IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2392/03

In the matter between

SWAZILAND BUILDING SOCIETY	PLAINTIFF
VERSUS	
SIBANGANI INVESTMENT (PTY) LTD	DEFENDANT
CORAM	SHABANGU AJ
FOR PLAINTIFF	MR NKOSI
FOR DEFENDANT	MR. MDLULI

11th March, 2004

This is an application for summary judgement by the plaintiff in the main action, for relief as follows;

1. " Payment of the sum of E194,745-65
2. Interest on the said sum of E194,745-65 at the rate of 13% per annum from date of summons to date of payment,
3. An order declaring the property mortgaged by Mortgage Bond No's 706/1995 and 426/1995 respectively to be executable;

4. Costs of suit on the scale as between Attorney and client including collection commission;
5. Further and or alternative relief. "

From paragraph three of the particulars of claim, the claim is alleged to arise from loans which the plaintiff granted and advanced to the defendant on two separate occasions on 8th February, 1995 and 17th October, 1995 for the sums E160,000 (One Hundred and Sixty Thousand Emalangeni) and E24,800 (Twenty Four Thousand Eight Hundred Emalangeni) respectively. Both debts were secured by mortgage bonds executed by the Defendant in favour of the plaintiff as ongoing security for the said loans. The first loan for the amount of El60,000 was secured by Mortgage Bond No. 426/1995 registered on or about 6th July, 1995. The second loan amount of E24,800 was secured by Mortgage Bond No. 706/1995 registered on or about 26th October, 1995. It is further alleged that the agreed interest in respect of both the first bond and the second bond was 16 percent per annum and 19 percent per annum respectively. There was also provision for the interest rate to be varied by the applicant who would give notice to this effect allegedly in terms of clause 22 of the first and second bond respectively. The total monthly repayment installment in respect of both loans was E2768-00 made up of an amount of E2,350-00 and E418-00 in respect of the first and second loan respectively. It is also alleged that in terms of clause 23 of each of the said bonds, provision is made conferring a right on the plaintiff to foreclose the bond and call upon the Defendant to pay forthwith all sums due and owing under the bond, in the event the respondent fails to make punctual payments in accordance with the terms of the said bonds. Clause 23 of the bond provides as follows

"Should any mortgagor/ at any time allow any judgement of any court of law to be entered or recorded against such mortgagor, or if any interdict should be applied for on any portion of any mortgagors estate or assets, or should any mortgagor compromise with such mortgagor's creditors or should any mortgagor convene any meeting of creditors, or should any application be made for the sequestration or liquidation of any mortgagor's estate, either compulsorily or voluntarily or for the placing of any mortgagor under judicial management, or should any mortgagor assign or offer to assign such

mortgagor's estate for the benefit of creditors, or should the property hereby mortgaged be attached under the judgement of any court, or should

the mortgagor (s) sell or offer to sell the property mortgaged without the consent of the society in writing first had and obtained, or should the mortgagor (s) fail punctually to pay on due date the interest or any sums due under this bond or commit any breach whatsoever of the conditions of this bond, or any one of them, then and in such case or in any or either of such cases, the society shall be entitled, anything to the contrary herein contained notwithstanding, forthwith to foreclose this Bond and to call upon the mortgagor (s) to pay forthwith all and every sums advanced under the bond and or owing in respect thereof, and if necessary to recover the same in any competent court.

The bonds also provide that all costs incurred in any action instituted against it to recover amounts owing by it from time to time to the plaintiff shall be borne by the defendant at the rate as between attorney and client including collection commission. All these allegations are not disputed by the defendant in its affidavit resisting summary judgement. Finally, the particulars of claim allege that the defendant " has failed to make payments on due dates and as of 31st August, 2003 was in arrears with its repayments in the sum of E20,814-85 (Twenty Thousand Eight Hundred and fourteen Emalangeni), which amount is due owing and payable and which, despite demand therefore, the defendant fails and or neglects to pay to the plaintiff."

The defendant has filed an affidavit resisting summary judgement and states that it has a good and bona fide defence to the plaintiff's claim. At paragraph 4.1 the defendant denies that he has 'failed or neglected to make payments on the due dates despite demand.' Then in paragraph 4.2 the deponent on behalf of the defendant states that; "...on or about May, 2003 and at Mbabane I entered into an agreement with the plaintiff to rearrange with the plaintiff the repayments in the following manner:

4.2.1, The parties agreed that I would increase my monthly repayments from the sum of E3,768-00 to the sum of E5000-00 per month in order to address the arrears.

4.2.2, At all times material to this agreement the Plaintiff was represented by Seth Nkambule and the Defendant by Themba Matsebula.

4.2.3, The terms of the rearrangement of bond terms are set out in letter of offer of rearrangement from the Defendant to Plaintiff dated 30th May, 2003 which offer was accepted by Seth Nkambule on behalf of Plaintiff . Copy of letter is annexed hereto and marked "B",

4.2.4. I state that the said agreement constitutes a rearrangement of the terms and conditions of the bond.

4.2.5. I further state that the Defendant has effectually and faithfully carried out the terms of such re-arrangement.

4.2.6. In the circumstances the Plaintiff is not entitled to foreclose the bond or to call upon defendant to pay all sums due and payable under the said bonds. "

The defence raised on behalf of the defendant therefore in the paragraph quoted above and forming part of the defendant's affidavit resisting summary judgement is that in May, 2003 the parties entered into an agreement in terms of which they allegedly agreed to reschedule the loan repayment. According to the defendant the parties agreed that the defendant would increase the monthly repayments from the sum of E3,768-00 (E2768-00) to the sum of E5000-00 (Five Thousand Emalangeni) in order to provide for arrears which had arisen as a result of the defendant's failure to punctually pay the monthly instalments on due date. It is clear therefore from the abovequoted portions of the defendants' affidavit filed for the purpose of resisting the summary judgement application that the defendant did at some stage fail to make the monthly instalment repayments as required under the provisions of the mortgage bonds. This would ordinarily entitle the Plaintiff to invoke the provisions of clause twenty three of the mortgage bond by foreclosing the bond and claiming payment of the whole balance then due and owing under the bond. It is not disputed by the

defendant that the balance owing by it under the provisions of the mortgage bond is the amount of E194,745-65 claimed by the Plaintiff. However, the defendant has further alleged that there was an agreement in terms of which the parties agreed to re-schedule the monthly repayments required in terms of the bond. In support of this the defendant annexes a document to its affidavit resisting summary judgement which document the defendant describes as the agreement. The defendant it would seem views this document as having novated the terms of the mortgage bonds in so far as same related to the repayment schedule previously agreed upon. The document is annexure "B" of the affidavit resisting summary judgement and is an undated letter, apparently on the letter heads of the defendant under the title "re : bank loan repayment." The letter is addressed to the "Building Society" at P. O. Box 300, Mbabane and reads as follows;

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"We Sibangani Board of Directors have decided to increase the monthly payment to Five Thousand (E5,000-00) per month. This is due to the areas (sic) we have fallen into and we would like to cover them up. We resume this payment this month. We hope our request will meet your favourably (sic) consideration."

The letter is signed by two people describing themselves as T.O. Matsebula and E.M. Matsebula. It is obvious that this letter which is annexure B of the affidavit resisting summary judgement described by the defendant as an agreement is not an agreement. This document is no more that a unilateral document written by the defendants' board acknowledging or admitting that they had fallen into arrears with their mortgage repayments and further stating how the defendant proposes to settle such arrears. This letter clearly does not assist the defendant in its defence against the summary judgement application.

This would be no defence to the plaintiff's claim, particularly to the granting of prayers one and two of the notice of application for summary judgement filed on 5th November, 2003.

The defendant in paragraph 4.2.7 of its affidavit resisting summary judgement had raised a defence "that the amount claimed by the plaintiff is in contravention of the money lending and credit Finance Act." The defendant does not say in the affidavit why this is so and in any event this line of defence was not pursued during argument. The Plaintiff is in any event one of those institutions exempted from the application of the provisions of the Money Lending and Credit Finance Act. It was probably as a result of this realisation that the defendants' attorney decided not to pursue any kind of argument resting on the provisions of the Money Lending and Credit Finance Act, 1991.

During the hearing of this application I brought it to the attention of both attorneys arguing the matter that there appears to be a discrepancy between the amount described by both of them in their papers as the total monthly instalment repayment in respect of

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both mortgage bonds on the one hand and what is clearly the total amount when one adds the amounts of E2,350-00 and E418-00 referred to in paragraph five of the particulars of claim read together with the actual mortgage bonds annexed to the summons. Having regard to the principle that summary judgement is regarded as a extra ordinary remedy requiring an applicant who seeks such a remedy to ensure that his application is not defective and conforms to the requirements of the rule, I needed to ascertain the nature of the error in describing the total monthly instalment repayment in paragraph five of the particulars of claim and also in paragraph 4.2.1 of the defendants' affidavit resisting summary judgement. Both attorneys confirmed it to be a typographical error stating that the monthly instalment repayment amount was E2768-00 and therefore that this is the amount which the defendant was supposed to pay monthly in respect of which it is alleged to have defaulted.

The last question is whether the order claimed under prayer three (3) of the notice of application for summary judgement, namely, an order "declaring the property mortgaged by Mortgage Bonds Nos 706/1995 and 426/1995 respectively to be executable", may be granted in summary judgement proceedings. The court decisions which have considered this matter in South Africa, in the context of uniform rule 32 (an equivalent of rule 32 of our rules of court), have not been uniform. HEYNS J, sitting as a single judge in the Transvaal Provincial Division, in the case of ALLIED BUILDING

SOCIETY V. MALIC CONSTRUCTION & DEVELOPMENT CO CC & ANOTHER 1991 (4) SA 432 (T) held that the provisions of rule 32 which define the nature of a claim on which summary judgement may be granted, do not permit the court in summary judgement proceedings to make an order declaring specially hypothecated property to be executable. On the other hand in NEDPERM BANK LTD V. VERBRI PROJECTS CC 1993 (3) SA 214 at 218I-219D ZULMAN J took the view that the relief of declaring specially hypothecated property executable, is ancillary relief and a procedural matter which does not have to be dealt with on the basis that it is a claim which is impermissible merely because of the provisions of rule 32 (1). Zulman J. expressly disapproved of the ALLIED BUILDING SOCIETY V. MALIC CONSTRUCTION &

DEVELOPMENT CO CC & ANOTHER case supra and considered it to have been wrongly decided. ZULMAN J dealt with the matter as follows from the passage referred to above

"The second point in limine relates to the portion of the relief claimed, namely that portion of it which seeks to have various immovable properties declared executable. In this latter regard I was referred to a very recently reported decision of HEYNS J. sitting in the TRANSVAAL PROVINCIAL DIVISION in the matter of ALLIED BUILDING SOCIETY V. MALIC CONSTRUCTION AND DEVELOPMENT CO CC AND ANOTHER 1991(4) SA 432(T). It seems to me from a reading of this judgement that the learned judge was in a sense motivated to refuse to declare property executable in summary judgement proceedings by the fact that insufficient allegations in the case before him had been made. It is true that the learned judge seems to go further in stating, obiter, in my view, that as a general principle, with reference to Rule 32 (2), it is not competent to grant such an order. Unfortunately I am unable to find any motivated reasoning for this other than the fact that the learned judge appears to believe that, because there is no specific statement in Rule 32 (1) to the effect that declaring property executable is a claim upon which summary judgement can be granted, the relief is therefore not competent. I am unfortunately, to the extent that this was indeed held by the learned Judge (who sat as a single Judge in the Transaal Provincial Division), in respectful disagreement with him. I therefore decline to follow that judgement, which I believe to be wrong in regard to this point. It seems to me that the relief of declaring property executable is ancillary relief it is a procedural matter, and is not to be dealt with on the basis that it is a claim which is impermissible merely because of provisions of rule 32 (1) or indeed at all. Accordingly, I am of the view that the second point in limine is without substance. "

The above reasoning was also referred to with approval by DIDCOTT J. in FIRST NATIONAL BANK OF S.A. LTD V. NGCOBO AND ANOTHER 1993 (3) SA 490

at 493 B-D. DIDCOTT J. also found himself to be entirely persuaded by arguments made by plaintiff's counsel which arguments he summarised and paraphrased in the following manner at page 492C-H;

"I turn now to the argument which counsel presented, succintly and ably, in the present proceedings. Elaborating on the criticism levelled by Harms at the judgement of Heyns J, it went thus. The prayer of the plaintiff for declaration of executability fell indeed outside the framework of Rule 32 (1) (b). It did so, however, not because it was a claim of the kind implicity excluded from that framework by the strict limitation placed on the kinds of claims which qualified for inclusion, but because it did not amount in the sense to a claim of any kind. It was merely a request for a direction with regard to the execution of the judgement claimed summarily and simultaneously, and in essence ancillary to the claim for such. The limitation did not therefore hit it. Applications for such requests were envisaged by the proviso to rule 45 (I), which dealt with the executability of immovable property in satisfaction of judgements. The plaintiff's request could properly have been made by means of a separate application, lodged after the award of summary judgement. But there was no reason in principle

why it should not have submitted the request at the same time and in the same proceedings as its application for summary judgement. Nor had that course been an unsuitable one to follow. The notice of motion in the application had apprised the defendants' of the request. And no further evidence, no evidence in addition to that supplied by the papers in the application, had been required to support the request. For it emerged that from those papers that the hypothecation had secured the payment of the

particular debts in respect of which summary judgement was claimed and that the bond had provided for the hypothecated property to be declared executable in a situation of the sort which was alleged to have arisen."

On the basis of the abovequoted remarks by DIDCOTT J in FIRST NATIONAL BANK OF S.A LTD V. NGCOBO supra I am satisfied that relief sought under prayer three of the plaintiff's notice of application for summary judgement can be granted in these proceedings. In any event no objection was taken by Mr Mdluli who appeared for the defendant during the hearing. In the circumstances summary judgement is granted as prayed in terms of prayer 1, 2 and 4 of the notice of application for summary judgement. I further grant an order in terms of prayer 3 of the notice of application.

ALEX S, SHABANGU

ACTING JUDGE