IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL TRIAL NO. 360/08A**

In the matter between:

PHINDILE SYLVIA MAZIBUKO APPLICANT

VS

SWAZILAND DEVELOPMENT
AND SAVINGS BANK RESPONDENT

CORAM: MONAGENG, J

FOR APPLICANT: MR. PAUL SHILUBANE

FOR RESPONDENT: MR. WELILE MKHATSHWA

JUDGMENT

4th JUNE 2008

[1] This is an application brought to this Court seeking a rescission of a judgment in default granted against one Phindile Sylvia Mazibuko, the applicant, who is a defendant in the main application wherein Swaziland Development and Savings Bank is the applicant. The applicant further seeks an order setting

aside a sale of execution of her immovable property scheduled to take place on the 16th June 2008.

[2] It is common cause that the Respondent Bank, Swaziland Development and Savings Bank loaned the sum of E63, 000 to the applicant on or about the 2nd September 1992. The Bank was to be repaid at the rate of E980 per month, over a period of 240 months and a bond was registered over the property. She was buying Lot 1442, Thembelihle Township, situated in the urban area of Mbabane, Hhohho region, Swaziland.

[3] Although her letter was not filed, it appears that on the 9th May 1995, the balance on the loan account was E63, 000 and she wrote to the bank asking the bank to reschedule her repayments.

[4] The respondent bank refused her request, and insisted on her depositing the sum of E43, 000 before they could consider a reschedule. She duly raised the amount of E43, 000 from the Swaziland Building Society, offered it to the Respondent Bank, but she says the bank refused the payment. This has not been denied by the respondent bank.

[5] Years later, specifically on the 28th January 2008, the respondent issued summons for the recovery of the capital sum and monies that she says had been debited to her loan

account without any agreement. This is the E322,961.97, subject matter of these applications. The applicant did not respond to the summons, except to request the respondent's attorney to approach respondent bank with a view to settling the matter out of Court, and giving him the letters outlining the above history of the matter.

[6] On the 28th February 2008, the respondent bank applied for a default judgment which was granted. The applicant approaches this Court for a rescission of the order, on the ground that according to the in ***duplum*** rule, in law, she cannot be liable to pay the respondent E322,961.97. Further that the amounts debited to her loan account were illegally debited.

[7] The applicant also takes issue with the form of the notice of sale, which she says does not comply with the ***peremptory proviso of Rule 46 (7) (b)*** of the Rules of Court, in that it makes no mention of the improvements on the piece of land ***inter alia,*** a dwelling house. She further contends that no writ of execution was issued against her in terms of ***Rule 46*** of the Rules of Court. She also says that no writ of execution was issued against movable property.

[8] The respondent on the other hand, argues that the matter, which has been brought to this Court on urgency, is not urgent

at all. In response to the contention that the amount accumulated and claimed violates the in ***duplum*** principle, the respondent asked the Court that in the event that the Court agreed with this assertion, the Court should consider varying the default order to the extent of calculating or ordering a calculation of the correct amount due, and confirming that amount.

[9] Alternatively the respondent contends that the interest charged immediately transformed into capital, therefore that the in ***duplum*** principle does not apply. The respondent further contends that the notice of sale complies with the Rules of Court. Respondent further says that it was not under any obligation to execute against movable property, so that plaintiffs averment that a writ of execution should have been issued does not apply.

[10] It should be noted that the sale of this property in satisfaction of this debt is scheduled for the 16th June 2008, and as correctly submitted by the applicant, this means that a consideration of this application under any circumstance is urgent, to avoid irreparable harm being done to the applicant's rights and interests, in the event a Court finds in her favour.

[11] Regarding the form of the notice of sale, it has become quite clear that there are developments on the piece of land and that logically if the lot is being sold, the development for

example, the house, is being sold with it. Quite clearly, the reason for a full description of the property to be sold, is to give prospective buyers a chance to appreciate the property to be sold, and to allow them to make an informed decision. This also protects the judgment debtor as he/she is able to benefit from maximum publication of his property to prospective buyers as required by law.

[12] It is clear to me that the notice describes the lot or a piece of land at the time it was registered more than ten years ago. The description as reflected in the notice cannot, by any stretch of imagination, be said to be reflective of the property to be sold as it is today, and cannot be said to be in compliance with Rule 46 (8) (b). It describes part of the property and as it stands, it has a real potential to turn off wouldbe buyers, and it is therefore misleading and prejudicial to the judgment debtor.

[13] I should also mention that this case is distinguishable from the case of ***Abraham Musa Mkhaliphi Civil v Swaziland Development and Savings Bank Case No. 557/1999.*** In that case, the property was an undeveloped piece of land-a farm and there could not be any other description attached to it but what was in the notice of sale. I find that the present notice is flawed and the defect cannot be cured at this stage.

[14] With regard to the writ of attachment of immovable property, again, it does not conform to ***Rule 46 (2)*** and Form

22, as submitted by applicant and it is therefore unacceptable and cannot stand.

[15] The submission that a writ of execution against this executable immovable property was not issued, per ***Rule 46 (1),*** has not really been addressed by the Respondent. There is no need to address this further. A writ of execution is required in law.

[16] I now turn to the in ***duplum*** rule or principle. This principle provides that interest should not exceed the principal debt. In this case, there was a principal debt - the E63, 000, an agreed rate of interest and there is an amount being claimed- the E322, 961.97. The law provides that a judgment debtor can raise this rule and that even in the event that the defendant does not raise it, the Court can raise it, if it is clearly applicable, from the evidence before the Court.

[17] In the case of ***the Standard Bank of South Africa Ltd v Oulanate Investments (PTY) Ltd*** (in liquidation 1998 (1) SA 811 (SCA) Zulman JA said, at page 834, "*It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate*". This is clearly a public interest principle, which raises a triable issue that cannot be resolved in these proceedings.

[18] Given the totality of these facts, I find that the applicant has made a case for the rescission of the default judgment that was granted on 27th February 2008. There are issues that should be resolved through fully fledged arguments, in the interest of justice.

[19] The default judgment is therefore rescinded, the notice of sale is set aside and costs shall be decided at the hearing of the main application.

SM MONAGENG
JUDGE

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