IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 840/98

IN THE MATTER BETWEEN

STANDARD BANK OF SWAZILAND LTD

(formerly Barclays Bank of Swaziland Ltd) APPLICANT

VS

THOKOZILE E. HLATSHWAYO RESPONDENT

IN RE:

THOKOZILE E. HLASHWAYO PLAINTIFF

AND

STANDARD BANK SWAZILAND LIMITED

(formerly Barclays Bank of Swaziland Ltd DEFENDANT

CORAM S.B. MAPHALALA -J

FOR APPLICANT MR T. MASUKU

FOR RESPONDENT MR P. SHILUBANE

JUDGEMENT

(15/09/98)

Before court is an urgent application brought on motion for rescission in terms of the common law. The applicant is applying for an order in the following terms:

1. Dispensing with the usual forms and procedures relating to the institution of motion proceedings and allowing this matter to be heard as one of urgency.

2. That the summary judgement granted on the 5th June, 1998, in favor of the above named plaintiff be and is hereby rescinded and/or set aside.

3. Staying any and all steps in the execution of the summary judgment granted by the court on the 5th June, 1998 pending the finalization of these proceedings.

4. That prayer 3 hereof operates with interim effect pending the finalization of these proceedings.

5. That the plaintiff be and is hereby ordered to pay the costs of this application only in the event that they oppose the same.

6. Such further and/or alternative relief as may to the court seem meet.

The application is supported by the founding affidavit of one John Ngwenya in his capacity as the loss control officer of the applicant. He states in his affidavit that on or about April, 1998 the applicant was served with a combined summons in which the respondent claimed payment of E10,000-00 a copy of which is annexed hereto and marked "JN1". In respect thereof, the applicant instructed its attorneys of record to file a notice of intention to defend and a copy of which is annexed hereto and marked "JN2". The respondent later applied for summary judgement, which application was opposed by the applicant. And in support thereof the applicant filed an affidavit resisting summary judgement, a copy of which is annexed hereto and marked "JN3". The respondent subsequently filed a replying affidavit dated the 3rd June, 1998 and a copy of which is annexed hereto-marked "JN4".

The matter was set down for hearing of the opposed application for summary judgement on the 5th June, 1998, which was granted in favor of the respondent. He avers that he is advised by the applicant's attorney that the application was granted on the grounds that the allegations in the affidavit resisting summary judgement, together with the annexures were in respect of another transaction amounting to E13,000-00 and not E10,000-00, as claimed by the respondents herein. The court he was advised by his attorney found that there was no defence on the papers before it to the respondent's claim of E10,000-00. He is advised further by the applicant's attorney that during the hearing of the matter, a postponement of the matter was sought by the applicants attorneys in order to place the relevant documents before court and subject to the applicant tendering wasted costs but the respondent successfully opposed the application for postponement thereby leading to the application for summary judgement being granted with costs. Subsequent thereto, the respondent's attorneys prepared a bill of costs in respect of the matter dated 9th June, 1998 and a copy of which is annexed hereto and marked "JN5".

Applicant thus apply for rescission of the summary judgement granted on the 5th June, 1998 on the following grounds:

12.1 The transaction in respect of which the respondent claim is based was made in 1984 with the Barclays Bank of Swaziland Limited and a merger between the said Barclays Bank of Swaziland Limited and Standard Bank

of Swaziland occurred in or about December, 1997 and as a result of which the accessing of the relevant documents proved to be difficult;

12.2 Having accessed some documents relating to transaction between the parties, the applicant, through Justus error referred to annexed documents in respect of another transaction between the parties.

He further on avers that it had always been the applicant's intention to oppose the respondent's claim and the applicant evinced a fixed and settled intention to oppose by filing a notice of intention to defend, notice to oppose summary judgement and an affidavit resisting summary judgement referred to herein above. That applicant's failure to annex the relevant documents was not due to an intentional disregard of the rules of the court but was occasioned by a Justus error on the part of the applicant. From the documents now accessed applicant has a defence to the respondent's claim in that on the 29th September, 1994 and the deposit was issued under certificate number 013610 and interest was at the rate of 17% per annum as evidenced by annexure "JN6". The fixed deposit was renewed on the 10th October, 1985 for 12 months and interest credited to her savings account number 594073108 on the same date as evidenced by annexure "JN7". On the date of maturity, the respondent gave instructions to the applicant to renew the deposit. The renewal was granted with interest at the rate of 11.5% per annum under certificate number 014723 and which matured on the 10th October, 1996. On the 5th February 1987, the applicant advised the respondent that the certificate had reached its date of maturity and he referred the court to a letter advising the respondent of the date of maturity, annexed hereto and marked "JN8". The respondent instructed the applicant to credit the principal amount plus interest to her current account 2168796 and the applicant accordingly credited the said account on the 26th February 1987 with the principal amount

of E10,000-00 and E1, 150-00 in respect of interest. He referred the court to annexure "JN9". On the 4th March 1987, the respondent withdrew the principal amount for her current account as appears more fully from annexure "JN9" hereto.

He submitted that applicant has a valid and bona fide defence to the respondent's claim. That in view of the afore going that the dictates of justice and fairness require that the application for rescission be and granted as the respondent withdrew the money now claimed and confirming the summary judgement would result in the applicant paying the respondent the same amount twice together with interest and costs.

Further the applicant prayed for condonation in applicant's delay in filing this application and avers that the same was occasioned by the difficulty in accessing documents relevant to this transaction, which took place more than thirteen (13) years ago. This was further obfuscated by the merger between the Standard Bank and Barclays Bank Swaziland Limited. The applicant's avers that this matter is urgent in the following grounds:

20.1. The respondent, who was granted judgement, is entitled to issue a writ of execution and demand satisfaction of the judgement. This may be done at any time to the applicant's prejudice, especial regard being had to contents of paragraph 15.1 to 15.5 hereof;

20.2. He submit that the applicant cannot be afforded substantial relief at a hearing in due course if the normal time limits were compiled with it would suffer prejudice as it is not aware if the respondent would be able to repay the money if the applicant becomes successful at a later stage. Alternatively, if the respondent will suffer prejudice that the prejudice is compensated by an appropriate order for costs.

The application is opposed by the respondent who duly filed an opposing affidavit. In her affidavit she raised two points in limine, thus:

2.1 In limine she is advised and verily believe that applicants application is totally misconceived because summary judgement in Swaziland is final judgement and cannot therefore be rescinded.

2.2 The applicant has not made out a prima facie case for a rescission at common law.

On the merits of the application she denies paragraph 2 of the applicant's affidavit in that Ngwenya had no knowledge of this matter as she dealt with one V.M. Dlamini the Operation Manager as more fully appears from annexure TH1 annexed hereto. She denies further paragraph 12 -12.2 that the alleged difficulty to access the relevant documentation was caused by the merger between Standard Bank Swaziland Ltd and Barclays Bank Swaziland Ltd because she had been claiming the money which is the subject of the claim before 11th March, 1997 long before the proposed merger between the applicant and Barclays Bank of Swaziland Ltd as evidenced by the fixed deposit receipt annexed to the summons. She denies furthermore that she renewed the fixed deposit on the 10th October 1985 in as much as there is no written evidence that she renewed the fixed deposit as alleged. She reiterated that she had never dealt with the deponent in regard to this matter. She accordingly submit that his evidence in these paragraphs is hearsay and should be struck out with costs. In any event she never received annexure "JNB" which was sent to P. O. Box 155 not Box 159 which was her address at the time. She denies that the applicant has a bona fide and valid defence to the claim and that the merger of the two banks had anything to do with this matter as she had been making enquiries from the applicant about this money for sometime. She denies further that the matter is urgent because the alleged urgency is of applicant's own making. She thus prayed that the application be dismissed with costs.

The applicant then files a replying affidavit deposed by John Ngwenya where he deposed "inter alia" that applicant has a bona fide and valid defence to the claim and further that the merger of the banks obfuscated the matter, particularly after the combined summons was issued.

The matter came for arguments in the contested roll of the 24th July, 1998. Mr Shilubane argued the points in limine that the court on the 5th May, 1998 made a final order for summary judgement. The applicant can only appeal the judgement and cannot obtain a rescission in terms of the law. The bank annexed wrong papers before the court and

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attorney for the applicant conceded that fact when the order was granted. The applicant is the author of its own problem. Mr Shilubane referred the court The Civil Practice of the Supreme Court of South Africa by Herbstein and Van Winsen (4thEd) at page 694 on the requirements the applicant is to satisfy in order to re-open the case.

Mr Masuku for the applicant conceded that wrong documents were filed when the order was granted, however, when they applied for a postponement to rectify the mistake the judge suggested that they could apply for rescission in terms of Rule 32 (11) of the High Court Rules. Mr Masuku contended further that no authority has been cited by the respondent to support the proposition that summary judgement cannot be rescinded in Swaziland, as they are final judgements. The rules state in Rule 32 (11) that a summary judgement can be rescinded. To this end Mr Masuku drew the court's attention to the case of Leonard Dlamini vs Lucky Dlamini Civ. Case No. 1644/97. He contended in view of this case that the first point in limine raised by the respondent falls away.

On the proposition that the applicant has not made a prima facie case for rescission at common law. Mr Masuku cited the case of Promedia Drukkers vs Uitgeners EDMS BPK vs Kaimowitz and others 1996 (4) SLA. 411. He argued that the requirements have been compiled with and these issues are fully canvassed in applicant's founding affidavit. In that case the court held that in terms of the common law, a court has a discretion to grant rescission of judgement where sufficient or good cause has been shown. The learned judge in that case cited with approval the case of Chetty vs Law Society, Transvall 1985 (2) SLA. 756 at page 765 b - c where the following was stated:

"But it is clear that in principle and in the long-standing practice of our courts two essential elements of "sufficient cause " for rescission of a judgement by default are:

i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and

ii) That on the merits such party has a bona fide defence which prima facie carries some prospects of success".

Mr Masuku argued further that the applicant has also applied for condonation.

In reply on points of law Mr Shilubane contended that although the applicant is citing good law the inescapable fact is that applicant's attorney was in court when the judgement which is sought to be rescinded was granted. The reason he submits that it is a final judgement is because the other party was present in court. If the Justus error was done by him he has no remedy. The respondent has been going to applicant (bank) for years but she could not get the papers. The annexure to the summons to wit, the fixed deposit receipt (original) is still with the respondent and the bank cannot say it has paid the money when the original receipt is still with her. These are the issues before me. I have studied the papers before me very carefully and have considered the useful submissions by both counsel. It appears to me from the facts presented that the applicant cannot obtain a rescission in terms of Rule 32 (11) of the High Court Rules. The rule provides that any judgement given against a party who does not appear at the hearing on

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an application under sub-rule (1) or sub-rule (6) may be set aside or varied by the court on such terms as it think just. In the present case applicant's attorney was present when the order was granted. Mr Shilubane's argument would have had credence if applicant had moved the application under this rule

and would have been barred to apply for rescission. Its recourse under those circumstances would be to appeal the decision of the court. However, the applicant has moved this application in terms of the common law, which it is perfectly entitled in law. What it has to prove are the requirements mentioned in the case of Promedia Drukkers vs Uitgeners (EDMS) BPK (supra). It is also trite that in its exercise of its discretion in application for summary judgement the court has to consider that summary judgement constitutes an extraordinary and very stringent remedy; it permits a final judgement to be given against a defendant without a trial (see Arend and another vs Astra Furnisher (PTY) Ltd 1974 (1) SLA. 298).

Under the common law an applicant in such an application must;

a) Present a reasonable and acceptable explanation for his default and;

b) Show that he has, on the merits, a bone fide defence which prima facie carries some prospects of success.

Turning to the facts before me it appears to me that the applicant has satisfied the court in accordance with the requirements laid down in the case of Promedia (supra) for me to grant rescission in this matter in terms of the common law.

In the result, I rule that the judgement is thus rescinded and applicant granted leave to defend the matter in the normal way. Further applicant is to pay wasted costs, respondent is not to pay for applicant's error. The effect of the order, therefore is that prayers 1, 2, 3 and of the notice of motion are granted.

S.B. MAPHALALA

JUDGE