IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4459/2005

In the matter between:

SWAZILAND DEVELOPMENT AND SAVINGS BANK ("SWAZI BANK") Plaintiff

versus

SHALI INVESTMENTS (PTY) LIMITED Defendant

Coram: Annandale ACJ

For Plaintiff: Adv. P.E. Flynn, Instructed by Cloete, Henwood, Dlamini Associated

For Defendant: Mr. Z. Magagula of Zonke Magagula & Company

JUDGMENT

1 December 2006

[1] The Plaintiff Bank issued provisional sentence summons against the Defendant company ("Shali"). The claimed amount is E2 352 621.31 and is said to arise from monies lent and advanced and loan facilities granted by the Bank. These monies were secured under a mortgage bond which details hypothecated properties.

[2] In addition, *mora* interest at the usual rate and attorney-client costs plus collection commission is claimed. Also, an order is sought to declare the mortgaged properties specifically executable.

[3] In response, Shali filed an affidavit in which provisional sentence is resisted.

[4] Therein, it is stated *in limine* that the summons was not properly served on the Defendant company in that it was left with a labourer and not as required and prescribed by the rules of court.

[5] It is common cause that the Defendant did indeed become aware of the matter, and timeously so, as evidenced by the resisting affidavit. At the hearing of the matter, the Defendant's attorney abandoned this point and it requires no further ado.

[6] The second aspect raised *in limine* and which forms the essence of the opposition to the matter, is that the claim is not based on a liquid document and therefore, no provisional sentence can be sought or ordered. I revert to this aspect below.

[7] The defendant company further denies the obligation to pay the full amount as stated in the summons. This amount is certified to be correct, and in terms of the mortgage bond document, this challenge becomes questionable.

[8] Clause 11 of the document states as follows:-

> "*11. A statement signed by/or on behalf of the Manager for the time being of the Bank, showing the amount*

> *owing to the Bank in respect of capital and interest and for all advances and payments made (in addition to the capital) to the Mortgagor(s) or for the Mortgagor(s) account or otherwise authorised to be made under this Bond, shall be sufficient and satisfactory proof for the purpose of obtaining provisional sentence under this Bond, and it shall rest with the Mortgagor(s) to prove that such amount is not owing to the Bank.*"

[9] The Defendant states that there is the absence of a deposit in the amount of +-E600 000.00, which is not accounted for in the "Certificate of Balance". Otherwise put, the total exposure of the Bank is said to be incorrectly calculated, omitting a large deposit.

[10] The Bank replies to this allegation, and declares that the deposit was indeed taken into account. For this, it attached various statements of account relating to Shali Investments. I fail to find such a sum reflected as a credit in the account. The Defendant however states this as a bold fact without advancing any further details of the alleged credit deposited into its account, which is not helpful to the court in order to scrutinise the accounts to determine the veracity

of the allegation. Likewise, the Bank's response is not helpful either. This dispute cannot be resolved on the papers as it presently stands.

[11] Swazi Bank relies on the provisions of clause 11 in this regard and in particular, that a certificate by a manager of the Bank, such as is annexed to the summons, "*...shall be sufficient and satisfactory proof for the purpose of obtaining provisional sentence under this Bond, and it shall rest with the Mortgagor(s) to prove that such amount is not owing to the Bank*".

[12] For present purposes, this dispute about the presence or absence of a credit of +-E600 000.00 is to some extent academic. At the hearing of the matter, the Bank's counsel lowered the expectations of its provisional sentence a great deal, which more than makes up for a potential miscalculation.

[13] Initially, as supported by the certificate of outstanding balance, the Bank prayed for provisional sentence in the amount of E2 352 621.31. This is the amount certified as a "total exposure" and is comprised of a farm purchase loan, farm improvement loan, farm investment loan, seasonal loan, and arrears on it, as well as a business vehicle (which is also an amount in dispute, in the sum of E41 311.18).

[14] In court, Advocate Flynn quite correctly conceded that provisional sentence cannot be taken in respect of the full amount of about E2.3 million, the total expense of the Bank. Instead, this claimed amount is now reduced to El 039 000, said to be the liquid amount as is reflected in the Bond. The Bank now intends to sue on an illiquid claim consisting of the difference between these two amounts, should it obtain provisional sentence.

[15] According to both the Bond itself and the statements of account drawn by the Bank, El 039 000 reflects the actual amount of money advanced to the Defendant by Swazi Bank.

[16] The Bank Statement headed "Shali Investments (Pty) Ltd 4261 ... Farm Purchase" reflects a debit entry on 2 July 2001, transf. cost (sic) of E74 396.50. Then, on 15 July, a further debit entry, Ubombo Sugar, of E964 603.50. Added together, it is an amount of El 039 000.00.

[17] The Bond, headed as "Mortgage of immovable property" and passed in favour of Swazi Bank, records that one Solomon Velebantu Masango in his capacity as duly authorised director of the Defendant, declared the mortgagor "...to be truly and lawfully indebted and held in firmly bound to and on behalf of (Swazi Bank) ... in the sum of El 039 000.00."

[18] It is this acknowledged indebtedness, which has since increased to more than twice as much, which the Bank now claims, instead of the full outstanding amount. The document then records the bonded properties pledged as security for the loan.

[19] This aspect of a reduced claim for provisional sentence is not the basis for opposing it, but the argument, to which I revert below, is that it is not a claim based on a liquid document, suitable for use in provisional sentence proceedings, which is used by the Bank, rather that it is an illiquid claim, based on an illiquid document.

[20] Before turning to the merits of the matter, it is recorded that Mr. Magagula raised a further legal point *in limine,* which he abandoned at the hearing.

[21] It would have been argued that the deponent of the Plaintiffs replying affidavit, Mr. Lukhele, had no authority to depose to it on behalf of the Bank, based on MALL (CAPE) (PTY) LTD V MERINO KO-OPERASIE BPK. 1957 (2) SA 347 (C) at p. 347 and J K MASEKO AND COMPANY (PTY) LTD V LUNGILE DLAMINI AND ANOTHER, unreported Swazi High Court case No. 3629/05. The argument would have been based on the absence of a resolution annexed to the affidavit but, as said, this argument was wisely also abandoned.

[22] The Defendant also abandoned a third legal point, namely an attack on the certificate of indebtedness arising from a reference therein to interest in arrear, without an explanation as to how it was calculated. This argument would have been based on a statement in Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa, where the learned authors state at page 963 that:

> "*...likewise, where the document expresses interest to be payable at "bank rate", provisional sentence will not be granted for interest since extrinsic evidence is necessary to show what the bank rate is*".

[23] In the present matter, following the reduction of the initial claim of about E2.3 million to just over E1 million, the question of interest accrued on the loaned amount does not arise. The claim, as it now stands, is only in respect of the initial amount stated in the Mortgage bond to be in respect of monies lent and advanced. The only reference to interest is *mora* interest, from the date of service of the summons to date of final payment, which is a different matter.

[24] Therefore, the aspect of interest on the capital amount of the claim, from date of receipt

thereof, does not arise. No extrinsic evidence is thus in issue and the question of interest has thus also become academic, save for interest on the provisional sentence itself, should it be granted.

The claim for such *mora* interest is at the usual rate of 9%, as per established precedent, but which rate has not yet been judicially considered and pronounced upon as to date hereof, insofar as I am aware. No argument was advanced and no authority relied upon to lay a challenge to the claimed *mora* interest rate.

[25] I now turn to deal with the crux of the matter, namely whether or not this claim is based on a liquid document. It is trite law that provisional sentence can only be taken on a liquid document and should it be otherwise, the matter stands to be dismissed, in which case the Plaintiff will resort to the issue of summons to claim the full outstanding amount due to it instead of suing for the balance between a provisional sentence and the full amount.

[26] The Defendant's argument is that the document on which the Bank relies is not a liquid document because, there is the need to prove the due amount by way of extrinsic evidence. It is said that the acknowledgement of debt is for an indeterminate amount, coupled to a fixed maximum. Counsel's argument is correct to the extent that liquidity cannot be retrospectively

conferred by the agreed issue of a certificate, but incorrect to also say that any further evidence than the Bond itself is required, based on the assumption that the amount is indeterminate.

[27] Interestingly, both counsel rely on the same case law as precedents to substantiate two opposing views in this matter. The first case is that of WOLLACH v BARCLAYS NATIONAL BANK LIMITED 1983 (2) SA 543 (A), which *inter alia* refers to an earlier decision of the Transvaal Provincial Division in HARROWSMITH v CERES FLATS (PTY) LTD 1979 (2) SA 722 (T).

[28] In the latter case, Boshoff AJP (with Myburg J and Esselen J concurring), considered many applicable authorities relating to what actually constitutes a liquid document, relative to security bonds and provisional sentence, which in effect must contain a clear unequivocal acknowledgement of debt. The court reconfirmed the position, which was incorrectly diluted in a number of earlier decisions, that no extrinsic evidence in the form of a certificate provided for in the bond document signed by anyone else but the Defendant could convert an illiquid document into a liquid document. The Court held at 744-H that "*(t)he position on the authorities then appears to be that the practise in provisional sentence proceedings*

> *has not been changed so as to allow an illiquid document to be converted into a liquid document by the production of extrinsic evidence in the form of a certificate provided for in the document and signed by a person other than the Defendant*".

HARROWSMITH v CERES FLATS (supra) is moreover no authority to support the argument of the Defendant's attorney that a mortgage bond cannot be a liquid document whenever it allows for a certificate of balance to prove the total amount of indebtedness. Boshoff AJP (as he then was) repeatedly emphasised the need to scrutinise the bond document to determine its actual nature, liquid or illiquid.

As a prime example at hand, the present certified outstanding balance of +.E2.3 million is illiquid, as it relies on extrinsic evidence to determine the full recoverable amount and without hesitation, as such it cannot be used to obtain provisional sentence in that amount. The bond does not contain an unreserved acknowledgement of debt in that amount but a different figure, as set out below.

In WOLLACH v BARCLAYS NATIONAL BANK LIMITED 1983(2) SA 543(A), it was held by the majority of the Appellate Division that an incorrect approach was adopted in the seventies, to grant provisional sentence if a debtor, in a

written instrument such as a covering bond or deed of suretyship, admitted indebtedness for an indeterminate amount subject to a fixed maximum, provided that the instrument stipulated that the extent of the debtor's liability at any given moment could be proved by a document such as a certificate (of balance) and that the plaintiff obtained and relied on such certificate. It was thus held that an acknowledgment that an indeterminate amount is due, albeit coupled to a fixed maximum, patently does not comply with the acknowledged requirement of liquidity, in terms of which the existence and extent of the debt must appear from the written instrument. Therefore, as the Defendant's attorney now argues, correctly so, liquidity cannot be retrospectively conferred by the agreed issue of a certificate. The question remains whether the amount of E l 039 000 is not a liquid amount, and that the further indebtedness, over and above this, is not an illiquid amount. Otherwise put, that from the same document, both a liquid claim as well as an additional illiquid claim can arise, as *in casu.*

In Wollach, the Defendant (Appellant) applied for advances, credits and other banking facilities. The Bank acceded to his application on condition (as set out in the bond) that the extent, nature and duration of the facilities would remain with the bank and also upon the further special condition

of receiving the security of the bond "*which shall be deemed to cover the principal sum of the mortgager's indebtedness to the said bank at any time up to, but not exceeding the sum ofR(XYZ).*"

In the case of Wollach, the Court found that when the acknowledgement of debt was read in proper context, it was improbable that at the time the bond was registered, the full amount of acknowledged indebtedness was yet due to the bank. It was therefore necessary to certify the full amount, which would then be tantamount to adducing extrinsic evidence, hence the finding that it was an illiquid debt, incapable of being recovered by way of provisional sentence.

Advocate Flynn argues that the present bond is distinguishable from the situation of Wollach (supra) in that at the time the bond was registered, it was for a liquid amount of debt, further providing for an illiquid amount, which as it turned out, presently amounts to about E2,3 million in total. The initial sum of money loaned and advanced, as a liquid acknowledged debt, is what the Bank presently seeks to recover by way of provisional sentence, and no more.

[35] In order to decide the matter, it requires a closer look at the bond itself. In essence, with irrelevant wording deleted, it reads:

'% the undersigned, Solomon

> *Velebantu Masango, in my capacity as a director of Shali Investments...duly authorised... do hereby acknowledge and declare the mortgagor to be truly and lawfully indebted and held and firmly bound to and on behalf of (Swazi Bank) ...in the sum of El 039 000.00* (the capital) *arising from money lent and advanced and to be lent and advanced from furnishing banking facilities to the Mortgagor by the Bank as a continuing covering security as will more fully appear in condition 12...however it shall always be in the entire discretion of the Bank to determine the extent, nature and duration of the advances to be made and the facilities to be allowed to the mortgagor...*"

[36] Various legal exceptions were renounced, in particular *non numeratae pecuniae,* which in any event would be inapplicable at present.

[37] A further amount of E519 500 is provided for as security for further costs and charges, especially in case of default.

The bonded property is then listed, with various conditions relating to the properties. Thereafter, provision is made for the certificate referred to above, which *inter alia* has it that it "shall be

sufficient and satisfactory proof for the purpose of obtaining provisional sentence under this bond".

That such a clause cannot alter the legal position of provisional sentence goes without further ado. It is not determinative of the liquidity or otherwise of the document. Such a clause cannot change an illiquid document into a liquid document. On the other hand, such a clause does not remove liquidity from a document, by its mere inclusion, similar to the provision for a certificate of balance.

Clause 12 to which reference is made in the ambit of the bond, makes it clear that the instrument is continuing covering security for an amount not exceeding the amount of the capital sum (E1 039 000) together with the additional amount (E519 500), now or in future owing to or claimable from the bank.

It thus seems to me that the mortgage debtor, the Defendant, unequivocally acknowledged that an amount of El 039 000 was the sum of a secured indebtedness to the Bank, arising from money lent and advanced " and to be lent and advanced", as well as a further secured amount to cover further contingencies.

[42] At the foot of the document, it is recorded that the debtor signed it on the 21st July 2002, but that the Bank's representative by then had already done so, on the 23rd May

2002. More interesting though is that *ex facie* the document, the Registrar of Deeds registered the bond on the 3rd of July 2002, after the Bank signed it but before it was signed by the mortgagor! Nevertheless, despite the apparent anomaly, this point was not argued before court and neither litigant placed any significance on it.

[43] As mentioned above, Advocate Flynn pointed out that the full amount of the loan, El 039 000, is reflected in a statement filed by the Bank in its replying affidavit. Therein, it is shown that on the 2nd July 2001, an amount of E79 396.50 was debited to the Defendant's account, as a "transfer costs". Thereafter, on the 15th July 2002, a debit entry of E964 603.50 is recorded as "Ubombo Sugar". Both these dates precede the date of signature by the Defendant. The two amounts add up to the exact amount of El 039 000.00, as reflected in the Bond.

[44] It therefore seems much more likely than not that at the time the Defendant signed the security bond, that the full amount secured had by then already been loaned and advanced to it by the Bank. It thus seems to me that when the defendant acknowledged its indebtedness to Swazi Bank in the amount of El 039 000, it was not to secure facilities for future use up to a maximum of

the said amount but that by that time, it had in fact already received that amount and utilised it for its own purpose.

[45] The further amount of E519 500 was to provide for further disbursements on its account and the purpose of the certificate was and remains to certify the total exposure by the Bank. Any further amount, above El 039 000, whether limited to E519 500 or more than that, is an illiquid amount, which requires extrinsic evidence to prove it, taking such amount beyond the scope of provisional sentence.

[46] Accordingly, in my view, the amount of El 039 000 is a liquid amount which does not require to be determined or ascertained by way of any extrinsic evidence, wherefore it does not fall outside the ambit of provisional sentence, based on a liquid document. Any further amount, over and above El 039 000 does however require to be ascertained, and in the present matter, such further amount may be proven *prima facie* by way of a certificate, such as the one attached to the summons. It is then for the Defendant to prove its incorrectness, should it wish to dispute the balance (or all) of the additional amount, in excess of El 039 000.

It is for these reasons that the Plaintiff cannot

succeed in obtaining provisional sentence for the full amount of its claim, namely E2 352 621.31, but it can obtain provisional sentence in the amount of E1 039 000, being the amount of the liquid document, Mortgage Bond No. 347/2002, a copy of which was annexed to the summons.

The Plaintiff further seeks to have an order to declare the mortgaged property specifically declared executable. The last clause of the bond, at the top of page 6 thereof, provides that in the event of any default by the mortgagor, the Bank may have the property declared executable for the full amount of the bond. I find no reason why such an order should not be made.

There is however no reason to award costs at the scale of attorney and own client, including collection commission as prayed for in the summons. I do take cognisance that such provision is routinely made in security bonds and likewise contracts or instruments, but in the present matter, I fail to find such proviso. Plaintiffs counsel, when asked to indicate to the court where it was so agreed, likewise could not immediately point it out during the hearing, nor afterwards, as he was given leave to do.

[50] The terms that were agreed upon are only to the extent that the Bank will be able to recover its costs incurred in calling up the Bond, but not to the extent that punitive attorney and client, or

attorney and own client costs, plus collection commission, was catered for. Costs should therefore be on he ordinary party and party scale.

[51] I am persuaded that in a matter like this, the Plaintiff was entitled to instruct counsel to argue the matter in court and that those costs have to be catered for.

[52] For these reasons, the Plaintiff must succeed to a limited extent in its application for summary judgment, as is set out in para. 66 below.

[53] There is a further aspect, which does not relate to the merits of the claim itself but which had an impact on the proceedings.

[54] On the 13th October 2006, the matter was enrolled for hearing. Because of the state of the roll that day, it could not be heard in the course of the morning session but it was stood down for hearing after the lunch recess. At the time the court adjourned, the legal representatives of both parties were present in court and neither expressed any reservations.

[55] When the court again sat at 14hl5, Mr. Magagula, attorney of record for the Defendant, was conspicuously absent. Instead, attorney Mabuza then appeared, imploring the court to postpone the matter. He stated that during the lunch hour he received the file in this matter,

"couriered" to him, that he was in no position whatsoever to argue the matter and that he did not receive Defendant's heads of argument.

[56] On the other hand, counsel for the Plaintiff was still ready, willing and eager to be heard, actually desirous of continuing despite the absence of attorney Magagula. No explanation was offered for his absence, save to state an unforeseen incident arose.

[57] For various reasons, recorded in open court, I decided to grant a postponement to the next week, but ordered wasted costs to be paid forthwith on the attorney client scale including counsel's costs as per Rule 68(2). Unless good course could be shown by Mr. Magagula, to sufficiently explain his sudden absence and requiring of an unsuspecting and unbriefed colleague to "bite the bullet" in his absence, such costs would be *de bonis propriis.*

[58] An affidavit was duly filed in an endeavour to substantiate and explain the absence.

[59] The contents of the affidavit unfortunately contradicts the explanation advanced from the bar in his absence.

[60] Mr. Magagula has it that he had a pressing family engagement in Witbank, South Africa. I have no quarrel with that, but it does not also say

when it arise, whether it is a sudden emergency that arose during the lunch hour.

[61] He does however say that his assistant, Mr. Noel Mabuza was to argue the matter "since we had prepared for court together. He knew as much about the matter and the Defendant's defence as I did but that "he could not proceed to argue the matter because he could not find the Defendant's Heads of Argument in the file."

[62] The two explanations are mutually destructive. I do not propose to deal with it in any further detail and certainly not to refer it for hearing of oral evidence in order to make a more substantiated factual finding.

[63] The result remains that without leave of court, the Defendant's attorney failed to return to court in the afternoon, causing a colleague to stand in for him, but who was in no position to argue the matter without damage to their client's case. It resulted in an unnecessary postponement, an unaffordable luxury when regard is had to not only the matter at hand but any of numerous pending contested matters which otherwise could have been heard.

[64] It would not be in order to straddle the defendant with the wasted costs, for the negligence (at best) of its instructed attorney,

who by necessity is expected to have a duty of care and due diligence.

[65] It is for these reasons that the wasted costs of the postponement on the 13th October 2006 has to be paid *de bonis propriis* by the attorney of record instructed by the Defendant.

[66] In the event, it is ordered that provisional sentence be entered against the Defendant in the amount of E1 039 000; that the properties mortgaged under Mortgage Bond No. 347/2002 be declared as specifically executable; that *mora* interest at the rate of 9% accrue from the date of service of summons; and that costs follow the event, which costs are to include costs of one counsel, to be taxed under the provisions of rule 68(2).

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE