IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 948/2005

In the matter between

PAULOS SIMELANE Applicant

And

BONISILE MAGAGULA First Respondent

ILLOVO SUGAR LIMITED Second Respondent

In re:-

BONISILE MAGAGULA Plaintiff

And

PAULOS SIMELANE Defendant

Coram: J. P. Annandale, AC J

For the Applicant: Mr. W. Mkhatshwa of Mthembu, Mabuza Attorneys

For the First Respondent: Mr. B. Maphalala of Maphalala and Company

JUDGMENT

17 February, 2006

[1] Shylock, micro money lender or loan shark - William Shakespeare immortalised the ruthless exploitation of indigent borrowers of money at exorbitant costs in the "Merchant of Venice." To

satisfy a debt, the shylock had to extract his pound of flesh without causing a drop of blood to spill in the process. A likewise scenario has developed in Swaziland where moneylenders seek to extract their "pounds of flesh" but not caring how much misery, hardship and unlawful exploitation the impecunious but imprudent and unsuspecting borrowers are caused to suffer in the process.

[2] In the present matter, the court intervenes in a process whereby a moneylender sought to recover some E20 000 from a borrower who received E2 000 as a loan. Worst of all, the moneylender is adamant that she operates within the realm of legality and seeks enforcement by the court up to the last cent.

[3] It is a malpractice that causes misery to many Swazis who are bamboozled and cajoled into financial serfdom by moneylenders who charge unlawful enormous amounts of interest, which the borrowers ingratiatingly agree to, with the principal sum of money multiplied many times over by the time the borrower eventually regains financial freedom. The courts of the land have adversely commented on the scourge of this infamous exploitation but the legislature is yet to enact a regulated micro money lending industry. It must be done sooner rather than later if the lot of the common man and woman, the average citizen, is of any concern to those in the halls of power. The receiver of revenue may also stand to gain in the form of tax collection.

[4] The brief background of this matter is that on the 2nd day of May 2003, the applicant borrowed E2 000 from the first respondent. The document recording the transaction chronicles that on that date, at Big Bend, Bonisile Magagula gave E2 000 to Paul Simelane, to be repaid at "30% monthly until July - 3 months."

[5] It is common cause that the borrower failed to meet the terms of the loan and that it resulted in summons being issued against him in March 2005. The claim, which emanates from the loan of E2 000 as recorded above, now transformed itself into the following:-

> "*Payment of the sum of El 5 373-00 (fifteen thousand three hundred & seventy three Emalangeni) being in respect of monies loaned and/or advanced to the defendant at the defendant's own special instance and request and which despite lawful demand by plaintiff defendant has failed, refused and/or neglected to settle*".

[6] In addition, *mora* interest at 9% *per annum* and costs of suit were also claimed.

[7] No appearance was entered to defend the matter and judgment by default was entered in June 2005. The craftily worded particulars of claim, reading that the claimed amount was "in respect of monies loaned" and avoiding any mention of the capital sum

that was actually loaned and advanced, in all likelihood created sufficient subterfuge to persuade the learned Judge to grant the judgment.

[8] Thereafter, a bill of costs was (prematurely) taxed and allowed in the amount of E5 053-39. This resulted in the original loaned amount of E2 000 now being a colossus of E20 426.39, which amount resulted in a *nulla bona* report by the Deputy Sheriff. Thereafter, a garnishee notice was served on the debtor's employer, the second respondent, requiring an amount of E2 000 per month to be deducted from his salary. His normal earning without overtime subsidies or deductions is E2 326. No financial enquiry into his ability to repay the judgment debt and costs by way of instalments was conducted prior to deductions being made. Whenever the court (and not the judgment creditor) is of opinion that the debtor is able to satisfy a debt by instalments out of his earnings, it may make an order for payment of such debt by instalments. It is when the debtor makes default in such payment that any salary, earnings or emoluments that are due to the debtor that it may be attached and executed in instalments by way of a garnishee, without further notice to the debtor. This is regulated under Rule 45(13)(k) and (1), read with (a). Presently, the judgment creditor by-passed these steps and served a garnishee notice upon the employer forthwith, without it being authorised to do so by the court and without the debtor being given any opportunity to be heard in the matter. Effectively, it was a continuation of the

roughshod trampling of the borrower with no regard being given to the consequences.

[9] Due to various reasons as are comprehensively set out by the applicant in his application to have the judgment rescinded, have the garnishee set aside and to seek the matter referred for trial, he *prima facie* adequately explains why he did not enter an appearance to defend the action after he was served with the summons. The first respondent sets up a number of grounds as to why the judgment should not be rescinded, insisting the matter be left as it stands and that the execution process should continue. Figuratively, she wants the very last drop of blood to be squeezed out of a stone.

[10] I am disinclined to judicially consider the various aspects, merits or demerits of the rescission application or opposition thereto, save for one aspect. Firstly, it is not necessary to do so in view of the *ratio* of this judgment, secondly, during the course of hearing argument, the respective attorneys agreed to this singular aspect being determinative of the outcome of the matter. It would result in either the end of the matter or else it being dealt with on full trial of the merits.

[11] This aspect pertains to the legality, enforceability and validity of the original loan agreement between the parties.

[12] Prior to the matter being argued before this

court, the parties consented to a suspension of the garnishee pending finalisation of the application and costs were held over to be dealt with in due course, as confirmed by counsel before me. Also, at an earlier stage, the prematurely taxed bill of costs was taken care of. Due notice would be given to have the taxation done in accordance with the rules.

[13] In his rescission application, the applicant pleads the applicability of the trite principle of *ex turpi causa non oritur actio,* or more commonly understandably, that no action arises from a dishonourable cause or motive. For example, a woman cannot sue upon an unfulfilled promise made to her as consideration for illicit intercourse. The basis on which he makes this assertion of *ex turpi causa* is that the contract or loan agreement between the two parties allegedly falls foul of the statutory provisions of the Money-Lending and Credit Financing Act, 1991 (Act 3 of 1991) hereinafter referred to as "the Act". If anything, the other side might well be *in pari delicto (potior est conditio possidendis vel defenditis).*

[14] The court would not rigidly enforce this general rule but will come to the relief of one of the parties where such a course is necessary in order to prevent injustice or to satisfy the requirements of public policy *{Jajbhay v Cassim,* 1939 AD 537, applied in *Petersen v Jajbhay,* 1940 TPD 182). The court is also not only entitled but obliged to consider any question of public policy, including any policy which

may be laid down by the legislature in a statute *[Albertyn v Kumalo and others, 1946 W.L.D. 529).*

The contract on which the plaintiff relies as the original cause of action requires further scrutiny to determine whether *ex turpi causa* and *in pari delicto are* applicable or not.

In this regard, most innovative but totally unpersuasive argument was heard from the respondent's attorney, which essentially is two pronged. Firstly, the argument is that the loan agreement does not fall to be held at odds with the Act as the Act refers to "*percentage points*" and not the symbol "%" or "*percentum per annum*".

This distinction is not only academic in nature but also ignores the interpretation section (Section 2) of the Act, wherein "annual interest rate" is defined as "a rate calculated by multiplying the interest rate per period by the number of such periods in one year."

Applying simple arithmetic, a monthly interest rate of "30%" equates to 30 x 12 which equals an annual

> interest rate of 360% or 360 "percentage points", using the statutory reference to the rate of interest. The loan agreement, on which the first respondent *qua* plaintiff relies, reads that the principal debt, being "the cash amount

in money actually received by or on behalf of a borrower of money in terms of such transaction," i.e. a money lending transaction (section 2(a)(i) of the Act) of E2 000, to be repaid at "30% monthly", thus effectively carries an annual interest rate of 360%.

[19] Section 3 of the Act regulates the "maximum annual interest rates chargeable in respect of money-lending transaction(s)". It reads in part:-

"*3(1) where in respect of any money-lending transaction or credit transaction the principal debt* **-**

3. *... (less than E500 at 10%)...*

4. *exceeds E500 or such amount as may be prescribed from time to time, no lender shall charge an annual interest rate of more than 8 percentage points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time by the Central Bank under Section 38 of the Central Bank of Swaziland Order, 1974.*"

[20] From a plain, simple and logical interpretation of this statutory limitation of interest charges in respect of a money lending transaction of E2 000, the maximum permissible interest rate is 8% per year. No more.

[21] Neither of the attorneys bothered to establish whether the interest rate has been amended since 1991. Enquiries and research by the court are *prima facie* to the effect that in fact it has not been amended to date hereof.

[22] In light of the above, it is my considered and unequivocal view that the interest rate as agreed to by the parties at "30% per month" falls far beyond the maximum statutory limitation of 8% *per annum.*

[23] The matter does not end here. The second leg of the plaintiff s/first respondent's instructed argument is that the interest charges do not exceed the capital amount (the *in duplum* principle) but should it nevertheless be found as such, the statute overturns the common law *in duplum* principle and sanctions the claimed amount. I deal with the latter aspect first.

Section 7 of the Act was argued to negate the common law and the well deserving established principle that interest shall not exceed capital.

This section which determines "conditions for sums recoverable or default or deferment of payment" reads that:-

> "*7. Where a borrower or credit receiver* **-**
>
> *(a)fails to pay an amount owed by him when*

such amount becomes due; or (b) *enters into an agreement with the lender to*

defer payment of the amount owed by him; the lender shall be entitled to recover from him in respect of the finance charges an additional amount which shall be calculated by reference to the total amount due but which is unpaid, the annual finance charge rate at which the finance charges were initially levied on the principal debt and, as the case may be, the period during which the defendant continues or the period for which payment is deferred."

In my understanding of this provision, much more than the originally anticipated and calculated interest charges stand to be recovered when the borrower does not comply with the terms of repayment. It does not also imply that the additional interest charges are limitless, as was argued by the first respondent's attorney. It will be absurd to hold that this section provides a licence towards a never ending escalation of interest charges. If that is what the legislature intended, it would have clearly stated it to be so, having regard to the presumption that the legislature is deemed to be aware of common law principles and that it does not mean to change it unless expressly so done.

One need go no further than the present matter. The

amount claimed from the defendant/applicant, originating from a principal debt of E2 000, was almost 8 times as much.

The other aspect of the second leg of the argument is that the *in duplum* rule "has no relevance in this matter since the amount of interest agreed upon by the parties is not 'double' or equal to the amount of the principal debt."

This is a wholly oversimplified and incorrect manner of stating the true position. Yes, if as argued, 30% of E2 000 multiplied by three months, only amounts to 90% of the principal debt and that that is the end of the matter, it is one way of looking through the looking glass.

However, it needs to be considered that the interest rate is 30% interest per month, which equates in fact to 360% interest per year. This is in absolute stark contrast to the legally permitted interest rate, on loans above E500, of 8% interest per year.

The fallacy of this argument can be found in an understanding of what "*in duplum*" actually means.

"It is a trite principle of our law which comes from the Roman Law on which, of course, our law is based, that no interest runs - and therefore is claimable - after the amount of interest is equal to the amount of the capital. At that stage the right to further interest is extinguished. This principle has consistently been applied in South Africa (see *Union*

Government v Jordaans Executor 1916 TPD 411 at 413; *Van Coppenhagen v Van Coppenhagen* 1947(1) SA 567(T) at 581-582 and authorities there cited). When the interest due on the principal debt of E5000 equalled the said amount of E5000 it ceased to run and no more interest could accumulate after that." (See the (unreported) judgment of the Court of Appeal of Swaziland in *Reckson Mawelela vs Mbabane Association of Money Lenders and Another, Appeal Case number 43 of 1999 at page 9, the centre paragraph).* This is the factual and *de facto* position in Swaziland as of date and certainly does not lend any measure of support for the first respondent's contention that interest accumulates limitless when a borrower defaults.

In turn, I now revert to the applicant's contention of *ex turpi causa.* The first respondent correctly concedes that no rights and duties can flow from an illegal or void agreement, with the result that neither party can enforce it. See for instance Gibson: *South African Law, Visser's 8th edition, 2003* at page 57; *Cape Dairy & Livestock Auctioneers v Sim 1924 AD 167* at 170 and *Mathews v Robinowitz 1948(2) SA 876(W)* at 878.

An agreement which is either immoral or illegal is void of legal effect. The Digest, or *pandectae,* part of the *Corpus Civilis* was composed from the writings and opinions of a number of the most eminent jurists which developed Roman Law to a degree of high excellence, by custom, in the course of a thousand

years prior to the sixth century, when the *Corpus Juris Civilis* was compiled in 533 AD under the direction of Emperor Justinian. It has withstood the test of time so well, stating the elementary fundamental principles which have always regulated and will always regulate human conduct, leading to it being labelled "The great and authoritative storehouse of legal principle" (per Watermeyer J in *Dyason v Ruthven (1860)*

3 Searle 305). It has formed the basis of legal systems on the Continent, South Africa, Swaziland and elsewhere.

[33] In 2.14.27.4 the *Digesta* holds that *pacta quae turpem causam continent pacta non sunt observanda,* the rule generally quoted in the form of the English law maxim, *ex turpi causa non oritur actio (Conradie v Rossouw, 1919 AD 314).* It is something dishonest, disgraceful or vicious, a quality usually referred to by the generic term "immoral". An *injusta causa* /Unjust cause) or one which is illegal *(illicita)* is void (See *Conradie v Rossouw supra* and *Kennedy v Steenkamp 1936 CPD 116; Grotius 3.1.43; 3.30.17; Voet 2.14.16; 12.5.4* and generally, Wille's *Principles of South African Law, Gibson's 7th edition 1977* atpp 24 and 329).

[34] It is this unassailable principle of our law which impacts on the immoral and unacceptable fleecing of Swazi people like the applicant, which has manifested in Section 6 of the Act. It reads:

"*6 (l)Any agreement in connection with any money-lending or credit transaction that is not in conformity of this Act shall be null and void, and shall not be enforceable against the borrower or credit receiver by the lender.*

(2)No lender shall in connection with any money-lending or credit transaction obtain judgment for or recover from a borrower or credit receiver an amount exceeding the sum of-

(a) the principal debt owed by the borrower or credit receiver;
(b) the interest charges on the principal debt;
(c) the additional finance charges calculated in the manner prescribed by section 7;
(d) in the case where judgment is obtained for recovery of the principal debt or finance charges due from the borrower or credit receiver, legal costs, costs awarded in terms of such judgment.

(3)...."

[35] Accordingly, the Act in fact re-confirms the *in duplum* rule, which was not roughshod over and negated as was argued. It also prohibits a judgment

being entered as was inadvertently done herein and it furthermore entrenches the common law principle that a loan agreement such as the present is void *ab initio.*

[36] It is therefore that it is not necessary to deal with the other aspects that were brought in issue and argued when rescission of the judgment and setting aside of the garnishee notice was applied for. *Inter alia,* those issues pertained to the period of notice of the application after the judgment debtor became aware of the matter, the non-furnishing of security for costs, an alleged factual dispute relating to the amount already paid to the plaintiff by the debtor, the absence of a financial enquiry into the position of the judgment debtor and his ability to pay prior to serving of a garnishee notice, and suchlike issues that otherwise would have had to be considered and pronounced upon.

[36] Finally, it requires to be recorded that the conduct of the first respondent's attorneys of record, in accepting instructions to litigate and sue the plaintiff in the manner they did, thereafter to oppose the rescission application in the manner that it was done, is unconscionable conduct, to endeavour at all costs to enforce an unforceable debt, furthermore, to require of the judgment debtor's employees to deduct close to all of his normal monthly income, at an amount that is equal to the initial loaned amount of money, which if left unchecked, would have resulted in recovering at least ten times the original amount from the applicant. Attorneys, as officers of

the court, are required to uphold the legal principles, laws of the land and the human rights of others, despite improper instructions received from their clients. Censure of this conduct is reflected in the costs order below and no further action by the Law Society of Swaziland is required by this court. The society is however not bound by this view and may decide otherwise.

[37] Further, due to the statutory provisions of the Act referred to above and also the legal principles of void contracts and *in duplum* interest, plaintiff having wrongfully and incorrectly having sought and obtained a judgment that she is not entitled to, the matter is ordered to have the following results:

1. The judgment obtained by default herein is ordered to be set aside and it is rescinded.
2. The garnishee notice issued herein and served on the second respondent, already ordered to be stayed, is set aside. It is further ordered that any and all deductions made by the second respondent from the remuneration of the applicant be refunded to him forthwith by the first respondent/judgment creditor, if the deducted amounts have already been paid over.
3. It is ordered that no bill of costs presented by the first respondent shall be taxed or allowed by the Taxing Master.
4. It is declared and ordered that the money lending agreement between the applicant and

the first respondent, dated the 2nd day of May 2003 in respect of the amount of E2000 plus 30% interest per month thereon is void, unenforceable and that it is a nullity.

5. It is further ordered that as a result of part 4 of this order, *restitio ad integrum* shall be made between the parties no later than 14 days after date of this judgment. All monies received from or paid to the other shall forthwith be restored to the other. In the event of a dispute as to how much money has been paid by the applicant/defendant to the money lender, all amounts *prima facie* supported by documentary proof shall be restored forthwith, with leave being granted to institute appropriate legal action if so wanted, to recover any alleged remaining balance.

6. Costs: All legal costs occasioned by the applicant to obtain the relief as ordered herein, including costs relating to the order obtained on the 9th November 2005, shall be for the account of the plaintiff/first respondent, on the attorney and client scale. Such costs, on presentation of an account, which the first respondent/plaintiff may require to be taxed and vouched for by the Law Society of Swaziland, shall be paid no later than 21 days thereafter. In the event that this costs order is not strictly complied with by the first respondent/plaintiff, her attorneys of record shall be required to do so *de bonis propriis,* after which recourse may be sought against

their instructing client.

J.P. ANNANDALE
Acting Chief Justice