IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	CIV. CASE No. 1836/97
IN THE MATTER BETWEEN	
SWAZILAND DEVELOPMENT	
AND SAVINGS BANK	PLAINTIFF
AND	
MARK MORDAUNT	1st DEFENDANT
WALTER QUINTON MORDAUNT	2nd DEFENDANT
CORAM:	DUNN J.
FOR THE PLAINTIFF:	MR. MLANGENI
FOR THE DEFENDANTS:	MR. MAMBA

JUDGMENT

5th JUNE 1998

This is an application for summary judgment . By summons issued on the 23rd June 1997, the plaintiff sought judgment against the defendants jointly and severally for -

1. payment of the sum of E20 525.16

2. Interest at the agreed rate of 22% per annum a tempore mora

3. An order declaring Lot number 65, situate on Second Avenue, Nhlangano Township, executable in terms of Surety Mortgage Bond No. 257/86.

4. Costs.

The allegation in the particulars of claim is that on the 11th May 1989 the plaintiff advanced an amount of E5 000.00 to the first defendant at his special

instance and request. It was agreed that the amount was repayable over a period of twelve months, at the rate of E545.00 per month. Interest on the amount was agreed on at the rate of 22% per annum.

In so far as the second defendant is concerned, the allegation is that he bound himself as surety and co-principal debtor by way of Surety Mortgage Bond No, 257/86 in favour of the plaintiff over Lot No. 65 situate in Nhlangano.

It is averred that the first defendant has failed to make repayment as agreed and that as at the 29th February 1996 the principal debt, interest and bank charges amounted to E20 525.16.

The defendants filed notices of intention to defend which were followed by the present application. The application is opposed by the defendants

The defendants deny that they have no defence to the plaintiffs claim They raise the defence that in terms of the common law, interest on a loan stops running when it equals the unpaid capital. This is what is known as the in duplum rule which was carefully and extensively considered in an instructive and authoritative decision of the Zimbabwe High Court in COMMERCIAL BANK OF ZIMBABWE LTD v MM BUILDERS & SUPPLIERS (PW) LTD AND OTHERS 1997 (2) SA 285. The leading South African and English decisions on the rule in question were considered in this decision.

The first defendant admits liability to the plaintiff in the sum of E10 000.00 in terms of the duplum rule and has tendered payment of that amount.

The plaintiff was permitted to file a replying affidavit in which the plaintiff accepted the effect of the duplum rule. It was however contended on behalf of the plaintiff that the common law does not apply in this case because the defendants had "specifically contracted with the plaintiff upon the express agreement that interest would be calculated at the rate of 22% per annum" and had thereby waived the application of the rule. With respect, this submission cannot stand. The application of the rule has nothing to do with the rate of interest applied. It prohibits the accumulation of interest beyond the amount of the capital. If, by payment, the accumulated interest is reduced interest will again run until the capital sum is reached and may again be accumulated up to the amount of the capital. In any event, the question as to whether or not the duplum rule can be waived was considered by Gillespie J. In the COMMERCIAL BANK case supra. Although the learned Judge was not called upon to decide the question as it had not arisen in the case, his views were, however, well reasoned and supported by persuasive authority and do, in my respectful view, correctly reflect the law. The learned Judge stated the following at 321F-322 A -

The ancient Roman and Roman-Dutch law applied the duplum rule rigorously to the extent that interest could not accrue after the amount of the double was reached. The rule was one conceived in public policy and in order to supply a protection perceived to be necessary. It is my view that an agreement that sought to waive the duplum rule in advance would be contrary to a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline upon a creditor. A loan that is properly serviced does not fall foul of the duplum rule. A creditor who does not extend credit to a bad risk or who calls up his debt at a proper time, when the loan is not being serviced, does not suffer from an application of the rule. To allow an agreement in advance waiving the rule would leave these abuses unchecked. That the courts may refuse to enforce a contract considered to be contrary to policy is undoubted. There is, in addition, very respectable authority that a waiver of the duplum rule in advance would be contrary to public policy:

In like manner the provisions of the Roman-Dutch law, that interest may not exceed the capital or be turned into capital, are still observed in practice..... This court will refuse to enforce, to its full extent, a contract made by our citizens, in which double the amount advanced, with interest, is stipulated for, not so much in protection of the promissor, but because to countenance such proceedings would be contrary to good morals, the interests of our citizens, and the policy of our law. (Per Kotzé CJ in TAYLOR v HOLLARD (1886) 2 SAR 78 at 85

Turning to the particulars of claim, the plaintiff filed a statement of the first defendant's loan account, reflecting the transactions on the account between the 18th May 1989 and the 29th February 1996. The statement reflects four credits to the account totalling E5 100.00. The debit column of the statement reflects the interest charges together with ledger fee charges. These two items in the debits, have not been individally totalled to reflect separately the effect of the credits in the reduction of the accumulated interest.

The first defendant has consented to summary judgment in the sum of E10 000.00. I grant judgment in that amount. The balance of the claim is dismissed. I make no order as to costs.

B.DUNN

JUDGE.