in these points taken by learned counsel for the appellant. It is clear, in our judgment, that both the application in the lower court and this appeal were made purely to delay the respondent's claims. There was no scintilla of evidence on which any bona fide defence could be based and in our view the application in the court below and the appeal in this court are clearly an abuse of process.

There is no merit in the appeal which is hereby dismissed with costs.

BANDA JA



I agree

RAMODIBEDI JA

I agree

MAGID AJA

Delivered on the    day of May 2006.