IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2216/98

In the matter between

FOOTGEAR (PTY) LTD t/a NEW JUMBO

CAR SALES APPLICANT

VS

STANDARD BANK SWAZILAND LIMITED RESPONDENT

CORAM: S.B. MAPHALALA - J

FOR APPLICANT: MR. H. FINE

FOR RESPONDENT: MR. J. HENWOOD

JUDGEMENT

(28/09/98)

Before court is an application brought with a certificate of urgency for an order in the following terms:

a) Dispensing with the normal forms and time limits for service and hearing this matter urgently.

b) Directing and ordering the respondent to make available and to release to the applicant any amounts that may be standing to its credit in account no. 3063930 held with the respondent's Manzini branch.

c) Interdicting and restraining the respondent from freezing the applicant's account.

d) Directing the respondent to pay the costs of this application.

The applicant in his founding affidavit avers that he is the holder of a current account no. 30663930 and that on the 10th September 1998 the applicant caused a cheque in the sum of E14,000-00 (fourteen thousand emalangeni) to be issued to one of its suppliers. The

cheque was dishonoured by the respondent and the words "effects not cleared" marked on the face thereof. This respondent did, notwithstanding the fact that there is a balance of over E69,000-00 of which E20,000-00 in the account was and is still available as is apparent from a copy of the latest printout annexed hereto dated 15th September 1998. The deponent personally approached the Manager, a Mr. Adams of the respondent to query the non-payment of the cheque. The response of Mr. Adams was that the cheque for E93,813,70 which had been deposited on the 10th June 1998 and which had been cleared during July 1998 had been stolen and therefore they had frozen the account.

As a background to this allegation the deponent stated the following: During June 1998 the applicant sold a motor vehicle a Sangyong Musso to a certain Mr. Louis Van Heerden for a price of E90,000-00. The said Mr. Van Heerden purported to represent Mondi Timbers. The said Mr. Van Heerden said the purchase price by means of a cheque for the sum of E93, 813.70, which was drawn in favour of Mondi

Timber and endorsed in favour of the applicant. It was an express term of the agreement that delivery of the motor vehicle would only take place once the cheque had been cleared by the bank at which point the applicant would also give the said Mr. Van Heerden change in the sum of E3,813.70. The said cheque for E93,813.70 was duly deposited on the 10th June 1998. The deponent is advised by the bank and verily believes that according to normal banking practice the cheque, being a South African cheque was cleared and funds were made available after twenty-one days. Indeed during July 1998 the funds were made available to the applicant and a number of transaction subsequently took place. The applicant submits that it is unfair for the respondent to freeze applicant's account for the following reasons:

i) There is a credit balance outstanding on is account.

ii) There is no order of court to freeze the applicant's account.

iii) The respondent itself represented to the applicant that the funds were

available and the cheque was good, as a result of which the applicant gave value to its prejudice.

iv) The said cheque has neither been returned to the applicant nor has applicants accounts been debited with the sum of E93,813.70 which applicant submits, that in any event they would not be entitled to debit applicant's account after over seventy- five days.

At paragraphs 18 and 19 applicant in its founding affidavit submitted the basis of urgency.

This application is opposed by the respondents who duly filed an opposing affidavit of one John Ngwenya who is the Loss Control Officer of the respondent. He admits paragraphs 1, 2, 3, 4 and 5 of the applicant's founding affidavit. On paragraphs 6 he admits the contents of this paragraph and add that the respondent dishonoured the

applicant's cheque and marked the words "effects not cleared" upon the cheque because the cheque had in fact not been cleared. On 2nd September 1998 the applicant deposed a cheque in the sum of E20,000.00 drawn on a local bank in Matsapha. After this deposit had been made the balance standing to the credit of the applicant's account was the sum of E20,829.37. In terms of the banking rules relating to clearance of cheques, a cheque drawn on a bank in Matsapha takes five working days to clear when deposited in Manzini. The said cheque was deposited on the 2nd September 1998 and in view of the fact that Friday September 4th and Monday September 7th were public holidays, the first available date upon which this cheque could have been cleared was Friday 11th September 1998 being the fifth working day (excluding weekends) after the deposit had been made. The cheque therefore was returned marked "effects not cleared" because the clearing period had not elapsed by the time the cheque was drawn. At paragraph 7 respondent avers the applicant is in fact not entitled to the funds referred to in the print out to wit, the sum of E69,000.00. Paragraph 8 is admitted by the respondent. AD paragraph 9 respondent avers that the applicant's version of the discussions, which took place between the deponent and the respondent's Manager Mr. Dean Adams does not fully set out what transpired. Adams indicated to the applicant that the respondent had received communication from Nedbank Sage centre branch President Street, Johannesburg that cheque no. 137075 drawn on its client, Mutual and Federal Insurance Company Limited (Mutual and Federal) for the sum of E93,813.70 had been stolen and that they (Nedbank) were together with his client Mutual and Federal investigating the issue. Adams requested the applicant's director to await the outcome of these investigations before any further withdrawals are made on the account. Unfortunately, the deponent refused and insisted upon making further withdrawals. Respondent avers that paragraphs 10 and 11 are unknown to the respondent and it can neither admit nor deny same.

Paragraph 12 is admitted to some extent. The respondents denies paragraphs 13 as reflected in its paragraphs 3.9.1, 3.9.2, 3.9.3, 3.9.4, 3.9.5, 3.9.6, 3.9.7, 3.9.8, 3.9.9, 3.9.10, 3.9.11, 3.9.12 of its opposing affidavit. Paragraphs 14 and 15 of the applicant's affidavit are admitted and also paragraph 16. At

paragraph 17 respondent denies that it has frozen the applicant's account and avers that it has simply stopped all operations on the account until the issue relating to the payment in respect of cheque number 137075 has been resolved. Further in response to paragraph 19 it makes the same averment.

The applicant then filed a replying affidavit in answer to respondent opposing affidavit where paragraph 1 of respondent is admitted and as paragraph 2 it denies the contents thereof and further paragraph 3.1 in paragraph 3.3 applicants deny that the cheque in question had not been cleared. Applicant states that the cheque in question was guaranteed by the respondent" Matsapha Branch and deponent personally informed Mr. Dean Adams on the 10th September 1998 that the cheque had been cleared but he was not going to allow the applicant to operate on the account. Applicant deny that it is not entitled to the funds in question and say that the respondent has no legal right to withhold payment of the funds in question. Applicant avers further that annexure "D" contain all the essential elements of a sale agreement in response to paragraph 3.9.6 of the respondent's opposing affidavit. Applicant points out that it is significant that respondent

admits to having negligently received the cheque into applicant's account. The applicant acted upon the said negligent representation and gave same as a result. Mr. Van Heerden brought an endorsed cheque to him and there was no reason for him to believe that it was not properly endorsed. Applicant further deny that it has been unjustly enriched.

These are the facts of the matter as reflected in the respective affidavits.

The matter then came before me for arguments on the 22nd September 1998, which I have considered very carefully in arriving at a just decision in this case. I am not going to outline them here, as they are still fresh in our minds. It is general knowledge that bankers over the years have had a relationship with their customers which is based on common law and bankers, being in a fiduciary position, had to act in the outmost good faith - uberramae fide, failing which not only would their image suffer, but customers would withdraw their funds from the banks. A.B. Fourie in his book titled The Institute of Bankers in South Africa - Aspects of Banking (1985 Ed) at page 2 stated that when [A] loses a cheque or the cheque is stolen from him and [B's] endorsement is forged and thereafter the cheque is paid by the bank then [A], who is the true owner, will have to recover his loss from the thief. If this is not possible he [A] will have to suffer the loss. This seems to me to be the scenario in the case in casu. It is also clear to me that the respondent has frozen the account of the applicant and I am not persuaded by the semantics used by the respondent in describing its action - the fact of the matter is that applicant's account with the respondent has been frozen. It is also evidence that the action to freeze applicant's account was done without a court order and would constitute spoliation - the bank has taken the law into its own hand. These courts take a dim view of such actions in that the respondent is asking the court to perpetrate an illegality. The respondent disregarded the doctrine of clean hands. It also appears to me that the amount which is suspected to have been stolen in Johannesburg is no longer in applicant's account he has used it for value he gave to Mr. Van Heerden. There is no shred of evidence that applicant acted in collusion with Mr. Van Heerden to perpetrate the alleged fraud. It is also common ground that the amount reflected in the print out has nothing to do with the stolen money but it includes deposits made by the applicant in respect of other business transaction. On the point raised by Mr. Fine that respondent is estoppel in law as it has negligently represented to the applicant that the cheque of E93,813.70 was good and applicant thus used the money in good faith. For this proposition I was referred to by Mr. Fine to the book by P. J Rabie on the Law of Estoppel in South Africa (1992 Ed) which supports his contention. An estoppel may be raised when the representor (the person whom it is sought to estop) made a representation to the representee (the person who raises the estoppel) and the latter, relying on the truth of the representation, acted thereon to his prejudice (see The Universal Stores Ltd vs O. K. Bazaars (1929) Ltd 1973 (4) S.A. 747 (A)). It is my considered view that the applicant is not the right party to punish for the alleged fraud that matter has to be fully investigated by the concerned parties in Johannesburg.

In the result, I thus grant applicant prayers (b), (c) and (d) of its notice of motion the effect of which is the following:

1. The respondent is directed and ordered to make available and to release to the applicant any amounts that may be standing to its credit in account no. 3063930 held with the respondent's Manzini branch.

2. The respondent is interdicted and restrained from freezing the applicant's account.

3. The respondent is to pay the costs of this application.

S.B. MAPHALALA

JUDGE