IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 35/2008

In the matter between

TEMAHLUBI INVESTMENTS (PTY) LTD **Applicant**

And

STANDARD BANK SWAZILAND LIMITED **Respondent**

Coram **BANDA, CJ**

FOXCROFT, JA

EBRAHIM, JA

For the Applicant **MR. L. R. MAMBA**

For the Respondent **MR. K. MOTSA**

HEARD ON: 10th NOVEMBER 2008

DELIVERED ON: *20/11/2008*

JUDGMENT

Ebrahim JA

The Applicant seeks leave to appeal against a decision of the High Court in which Maphalala J, refused an application brought by the applicant for summary judgment.

At the hearing before the learned Judge *a quo*, it was agreed by the parties that the only point to be argued was whether or not the claim fell within the ambit of Rule 32 of the High Court Rules. The respondent raised certain points of law in resisting the application of summary judgment and the non joinder of certain parties. However, it was agreed between the parties that they would restrict their arguments to the suitability of the granting of summary judgment.

The issue which falls for determination is whether an appeal lies to this court against the decision of the High Court which was an interlocutory order.

It was the applicant's submission that this court has a discretion as to whether or not to grant leave to appeal against an interlocutory order and the court will do so if the outcome of the appeal against such order may lead to a more expeditious and cost effective final determination of the dispute. Counsel submitted, however, that leave will generally be granted where there is a reasonable prospect of success and that the case is of substantial importance to the applicant alone or both the applicant and the respondent.

The respondent opposes the application for leave to appeal on the grounds that summary judgment is not appealable because it is a purely interlocutory decision. He submitted that the refusal of summary judgment is interlocutory as it neither disposes of the matter nor prevents the Judge who refused it to vary the same order later in the proceedings.

In: **SOUTH CAPE CORPORATION (PTY) LTD. V ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 534 (A)** at **550 H**

Corbett J A, stated:

> *"(e) At common law a purely interlocutory order may be corrected altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect even though it may be interlocutory in the wide sense in res judicata... "*

In the case of **MINISTER OF HEALTH AND OTHERS** V **TREATMENT ACTION CAMPAIGN AND OTHERS NO 1 2002 (5) SA 703 (CC)** in the head note appears the following:

> *"Appeal in what cases — Against interim execution order pending appeal — Permitting aggrieved litigant to appeal execution order pending final appeal would generally result not only in piecemeal determination of appeal, but would stultify very order made — Order to execute pending appeal is*

interlocutory order — As such order may be varied by Court that granted it in light of changed circumstances A11 these considerations making it plain that generally not in interests of justice for litigant to be granted leave to appeal against order of execution - Ordinarily, for applicant to succeed in such application, applicant would have to show irreparable harm would result if interim appeal were not granted — If irreparable harm cannot be shown application for leave to appeal will generally fail - If applicant can show irreparable harm, irreparable harm would have to be weighed against any irreparable harm that respondent may suffer were interim execution order to be made ".

There is merit in respondent's counsel submission that besides fragmenting the matter the granting of leave in interlocutory matters would open the flood gates for such applications to be brought to this court.

It is not disputed by either party that a refusal to grant a summary judgment has been held to be interlocutory in effect as well as in form.

POLIACK & CO. LTD V PENNICK 1936 TPD 167; KGATLE V METCASH TRADING LTD 204 (6) SA 410 (T).

It is not in dispute that any rule or order made in any civil suit or proceedings which has a final and definitive effect would be appealable. The exact nature of an

interlocutory order has been the subject of many pronouncements.

In the case of **STEYTLER NO. V FITZGERALD, 1911 AD 295** De

Villers, CJ in considering the test to be applied, at page 304 said:

> *"Whether on the particular point in respect of which the order is made the final word has been spoken in the suit or whether in the ordinary course of the same suit the final word is still to be spoken. Take the case of a judgment of absolution from the instance .... It has the force of a definitive sentence in as much as by our practice the particular suit in which it has been pronounced is ended and a fresh suit is necessary to enable the Plaintiff again to proceed against the same defendant .... Where a court refuses to grant absolution from the instance on the application of the defendant the position is different. Such a refusal is purely interlocutory and has not the effect of a definitive sentence in as much as the final word in that suit has still to be spoken, the court having decided that the suit should take the ordinary course and not be put to an end by absolution. The question in issue remains open until final judgment".*

Innes J stated the test to be applied in a different form. He said:

> *"When an order incidentally given during the progress of the litigation has a direct effect upon the final issue when it disposes of a definite portion of the suit then it causes prejudice which cannot be repaired at the final stage and in essence it is final though in form it may be interlocutory".*

The test suggested by Innes J has been accepted.

See **GLOBE ABD PHOENIX G.M. CO., LTD V THE RHODESIAN CORPORATION, LTD 1932 AD** at **1153** one may take it then that:

> *"In order to be appealable an interlocutory decision must be one which is irreparable not in the sense that the effect which it produces cannot be repaired having regard to the resources at the command of the person against whom it is made, but in the sense that if it remains in reserve it irreparably anticipates or precludes some of the relief which would be or might have been granted at the hearing".*

See also: **MEARS V. THE NEDERLANDSCH ZA HYPOTHECK BANK LTD 1908 TS 1147;**

LOMBARD V. LOMBARDY HOTEL CO., 1911 T.P.D. 866;

DHALMINIV JOOSTE 1926 O.P.D. 229.

It is apparent from these line of authorities that for the applicant to succeed in its application before this court it has to establish that the order made by the court a quo has a final and definitive effect as orders held to be interlocutory are non appealable. Generally orders refusing summary judgment fall into that category.

On the facts of the matter before us it cannot be held that "the final word has been

spoken in the suit" and it cannot be said that the decision taken by the court a quo cannot be repaired. There is nothing precluding the applicant from instituting an action in an attempt to obtain the relief he sought by way of summary judgment. The dismissal of his application for summary judgment by the court a quo does not amount to a final and definitive order against it.

I will proceed, however, to consider whether the applicant has a reasonable prospect of success.

The applicant brought an action in the High Court in terms of which it sought summary judgment against the respondent. The order it sought was that the respondent honour all cheques and instruments drawn by the appellant provided that there were sufficient funds to meet the same.

It was the appellant's claim that it was a customer of the respondent and had with them a current banking account. It claimed that it was a tacit term of the agreement between them that the respondent would honour all cheques properly drawn on it provided there were sufficient funds in its account.

It was its case that it presented a cheque to the respondent for the withdrawal of E2000 but it refused to honour the cheque.

Following this refusal the appellant brought an application before the High Court for summary judgment.

The respondent in its opposing affidavit in defending the application pleaded *in limine* that the appellant's claim for summary judgment would only be competent if it was a claim which met the requirements of the High Court Rules.

The respondent also pleaded that the appellant's account with it had been "frozen" following a court order served on it interdicting it from providing funds to the appellant from its account. The respondent explained that the Swaziland Post and Telecommunications Corporation (SPTC) had sought this interdict to preclude, Thembisile Dlamini, a Director of the appellant who had been employed by the SPTC, and who together with an accomplice had misappropriated El 1, 319 826-88 from the SPTC from withdrawing any monies from the appellant's account with the respondent. The Director of Public Prosecutions (DPP) was also a party to the interdict proceedings brought against the appellant.

It was the respondent's defence that it was bound to obey the court order interdicting it from providing funds to the appellant from its account.

The respondent further submitted that the appellant should have joined the SPTC and the DPP who were the institutions responsible for obtaining the interdict "freezing" the appellant's account as they had a direct and substantial interest in the matter.

Section 32 (1) of the High Court Rules provides:

"32 (1) where in an action to which this rule applies and a combined summons has been served on a 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 a particular part of such a claim, apply to the court for summary judgment against that defendant.

(2) This rule applies to such claims in the summons as is only —

a) *on a liquid document;*

b) *for a liquidated amount in money;*

c) *for delivery of specified movable property; or*

d) *ejectment*

together with any other claims for interest and costs.

It seems to me from the pleadings filed by the appellant that what it sought is an order which in effect is an order for specific performance. The order was drafted in the following terms "an order that the defendant honour all cheques and instruments drawn by the plaintiff on it provided there are sufficient funds to meet same".

In **HUGO FRANCO (PTY) LIMITED V GORDON 1956 (4) SA 482 at**

483 F Murray CJ stated whilst dealing with the rules pertaining to summary judgments.

"That this procedure applies only in a limited number of defined claims. It will be seen under (a) the demand must be a liquidated one and for money. This in itself excludes a liquidated demand other than for a fixed definite thing e.g a claim for transfer or delivery or ejectment for rendering an account for cancellation of cession of a bond, for a declaration that a property is free of servitude each whereof has been judicially recognized as a liquidated demand. The money demand and must be a liquidated one ".

In ABDURAHMAN'S ESTATE V ABDURAHMAN 1956 (3) SA 295

(C) Van Winsen J expressed the view that the summary judgment rule:

"Embodies an extraordinary remedy and a litigant who wishes to avail himself of the procedure therein prescribed must bring himself squarely within the ambit of the rule ".

In my view the applicant did not meet these stringent requirements. The amounts of money he seeks are not specified. It has not indicated when these withdrawals will be made other than stating that this will be done sometime in the future. The applicant submitted that its claim is appropriate because it is based on a liquid document yet no liquid document in support of this claim was attached to its application.

This does not accord with the *dictum* in the case of **CREDCOR BANK LTD V THOMPSON 1975 (3) SA 916 (D) at 919 G - H** where Fagan J stated:

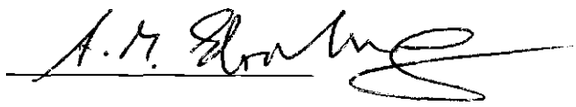
"It seems to me that in regard to this rule, too, the object of the provisions that a copy of the liquid document must be annexed to the affidavit is to ensure that a defendant against whom the extraordinary remedy for summary judgment is sought should be allowed at least to see a copy of a document which forms a vitally important part of the case which is being made against him ".

See also **HERBSTEIN & VAN WINSEN "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA" FOURTH EDITION, 1997** where the learned authors state at page 439 that:

"If a claim is founded on a liquid document, a copy of the document must be annexed to the plaintiff's affidavit".

In this matter no liquid document was attached to the papers in support of the application made by the applicant. A further weakness in its case is the fact that what it sought was the drawing of cheques in the future when it is not apparent what amounts of money are likely to be drawn and when such withdrawals will be made. It seems to me that had the appellant tendered the cheque of E2000 and the respondent refused to honour his prospects of success may well have been different in respect of that cheque provided in it's application for summary judgment the appellant had affixed the relevant cheque. What the appellant sought in this case

was "an order that the defendant honour all cheques and instruments drawn by the plaintiff on it provided there are sufficient funds to meet the same". The amounts

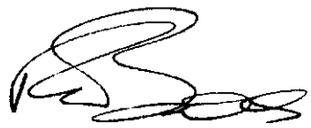


which are being sought are not known and it is not known when such amounts will be requested.

In my view the applicant did not meet the stringent requirements needed to be satisfied for it to have succeeded in its application for summary judgment and it has no reasonable prospect of success.

I am also of the view that it cannot be held that the order made by the court *a quo* is an interlocutory order which has a final and definitive effect on the applicant's rights. The applicant has not shown that irreparable harm would result if the relief he seeks were not granted.

In the result the application for leave to appeal is refused with costs.



I agree

I agree