

HIGH COURT OF SWAZILAND

CIVIL CASE NO.2040/95

In the matter between:

STANDARD CHARTERED BANK (SWD)	PLAINTIFF
VS	
VIVIAN THABILE MATSEBULA	DEFENDANT
CORAM	MATSEBULA J
FOR PLAINTIFF	MR. FLYNN
FOR DEFENDANT	MR. SIMELANE

12/08/04

In the amended particulars of claim plaintiff alleges that it lent in advance to the defendant as a house loan an amount of E68 250.00 and that the said amount would be repaid in three hundred and twenty-four equal monthly instalment of E367.06 each month. Plaintiff would be entitled to charge interest on the capital amount outstanding at a rate of 5% per annum while defendant remained in plaintiff's employment. Plaintiff also alleges that the said loan was subject to plaintiff's usual rules and conditions pertaining to the staff loan scheme contained in annexure "A". Annexure "A" is in a form of a letter addressed and directed to defendant.

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Annexure "A" is signed by the plaintiff's agent and by defendant herself. It is proper that I refer to annexure "A" as if it "has been read into my judgment because it forms part of the proceedings, it will form part of this judgment. The reference to subject to the "bank's usual rules and conditions pertaining to the staff and loan scheme" is further explained in paragraph 5.4 of the particulars of claim which in turn refers to annexure "B". Annexure "B" appears at page 9 to 10 of the book of pleadings. An important paragraph of annexure "B" is paragraph 5 which reads and I quote:

"Upon his/her leaving the bank services for any reason whatsoever outstanding loans and advances to the officer concerned becomes automatically payable in full although at its discretion, the bank may agree to accept repayments by instalments subjected to normal commercial rates interests being charged."

The above quoted paragraph is important as it encapsulate the reason why in the final analysis the bank exercises its discretion in terms of the applicability of the application of the in duplum rule it charges interest at normal commercial rate notwithstanding the agreement reached between the plaintiff and defendant before and after defendant left the plaintiff's employment.

In terms of annexure "A" dealing with the application for a loan of E68 250-00 by the defendant dated the 27th August 1991 she subsequently tendered a letter of resignation dated the 7th January 1992. It is not clear from the pleadings or the viva voce evidence if she had by that time of resignation made any appreciable payments towards servicing her loan account. What is clear is she "is requesting a period of six months within which she hopes she would have some alternative arrangement of payment of the same." The alternative arrangement of payment of the same is contained in a letter from her erstwhile attorneys Masina, Mazibuko & Company which is annexed here and marked annexure "D". In annexure "D" defendant requests to make payments of the balance loan in

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instalments of E1 000-00 in monthly instalments. Her attorneys enclosed a cheque in the amount of E1 000-00 payable to the plaintiff.

In response to annexure "D" plaintiff turned down the offer of E1 000-00 per month per letter dated 6th April 1993. The offer of E1 000-00 per month is according to annexure "E" by plaintiff, insufficient.

"It is not even sufficient to service the interest accruing every month let alone the capital sum".

Plaintiff suggests that the defendant pays at least E2 000-00 per month.

"This could accommodate the interest charges, and reductions to the principal sum".

In its letter, in response, plaintiff also encloses a print out of the account for defendant's scrutiny. The printout is set out in annexure "F" which is part of these proceedings. According to annexure "F" defendant is shown to have paid the following amounts:

On the 1st April 1993 she paid E1 000-00; On the 16th June 1993 she paid E2 000-00; On the 25th November 1994 she paid E400-00; On the 7th April 1995 she paid E1 480-00; On the 13th May 1995 she paid E370-00;

All the above amounts were credited to the principal amount which by then had accumulated to an astronomical amount of E120 515-13.

At the issue of the summons the amount owing by the defendant is given as E122 801-98 and interest chargeable is given as 13% per annum calculated from the 1st July 1995 to date of payment.

At the commencement of these proceedings, Mr. Flynn on behalf of the plaintiff indicated that he would, instead of the amount of E122 801-98 being sued on he was going to proceed against the defendant on the original debt of E68 334-60. Mr. Flynn said this is the amount that the defendant owed plaintiff when she resigned. This is the

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amount that defendant was called upon to pay in full at her resignation. Mr. Flynn also said plaintiff was now claiming a commercial rate interest of 9% per annum and forgoes further interest which was chargeable in terms of the agreement. Mr. Flynn mentioned the application of the in duplum rule without going into any details.

I have consulted extensively relating to the application of the in duplum. rule. This, I did because I was of the view that counsel for the defendant has either not fully understood the application of the in duplum rule or did not read this application. Mr. Simelane in his opening remarks stated that defendant did not deny that she owes plaintiff the amount of E68 334.60 as per calculation by plaintiff's

employee, (tape defective) Mr. Simelane said because plaintiff was accepting what defendant did not deny therefore plaintiff had no case against the defendant because plaintiff was conceding to the sum of the figure admitted by defendant as being owed. Plaintiff ought to have withdrawn his cause of action, so states Mr. Simelane. Whether Mr. Simelane was seriously meaning what he addressed the court, it is very doubtful because on the one hand he states that his client admits that she is indebted to this amount and she further admits that she had not paid this amount.

In her evidence before this court, defendant admitted that she was being sued for E122 801-98 and interest chargeable was 17% per annum. She stated that her defence was based on annexure "A". Annexure "A" is the document she signed where the original loan was advanced and paid through her. Sight should not be lost of the fact that annexure "A" was of application as long as she remained in the employ of the plaintiff. Annexure "A" in turn refers to annexure "B". Defendant admits part of

annexure "B" contents and argued that the latter part of annexure "B" was added subsequent to her resignation

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from plaintiff's employment. Defendant was however unable to produce any document to substantiate her arguments.

PW3 Mrs. Masina stated on oath that there never were any amendments to annexure "B".

It is my view that defendant is a witness who is very economic with telling the truth. For example, in her affidavit, opposing an application for summary judgment (see page 21 book of pleadings). She stated on oath that she had paid on each occasion amounts amounting to E2 000-00 while she continued to pay the other instalments in terms of the letter of the 27th August 1991. This was obviously not true as it has now turned out from the documentary in evidence.

In my judgment, I therefore have no hesitation in rejecting her evidence that annexure "B" was ever amended as she claims.

I now turn to the application of the in duplum rule. I have consulted Appeal Case No.50/99 SHISELWENI INVESTMENTS (PTY) LTD VS SWAZILAND DEVELOPMENT 8b SAVINGS BANK a judgment of a full bench consisting of Leon JP, Tebbutt JA and Schreiner JA. The judgment handed down by Tebbutt JA at page 7 of the judgment. The learned judge of the Court of Appeal refers to the (inaudible) to the STANDARD BANK OF SOUTH AFRICA (LTD) VS ONET INVESTMENTS (PTY) LTD 1988(1) SA 811 SCA where it was held in dealing with the in duplum rule.

"The rule which provides that interest stops running when unpaid interest equals the outstanding capital is a rule based on a public policy designed to protect borrowers from exploitation by lenders. As such borrowers cannot wave it and banking practice cannot alter it. The practice by bankers of capitalising on unpaid interest does not result in interest losing its character as interest and certainly not for the purpose of in duplum rule."

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At page 5.7.2 of the STANDARD BANK OF SWAZILAND VS ON SET

supra. The learned judge states the following and I quote:

"In order to apply the in dupluth rule the unpaid amount of the capital advanced has to be established and the establishment of that amount depends in turn upon how credits to the account have been appropriated. See STANDARD BANK OF SOUTH AFRICA supra at page 572 (e). As soon as and for as long as the in duplum rule suspends further running of the interest, all credits to the account should be appropriated to pay the interest before they apply to pay the capital."

The difficulty with the present case however, is that the defendant as shown above tendered her resignation from the employment of the plaintiff soon after the application for a house loan, in terms of annexure "A" was concluded and notwithstanding the provisions of paragraph 1 of annexure "A" which states that the loan of E68 250-00 advanced by the plaintiff was subject to the bank's usual rules and conditions pertaining to the staff loan scheme. Staff loan scheme is contained in exhibit "B" paragraph 5.

The defendant failed to pay the outstanding loans and advances. Defendant also failed to honour the subsequent arrangement she and plaintiff agreed to. As a result of her failure the amount had accumulated to E122 801-98 as at June 1995 when summons was issued. This amount clearly violated the in duplum rule whereas in the STANDARD BANK supra it was held.

"for as long as the in duplum rule suspends further running of the interest of all credits to account to be appropriated to pay interest before being applied to the capital a creditor may therefore not recover in legal proceedings against the debtor more than unpaid capital together with interest equal to the

unpaid capital."

In order to apply the in duplum rule, the unpaid amount of the capital advanced has to be established and the establishment of that amount depends in turn upon how credits to the amount has been appropriated. According to exhibit "F" as at 11th December 1992 the unpaid amount of the capital stood at E75 901-46 and defendant did

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not pay any amount until the 2nd April 1993 when she paid a E1 000-00. The unpaid amount of the capital together with the interest had reached the total of E86 184-69 inclusive of interest less the E1 000-00 credit, this equals to E85 184-69. Defendant again paid per cheque on the 6th June 1992 an amount credited of E2 000-00. When he paid this amount, the capital together with the interest had risen to E87 659-11 and the payment of E2 000-00 brought the balance to E85 659-11. Defendant did not pay any amount until the 25th November 1994 when she paid in cash a sum of E400-00. As at this date the payment of this amount, the capital interest included has arisen to E110 268-22 and the credit of E400-00 brought the balance to E109 869-22. Defendant again failed to pay until the 7th April 1995 when she paid E1 480-00 as at this day the balance owing was E 108 469-72 and the payment brought the balance to E1 16 989-72. The last payment defendant made was on the 13th May 1995 when she said she paid an amount of E370-00. This payment brought the balance to E120 515-13. There no documentary document of any payment by defendant and summons was issued when the amount owing together with the interest stood at E 122 801-98. This amount violated the in duplum rule.

Considering the mode of payment by defendant, it would hardly be said to be unfair to infer that she had made up her mind not to honour any of her obligation to pay either in terms of exhibit "A" or exhibit "E". No wonder her account was labelled "irregular account".

I have had a careful consideration of all the Acts, facts and law in this matter. It is my considered view that the plaintiff has discharged its onus on a balance of probabilities considering the application of the in duplum rule, the court grants the following judgment:

- (a) "(a) The court grants judgment in the original amount advanced to the defendant;

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- (b) Interest to run from the 1st July 1995 to date of payment. The interest should be the commercial interest.
(c) Costs of suit - This will include the costs of counsel in terms of Rule 68 of the High Court Rules.

J.M. MATSEBULA

Judge