

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

CASE NO. 614/2003

In the matter between :

SWAZILAND BUILDING SOCIETY

PLAINTIFF

AND

UMZIMNENE INVESTMENT COMPANY

(PTY) LIMITED

DEFENDANT

CORAM:

MAMBA AJ

FOR PLAINTIFF: ADVOCATE FLYNN

(Instructed by Cloete  
& Co.)

FOR DEFENDANT:

ADVOCATE KADES  
(Instructed by Zonke  
Magagula & Co)

**JUDGEMENT**

**29/09/06**

[1] By summons dated the 24<sup>th</sup> day of March, 2003 the plaintiff sued the defendant for

- (a) Payment of the sum of E249,502-62 in respect of monies loaned and advanced to the defendant in terms of a written loan agreement and mortgage bond dated the 02/10/1990,
- (b) Interest on the above sum of E249,502-62 at the rate of 17.25 percentum per annum from date of issue of summons to date of final payment,
- (c) An order declaring the property mortgaged by mortgage bond number 844/1990 to be executable, and other ancillary relief.

[2] After hearing final argument on the 14<sup>th</sup> day of August, . 2006 the case was postponed for judgement on the 25<sup>th</sup> August, 2006. On that date I granted judgement in favour of the plaintiff as prayed and indicated that my reasons therefor would be submitted later. These are my reasons for judgement.

[3] The following facts are either common cause or not in dispute:

- (i) On or about the 2<sup>nd</sup> day of October, 1990, the plaintiff lent to the defendant a sum of E175, 000-00 upon the terms and conditions contained in Mortgage Bond Number 844/1990 (hereinafter referred to as the Bond).
- (ii) (ii) It was a material term of the Bond that the Defendant would liquidate the said loan by making regular successive monthly instalments of E2764.00 or such increased or decreased payments as dictated or determined by the increase or decrease in the rate of interest from time to time and that such payments

would be payable on the last day of each month.

- (iii) On the date of the loan agreement the applicable rate of interest was 17.25 percentum per annum.
- (iv) It was a further term of the Bond that the capital outstanding from time to time would bear interest at the rate of 17.25% per annum or such increased or decreased rate of interest as would obtain in Swaziland from time to time.
- (v) The interest payable would be calculated and chargeable at the applicable rate, quarterly in advance on the balance remaining or owing from time to time.
- (vi) From about May, 1992, the plaintiff did not calculate and charge interest quarterly in advance but it charged interest monthly in advance.
- (vii) Exhibit B correctly reflects the applicable rate of interest from time to time over the relevant period.
- (viii) At all times material hereto, the plaintiff calculated and charged interest on the defendant's loan account at the rate stipulated in exhibit B, at any particular given period.

[4] The plaintiff alleges further in its summons that the defendant is in breach of its obligations in terms of the loan inasmuch as defendant has failed to make regular payments on due date and as at the 24<sup>th</sup> day of March, 2003 was in arrears with his payments in the sum of E80, 052.82. As a result of such breach, the plaintiff has exercised its rights of foreclosure and has demanded that the defendant must pay all sums owing, due and payable under the bond. The total sum due and owing as at 31<sup>st</sup> March, 2003 is E249,502.82 as stated in paragraph 1 above.

[5] In its defence to the above allegations, the defendant avers in paragraph 3.4.1 of its counter claim (which is incorporated in its plea) as follows:

"The plaintiff, however, calculated and debited interest on the loan to the defendant at rates higher than the said **mora** rate."

And at paragraph 3.5.1 further states that :

"The plaintiff, however, debited the defendant with unreasonable, unauthorised, unfair and excessive charges on the loan."

[6] One notes that the above averments by the defendant are general, they are lacking in specifics. There is no allegation for instance as to at what period in particular did the plaintiff charge interest at a rate higher than the **mora** rate and what the **mora** rate was at that given period, or in what way or manner were these charges unfair, unreasonable, excessive or unauthorised. Again, the unreasonable, unauthorised, unfair and excessive charges are not specified or indicated. The unreasonableness, unfairness, impermissibility and excessiveness of the said charges is not indicated.

[7] The defendant's counter claim was eventually not persisted in and the defendant did not lead any evidence in support of its case. Mr Kades for the defendant indicated during argument that the counter-claim was being abandoned and it was accordingly dismissed with costs.

[8] In support of its case, the plaintiff led the evidence of two witnesses. Exhibit A - A12 is the full history or statement of the defendant's loan account. It indicates the capital sum loaned

to the defendant; the various amounts paid by the defendant as or in lieu of instalments; it specifies the amounts debited to the account as interest and other charges and the various balances standing to the account from time to time. The various sums debited as interest were, according to Mr Norman Msibi, the plaintiffs Mortgage Manager, calculated according to the rate of interest stated in exhibit B as applicable from time to time.

[9] As stated under (vi) above, from about May 1992, the plaintiff began calculating and charging interest on the defendant's loan account monthly in advance instead of quarterly in advance as provided in the Bond. According to Mr Norman Msibi this was a conscious or deliberate decision taken by the plaintiff in an attempt to assist the defendant as calculating interest monthly resulted in the amount of interest charged on the defendant's account being lower than if it had been charged strictly in terms of the bond, that is to say, quarterly in advance. He explained, both in his evidence in chief and under cross examination, that as the defendant was required to make regular monthly payments, any amount paid on each month would reduce the balance owing and interest would be chargeable on that reduced or lower balance instead of the unreduced balance obtaining where interest is calculated and charged quarterly in advance. Charging interest quarterly in advance, so he said, did not take into account the monthly instalments that would eventually have been paid during that quarter under consideration and thus meant that interest was being charged and calculated on a higher or bigger balance. So, whilst charging interest monthly in advance was not strictly in terms of the Bond, it was to the benefit and or advantage of the defendant. In short, the defendant was not prejudiced or disadvantaged thereby. I accept this explanation by the plaintiff and hold that the defendant may not complain that it has received an unsolicited benefit or

advantage from the plaintiff.

[10] It was, however, conceded by Mr Msibi under cross examination and correctly so in my view, that where there are no monthly instalments paid and interest is calculated and chargeable monthly in advance, say for a period of 12 months, this would result in a higher amount of interest than where interest is calculated and charged quarterly in advance, other things being equal; on the same amount of capital, over the same period and at the same rate. In the present case this was not the case though as the defendant was required to and did make monthly repayments.

[11] It was argued on behalf of the defendant that the plaintiffs claim had to be dismissed because the plaintiff has failed to prove its claim as pleaded in its summons; namely that all interest and charges levied on the defendant's loan account were done in accordance with the loan agreement. Defendant argued that charging interest monthly in advance was not provided in the Bond. The Bond provided that interest be calculated and charged quarterly in advance. In my view, this argument cannot be sustained. It was conceded by the defendant in argument that if, for instance contrary to the terms of the Bond, the plaintiff had unilaterally decided not to charge interest on the account at all, the defendant would have no cause to complain for receiving this unsolicited advantage.

[12] In the result I make the following order :

1. Judgement is granted in favour of the plaintiff against the defendant for :

(a) payment of the sum of E249,502.62 as at 31/03/03.

(b) interest on the sum of E249,502.62 at the rate of 17.25% per annum from the 31<sup>st</sup> day of March, 2003 to date of payment.

(c) The property mortgaged by Mortgage Bond 844/1990 is hereby declared executable.

(d) Costs of suit on the scale as between attorney and client including collection commission and fees of Counsel to be certified under rule 68(2) of the rules of court.

2. The defendant's counter claim is dismissed with costs, such costs to include the costs of counsel as well.

**MAMBA AJ**