IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2497/07

In the matter between:

BONGANI MFANENI NKAMBULE APPLICANT

AND

SWAZILAND DEVELOPMENT

& SAVINGS BANK 1st RESPONDENT

MELUSI R. QWABE N.O. 2nd RESPONDENT

In Re :

SWAZILAND DEVELOPMENT &

SAVINGS BANK PLAINTIFF

AND

BONGANI MFANENI NKAMBULE DEFENDANT

CORAM: MAMBA J

FOR APPLICANT: MR M. NDLOVU

FOR RESPONDENTS: (NO APPEARANCE BY S.V. MDLADLA & ASSOCIATES)

JUDGEMENT

29th APRIL, 2008

[1] When this application appeared before me on the 13th December, 2007, the parties agreed, that the matter should be placed before me on the 8.30 roll on the 21st January, 2008. This was done after I had heard part of the argument by the Applicant. As there were two writs involved; one under the above case number and the other under case number 1982/07, I ordered that the file or court record under the latter case number should be made available to me, preferably before the 21st January 2008. This was done and on the 21st January 2008 the matter was postponed sine die.

[2] Later through my interpreter, I directed that the matter must be set down before me for continuation of argument on the 28th March, 2008 when I would be doing the contested motion court of that day. I was advised that both counsel were notified and the matter was accordingly set down by the Applicant's Attorneys for that date. The notice of set down appears to have been served on the Respondent's Attorneys and filed with the office of the Registrar on the 12th March, 2008.

[3] Throughout the various stages in the proceedings the Respondents indicated that they were opposing the application for the rescission and the setting aside of the relevant writs.

[4] On the 28th March 2008, the matter was called two times and on each of those occasions, the attorneys for the respondents

were not ready to proceed with the case.

[5] On the first occasion, Attorney Mr N. Mabuza from the Respondents' firm of Attorneys, told the court that the matter was being handled by Mr Mdladla who was however not available in court at the time. He applied for a postponement to the following week. The application was successfully opposed and the matter was stood down to the end of the roll on the application of Mr Mabuza, who had to get further instructions from Miss Mamogobo the attorney who had previously argued the matter on behalf of the Respondents. She was said to be in another court room within the High Court.

[6] When the case was reached and called for the second time neither Mr Mdladla, Mr Mabuza nor Miss Mamogobo were present in court. Mr Mkhwanazi informed the court that Miss Mamogobo had instructed her to apply that the matter be stood down yet again to allow her to finish her business in the other courtroom. This application was opposed by the Applicant's attorneys. I refused to stand the matter down yet again and ordered that it should proceed in the absence of the Respondents' attorneys who had been given due notification and who were apparently not ready to proceedj without any justification other than that attorney Mamogobo was engaged in another court. Despite being served with the notice of set down on the 12th March 2008, Respondents' attorneys had not sought and obtained adequate arrangement with the Applicant's attorneys or the Registrar of

this court on the further conduct of this application prior to today.

[7] The court took into account that, Mr Mabuza had initially sought a postponement on the grounds that Mr Mclladla was dealing with the application but when reminded that Miss Mamogobo was in fact handling it, he applied that it be stood down. Further, Mr Ndlovu, Counsel for the Applicant informed the court that his information was that though Miss Magogobo had indicated her willingness to attend to the application, she was reluctant to do so. This attitude by the Respondents' Counsel, which bordered on indifference or lack of interest in the matter to discourtesy to Counsel on the other side, did not merit a further indulgence from the court. The Respondents were afforded the opportunity to be heard. They spurned it. They may not complain that they were unfairly treated.

[8] I considered the merits of the application, as I had studied the files and heard arguments previously and granted it on the following grounds:
Rather strangely, two summonses (annexures D and E) for different amounts were sued out by the Registrar under the same case number (2497/07) on the same day; one for E84,939.63 and another for E35, 475.95 respectively. From the documents presented, the court did not grant judgement against the applicant in the sum E84, 939.63 although an application for default judgement in this amount was made on the 19th October

2007 together with a similar application for E35, 475.95. Maphalala J granted the latter application. Consequently no writ of execution could be issued by the Registrar in respect of a judgement that was never granted by the court.

[10] The acknowledgment of debt that was signed by the parties refers or relates to arrears, legal costs, Deputy Sheriff's fees and costs for preparing the acknowledgment itself and is in respect of those amounts only. It does not relate to the capital amount owing. Further, these arrears are in respect of the sum of E84, 939.62 and not the sum of E35, 475.95 (see annexure C at page 21 of the Book of Pleadings).

[11] Annexure 'A' (page 12 of the Book of Pleadings) states that the judgment for E84 939.63 was granted by this court on the 24th August 2007 under case number, 1982/07. This is obviously false as no such judgement was granted by the court. This is acknowledged by the first Respondent who states that the E84, 939.63 is the full amount owing which, because of the Applicant's breach of the acknowledgement of debt and settlement, became due and owing or payable. But as stated above, the acknowledgement of debt is for specific sums or amounts and it is those specific amounts or portions thereof that were to become due and payable upon breach of the agreement. Paragraph 10 (page 31) of the agreement specifically states that the 1st Respondent "shall be entitled to make this agreement an order of court... whereupon judgement shall be entered against the [Applicant] in terms of paragraphs 2.1 to 2.3 by consent of

the parties." These paragraphs do not relate to the capital amount owing but to arrears and costs.

[12] On the default judgement granted on the 19th October, 2007 the applicant states that he never received the summons upon which it was entered. His assertion is confirmed by his maid to whom the summons was given by the Deputy Sheriff.

[13] His defence is that he neither applied for the loan, nor was he granted such loan. First Respondent says he did apply for the loan and the loan was granted to him. The first Respondent points to annexure R (page 56) as evidence of the Applicant's explicit or implied acknowledgement of such debt. Applicant's answer to this is that this annexure is in respect of another matter or debt.

[14] I am unable to decide or resolve this dispute either way. It is a triable issue that if established may afford a defence to the Applicant. As a result it would be grossly unfair for the court to shut its doors to the applicant and deny him the opportunity to be heard on this matter. The principle that there should be finality or closure to court cases, must in my view, yield to the ***audi alteram partem*** rule in these circumstances.

MAMBA J