IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO. 3442/02**

In the matter between :

SWAZILAND BUILDING SOCIETY **PLAINTIFF**

AND

FONTEYN INVESTMENTS (PTY) LTD **DEFENDANT**

CORAM: MAMBA J

FOR PLAINTIFF:ADV. P. Flynn (Instructed by E.J. Henwood)

FOR DEFENDANT: Mr Z. Magagula

JUDGEMENT
08/08/2008

[1] In November 2002, more than 5 years ago, the plaintiff issued summons against the Defendant for payment of a sum of E362,581.78 being the full balance due and owing to it by the Defendant in respect of a loan secured by a mortgage bond. The initial amount loaned and advanced by the plaintiff to the defendant was a sum of E3000,000.00 and was to be repaid in instalments of E4,701.00 per month or such increased payments as may be due as a result of increase in the rate of interest applicable from time to time. The capital outstanding was to bear interest at the rate of 17.4% per annum or such increased rate of interest which the plaintiff may levy upon notice to the Defendant.

[2] At the time of launching this action, the plaintiff alleged that the Defendant was in breach of the agreement by being in default with its monthly instalments and was in arrears in the sum of E109, 835.24. As a result of this, the plaintiff decided to exercise its right of foreclosure and called upon the defendant to pay the full amount due and payable under the Bond and other ancillary relieves, including an order declaring the property mortgaged by Mortgage Bond No. 63/1992 to be executable.

[3] For various reasons for which neither of the parties herein is to blame the matter could not go on trial until the 10th June 2008. By this time the plaintiff's particulars of claim had since been amended and reflected that the full balance due and owing by the defendant as at 1st February 2008 was a sum of E768.112.54 and the interest rate applicable at the time was 15.25% per annum. This is the amount and the other ancillary relief that is claimed in this action.

[4] In its defence the defendant pleads that it has paid a total of E522,012.55 to the plaintiff and this amount was enough or sufficient in discharging its obligations towards the plaintiff in respect of the loan in question. This plea is further amplified or expanded on by the defendant as follows:

> "7.2 ...at the time of the last payment made by the Defendant, and in terms of the law, it had paid the capital amount as well as the interest (recoverable in terms of the agreement and the bond) as well as any lawful charges.
>
> 7.3 ... the plaintiff was only entitled to recover to the aggregate amount, comprising the capital and interest up to the initial capital debt of E300,000-00. [and]
>
> 7.4 ...that contrary to the bond conditions plaintiff did not calculate interest at the rate of 17.4% per annum, calculated and chargeable quarterly in advance. Defendant states that plaintiff calculated the interest and charged it in advance

on a monthly basis.... [And apparently with reference to the in duplum rule.]

8.4 Defendant states that in terms of the law the aggregate amount due to the plaintiff, cannot exceed E600.000-00 based on the capital and interest, [and in any event] the plaintiff has debited interest on the loan incorrectly and not in accordance with the terms of the agreement."

The last reference to the incorrect calculation of interest is of course a reiteration of what is stated by the defendant under paragraph 7.4 of its plea (quoted above).

Lastly, the Defendant avers that "...the applicable interest rate as at February 2008 was 15% [per annum]."

[5] In proof of its claim, the plaintiff only led the evidence of Mr Norman Msibi who is its Mortgage Manager. The Defendant did not lead any evidence in support of its defence or plea.

[6] Mr Msibi testified that the loan under consideration was a business loan and interest thereon was charged at 0.75% above the prime lending rate. Exhibit C which is a comparative table of interest rates between Swaziland and The Republic of South Africa from 1995 to April 2008, shows the prime lending rate as at 1st February 2008 as

14.50% per annum. When 0.75% is added to this the total rate of interest chargeable on the loan at the relevant period is 15.25% and not 15.00% as alleged by the Defendant. Defendant is clearly in error in his plea in this regard. I should perhaps also add that the Defendant did not dispute or challenge the contents of annexure C.

[7] I turn now to examine the Defence based on the in duplum rule. Later, I shall deal with the issue pertaining to the allegation that the plaintiff

wrongly or incorrectly charged interest on the account by charging interest monthly in advance instead of quarterly in advance. The in duplum rule has been the subject of discussion in several cases in this jurisdiction and in South Africa and Zimbabwe. In **SHISELWENI INVESTMENTS (PTY) LTD v SWAZILAND DEVELOPMENT AND SAVINGS BANK** (Appeal Case 50/99) our Court of Appeal (now the Supreme Court) in a judgement delivered on 12/12/00 referred with approval to the law as stated in the Zimbabwean and South African judgments as follows:

> "In **COMMERCIAL BANK OF ZIMBABWE v W.M. BUILDERS SUPPLIES (PTY) LTD 1997 (2) SA 285** the following passage is quoted as to what should be shown by a bank:
>
> "The amount of the capital due, the total amount of interest due thereon as at a specified date, whether or not interest on the total amount is claimed and, if so, the amount in respect of which the interest is claimed and the date with effect from which the interest will run in the case of a claim relating to a bank overdraft, the papers should show the total amount of the debt claimed and, separately, the total capital amount loaned by the bank to the client, the total amount of interest due thereon as at a specified date, and if appropriate the total amount due in respect of bank charges, cheque books etc and the interest, if any, due thereon at a specified date. If the client has made any payments in respect of the overdraft account, the papers should specify the total amount paid and also how the payments have been appropriated...
>
> ...In STANDARD BANK OF SOUTH AFRICA LTD v ONEATE INVESTMENTS (PTY) LTD **1988 (1)** SA **811** (SCA) the court dealt, inter alia, with the in duplum rule. It held that the rule, which provides that interest stops running when unpaid interest equals the outstanding capital, is a rule based on a public policy designed to protect borrowers from exploitation by lenders. As such it cannot be waived by borrowers, and cannot be altered by banking practice. The practice by bankers of capitalizing unpaid interest does not result in interest losing its character as interest, and certainly not for the purposes of the in duplum rule (see the judgement of Zulman J.A. at p 828 D-E and E-I and the cases

there cited)."

These cases were also followed by this court in the case of **SWAZILAND DEVELOPMENT AND SAVINGS BANK v MARK MORDAUNT & ANO** (Case 1836/97 delivered on 05th June 1998).

[8] In casu, the plaintiff admits that the defendant made payments totaling E523,857.06 in respect of the loan under consideration but aver that this was not enough as it mostly went towards the payment of interest as it was applied and or allocated first towards payment of such (before the capital outstanding from time to time).

[9] The detailed history of the loan account from inception to the 1 August 2002 lists or shows all the credits and debits that were made on the account. One of such debits is a sum of E18 500.00 which was a further advance by the plaintiff to the defendant on the 13th January, 1998. In real terms therefore, the total amount loaned and advanced to the defendant by the plaintiff is a sum of E318,500.00. This, I should add, is conceded by the defendant. Compound interest was being charged, that is to say, interest charged on the balance due was being capitalized. I should point out as discussed below that this exercise did not, in law, mean that upon capitalization such interest lost its character as interest.

[10] It is common cause that the defendant's last payment of its instalments was a cheque payment of a sum of E4, 000-00 and this was on the 6th August 2001. Upon payment of that amount, the loan account reflected a sum of E301, 009.26 as the full balance owing by the defendant. I observe further that prior to this payment, the defendant's monthly instalments were inconsistent inasmuch as the amounts varied or fluctuated, especially

towards the end of this period. In the **Standard Bank case (supra)** at 827H-834F ZULMAN JA (with whom all the other judges concurred) said the following concerning the in duplum rule and capitalization of interest:

> "Before I turn to deal with capitalization as an issue in this case, it is convenient to refer first to the in duplum rule which is undoubtedly part of our law. It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment interest drops below the outstanding capital, interest again begins to run until it once again equals that amount. **(LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A).)**

It is common cause that, subject to what is later said concerning appropriation, when summons was served the interest element of the claim did not exceed the amount of the outstanding capital and, for that simple reason, the application of the rule did not arise at that stage. Because of the delays in the litigation the in duplum rule only became of concern well into the life of the litigation. Because of this, a number of subsidiary questions arise. The first concerns capitalization. (The other will be dealt with subsequently.) It reared its head in response to the plea of in duplum. What the bank then alleged was that, due to the practice of banks to capitalize interest, interest once capitalised loses its character and becomes capital. Therefore the in duplum rule cannot apply to overdraft accounts. This practice, it was alleged, is long established, notorious, reasonable, certain and does not conflict with the positive law. The capitalization response gave rise to an extensive excursus in the judgement of the Court a quo (at 560G-572E).

A moment's reflection brings one back to the basic question of whether the pleaded legal effect of the commercial practice to capitalize is in conflict with a rule of positive law (the in duplum rule) which the parties cannot by agreement or conduct alter - in Africakaans, 'dwingende positieve reg' (Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd 1973 (2) SA 642 (C) at 645H). The Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd and Others and Three Similar cases 1997 (2) SA 285 (ZH) case correctly, I believe, held that the in duplum rule could not be waived (at 321D-322D). So, too, Leech and Others v ABSA Bank Ltd [1997] 3 B All SA 308 (W) at 314G-H. The rule is one based on a public policy designed to protect borrowers from exploitation by lenders (LTA Construction Bpk v Administrateur, Transvaal (supra at 482F-G)). As such it cannot be waived by borrowers and cannot be altered by banking practice (cf Morrison v Anglo Deep Gold Mines Ltd 1905 TS 775 at 781 and Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719 at 734-5)...

An examination of the bank statements in this matter reveal simply that compound interest was

charged and added to the previous balance. Plainly if the bank was entitled to capitalize interest in the sense suggested by the plaintiff, namely to regard each charge of interest as going to increase the capital mount of the debt, this would make serious inroads upon the in duplum rule. If interest were to become capital the capital amount of the debt would always be increasing and the bank would run no risk of a lesser capital amount being the subject-matter of the rule.

As correctly pointed out by Mr Rogers the practice of 'capitalisation' of interest by bankers does not result in the interest losing its character as such for the purposes of the in duplum rule. Furthermore, if lenders were entitled to employ the expedient of a book entry to convert what is interest into capital, this would afford an easy way to avoid not only the in duplum rule but also the provisions of the Prescription Act and the Usury Act 73 of 1968 (where such provisions would otherwise be applicable). When interest is compounded it remains interest. (Compare Rooth & Wessels v Benjamin's Trustee and The Natal Bank Ltd 1905 TS 624 at 633-4 and Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587 (W) at 600 B-F.)

With reference to both English and South African authorities, **Selikowitz J** correctly summarized the law on the matter in the following terms:
'After considering the evidence and weighing the views of the many eminent Judges referred to above, I conclude that there is no basis for saying that the interest debited by a bank to an overdrawn current account and added to the total amount outstanding loses its character as interest and becomes capital or anything else. The debit balance shown in a customer's bank statement is made up of separate debits, each one of which has its own identity and origin. Some arise from moneys lent and advanced, others from the bank's service charges or commissions, still others from taxes or even from the sale to the customer of stationery such as cheque or deposit books. The lumping together of all the amounts which are owed to the bank and which remain unpaid does not change their origin or their nature.' At 572A-C.)
In a carefully reasoned judgement in the High Court of Zimbabwe in Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd and Others and

Three Similar Cases supra at 304D-311H, Gillespie J (Smith and Blackie JJ concurring) - again after considering the effect of both English and South African cases and after receiving evidence on affidavit of banking practice much to the same effect as the evidence led in this matter - reached the same conclusion on this issue as did Selikowitz J.

Counsel for the bank in their heads of argument submitted that the passage in the judgment of Botha JA in Du Toit en 'n Ander v Barclays Nasionale Bank Bpk 1985 (1) SA 563 (A) at 568D-H supported, at least by implication, the proposition that once interest is capitalized it loses its

quality as interest. The way I read the remarks, they were not intended to be of general application but only to be of application to the particular facts of the case being considered by the Court. In any event it seems to me that the remarks are obiter and, insofar as they may be inconsistent with the authorities to which I have referred, I have to disagree respectfully.

Appropriation of payments

The significance of how to properly appropriate payments admittedly made by **Oneanate** to the bank assumes importance in deciding the capital amount of the debt owing to which the in duplum rule was to be applied. As was pointed out, it is common cause that, subject to the argument concerning appropriation, when summons was served the interest element of the claim did not exceed the amount of the outstanding capital. By allocating payments to the account to capital and not to interest the court a quo was able to apply in duplum rule to the debt prior to summons. **Selikowitz J** proceeded to develop special new rules concerning appropriation for banks and like institutions (at 573F-576E).

He held, applying the so-called rule in Clayton's case (Devaynes v Noble; Clayton's case (1816) 1 Mer 572 (35 ER 767; [1814-23] All ER Rep 1)), that, 'in the absence of effective appropriation by the customer or the bank, the rule in Clayton's case applies in our law to current accounts with banks for so long as the account is not affected by the jn duplum rule. As soon as and for so long as the in duplum rule suspends the running of further interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital.' (At 576C-D.)

Clayton's case concerned the appropriation of payments made into a bank account. Sir William Grant MR, after setting out the general principles relating to appropriation of payments, recognized the debtor's right to make an allocation and, in absence thereof, the right of the creditor to appropriate. He found a conflict of principle as to whether the creditor was entitled to exercise any such right ex post facto. He considered it unnecessary to resolve such conflict in the circumstances holding that:

'But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1 000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all

accounts current are settled, and particularly cash accounts...

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished.' (At 793 of the English Reports.)

As pointed out by **Gillespie J** in his discussion of Clayton's case in the **Commercial Bank of Zimbabwe case supra** at 316H-317A, it is important to note two distinguishing features: First, the facts in the matter showed a system of accounting involving a passbook issued to the customer showing the bank as debtor, the customer as creditor and ruled in two columns for debtor and creditor with chronological entries on each side as the transactions were effected. Second, the competing debits in issue in Clayton's case were all capital debits.

Additionally, as pointed out by Gillespie J, due regard must be had to the words 'presumably it is the sum first paid in that is first drawn out' in the dictum quoted above. The significance of these latter words is demonstrated in Deeley v Lloyds Bank Ltd [1912] AC 756 (HL) at 771 where Lord Atkinson commented as follows: 'It is no doubt quite true that the rule laid down in Clayton's case is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case, by evidence going to shew that it was not the intention of the parties that it should be applied.'

On the facts of Deeley's case it was held that the presumption had not been displaced and that payments made to the debtor's account after notification of a second mortgage bond ought to have been taken as having been appropriated to an earlier indebtedness, namely that under a first mortgage bond. (In this case there was a competition between two capital debts and not between capital and interest components of the same debt as is the situation in casu).

The following remarks of **Gillespie J** in the **Commercial Bank of Zimbabwe** case supra at 318B are particularly apposite:

'The important principle once again is that the so-called rule in Clayton's case is no more than a factual presumption arising from the general circumstances pertaining to the keeping of a current account by a banker in the absence of any express appropriation by either party.'

There is thus clearly no room for the operation of the Clayton presumption where the facts of the case do not support such a presumption. The facts in casu certainly do not support any such presumption. Oneanate's account was certainly not 'ruled' in the manner described in Clayton's case nor does any question of two competing capital debts arise...

The tiate from which interest is to run

A further question which arises in regard to the application of the in duplum rule is whether, if during the course of litigation the double is reached, interest stops running and only begins to run again once judgement is pronounced. There is no dispute that in this case the bank is entitled to interest as from the date of judgement at the agreed rate and in spite of the double having been reached. The finding of the Court a quo (at 578F-H) that the bank was entitled to statutory mora interest only was based on Stroebel v Stroebel 1973 (2) SA 137 (T) at 139C-E, but Stroebel's case did not say that.

Stoebel's case is, however, authority for the proposition that, in spite of the contrary view of Van der Keessel *Praelectiones* ad Gr 3.10.9-10, if the duplum has been reached, interest does not again commence to run *pendente lite.* The **Commercial Bank** case supra at 299B-300F followed suit. Van der Keessel relied upon a decision of the Hooge Raad which could not be traced and Mr Rogers' researches point to the probability that Van der Keessel either had access to Scheltinga's lecture notes on De Groot (loc cit) (Scheltinga had been his teacher) or that they both used the same source. Scheltinga, incidentally, was first published in 1986 due to the efforts of Professors De Vos and Visagie. Van der Keesel was unaware of other Hooge Raad judgements since made public by the publication of Van Bynkershoek's notes. There are two, Obs Turn 267 and 738, brought to our attention by Mr Rogers that can be interpreted to state otherwise. Due to the paucity of the facts recited by Van Bynkershoek, it is not easy to assess the impact of these cases.

Because of the low rates of legal interest in olden times, this question could not have been one that would have arisen readily before the era of hyperinflation and excessively high rates of interest. The very limited references to the question in the authorities and the absence of a decision in our case law before Stroebel's case in 1973 make this clear....

I agree with Mr Rogers that the in duplum rule with which Carpzovius was concerned differed from that applicable in Holland, or for that matter in Friesland, because it is premised on the view that ordinarily no further interest could run once a debtor had paid an amount of interest equal to the capital. In the light of this I am not prepared to consider his views on the subject as being of any persuasive authority.

But Huber also dealt with the same principle in his *Praelectiones luris Civils ad* 22.1.29. His reasoning there is that since judgment novates the original debt, interest can again being to run on the novated capital amount as from the date of judgement. Sande Dec Cur Fris 3.14.11 express a slightly divergent view. He allows interest to run on the debt as novated by judgement,

but adds logically, if novation is the test, that the interest element of the judgement also attracts interest. In effect, what he holds is that, if the judgement is for Ra capital plus Rb interest (b may equal but not exceed a), after a short legal respite, judgement interest can run up to 2 (Ra + Rb). Neither Huber nor Sande's reasoning is in consonance with our law, simply because a judgement does not in a real sense novate the debt (Swadif (Pty) Ltd v Dyke NO 1978 (1) Sa 928 (A).

It might at this stage be helpful to repeat the justification for the jn duplum rule. (There is a useful collection of authorities in the judgement of Boruchowitz J in **Leech's** case supra at 313C-314D.) 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. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double. Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it. A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process.

The present case is a good illustration of such delays. Summons was served in November 1990, the trial commenced in June 1993, the final judgement of the Court a quo was given in May 1995. This appeal was heard in August 1997. If one accepts that interest and indeed compound interest is 'the life-blood of finance' in modern times I am of the opinion that one should not apply all of 'the old Roman-Dutch law to modern conditions where finance plays an entirely different role' (per Centlivres CJ in Linton v Corser 1952 (3) SA 685 (A) at 695H). (See also the remarks of Kotze JA in West Rand Estates Ltd vs New Zealand Insurance Co Ltd 1926 AD 173 at 196-7 dealing with the question of mora).

> Once judgement has been delivered the question again arises as to what the public interest demands. It is arguable that the creditor is in duty bound to execute and bring to a close the further accumulation of interest. That can be achieved by accepting the approach adopted in the Commercial Bank case supra at 300G-I that interest on the amount ordered to be paid may accumulate to the extent of that amount, irrespective of whether it contains an interest element. This would then mean that (i) the in duplum rule is suspended *pendente lite,* where the *lis* is said to begin upon service of the initiating process, and (ii) once judgement has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgement."

I am in respectful agreement with these views by the learned judge of Appeal.

[11] In the present case, the evidence shows that at the issue of summons in November 2002 a sum of just over E330 000,00 had been advanced to defendant by the plaintiff-since inception of the loan and bond agreement. This amount comprised a sum of E318,500.00 actually advanced to the defendant plus a sum of E11 522.87 paid by the plaintiff on behalf of the defendant in respect of insurance for the mortgaged property. At the same period, the total amount of interest charged on the account was a sum of E553,550.97, whilst total instalment repayments by the defendant amounted to E523,857.06. This does not require a great deal of mathematical calculation to realize that these repayments by the defendant are E29, 693.91 less than the amount of interest that had been levied on the loan during this period. This again, is not denied by the defendant, but of course the defendant's averment that the plaintiff unlawfully and incorrectly charged interest, impacts on this. I examine this later in the judgement.

[12] Defendant's contention that the in duplum rule protects it from being charged interest in a sum of more than E300 000.00; that being 100% of the capital advanced to it, is with respect, not an entirely correct postulation or statement of the rule. It is not incorrect of course in situations like the two local cases I have referred to above, where the debtors had made no instalments at all and the amount charged for interest had reached the double. Where, however, some payments have been made the rule is that the amount of interest claimed at any given period may not exceed the amount of capital

owing at that particular period. Such that a debtor may continue paying interest indefinitely. **Gillesppie J** expressed this as follows in the **Commercial Bank of Zimbabwe @ 303C-D** case (supra):

> "In conclusion, the result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues a simple or compound interest, ceases to accumulate upon any amount of capital owing, whether the debtor arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of capital outstanding. Upon judgement being given, interest on the full amount of the judgement debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgement debt, being the capital and interest thereon for which cause action was instituted."

The thrust of or central to the in duplum rule is the separation of or distinction between capital and interest in relation to loans. The line of demarcation between the two must be kept clear. Any blurring of the line may lead to the very evil that the rule seeks to prevent and thus render it meaningless. **Selikowitz J** in the **Standard Bank of South Africa Ltd v ONEANATE INVESTMENTS (PTY) LTD 1995 (4) SA 510 (C) @ 572** after reviewing and analyzing many authorities on the issue stated that:

> "After considering the evidence and weighing the views of the many eminent Judges referred to above, I conclude that there is no basis for saying that the interest debited by a bank to an overdrawn current account and added to the total amount outstanding loses its character as interest and becomes capital or anything else. The debit balance shown in a customer's bank statement is made up of separate debits, each one of which has its own identity and origin. Some arise from moneys lent and advanced, others from the bank's service charges or commissions, still others from taxes or even from the sale to the customer of stationery such as cheque or deposit

books. The lumping together of all the amounts with are owed to the bank and which remain unpaid does not change their origin or their nature. Words like "capitalization" are used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects the nature of debit. Interest remains interest and no methods of accounting can change that."

This was echoed by **Gillespie J** in the **Commercial Bank of Zimbabwe** (supra) at 315E-F where the learned judge said:

"To summarise thus far, the duplum rule as defined above, applies to all debts where a capital sum is owing together with interest thereon at an agreed rate, including bank overdrafts. The term 'capitalisation', where it is used in connection with the debiting of unpaid interest, means no more than the charging of compound interest, and does not signify that interest so capitalized has lost its character as interest and is to be excluded from reckoning for the purposes of the duplum rule."

[13] In easy, the plaintiff has submitted what I have referred to above as a statement laying out the history of the loan account. This history is, however, very brief and wanting in detail on the issues relevant to the in duplum rule or defence raised herein. The statement admittedly reflects annotated debits and credits to the Account and the total amount owing. What is significant though about this balance is that there is no allegation or proof as to how much of that amount constitutes the capital and how much is interest; or put differently; of the several sums paid by the defendant how much was appropriated towards the capital. The statement indicates that at one point the total amount owing was a sum of just over

E260.000.00. This indicates that part of the capital sum had been paid. The summary of the statement referred to above showing total interest charges and total payments by the defendant does not adequately address this issue.

[14] One would have expected that where there have been substantial payments, as in the present case, and an allegation that the in duplum rule has been breached, the plaintiff would find it appropriate to present evidence detailing what amount is claimed in respect of the capital and also the amount claimed in respect of interest, separately. The plaintiff did not lead this evidence. It is not enough in my view to argue that at the time of the issue of the summons the total amount due had not reached the double of the amount actually advanced or loaned to the defendant; that is to say, E600 000-00. That in any event is not the double in issue. The relevant double is that of the capital amount owing at the relevant time, which has not been stated herein.

[15] I do not, unfortunately, consider it the duty of the court to sit down and analyze the combined loan account herein and separate each transaction and classify or categorise each debit and credit in order to ascertain what of that total amount claimed constitutes capital and what constitutes interest. That is the responsibility of the plaintiff to lead the necessary evidence from which the court may determine these issues. Again I refer to what Gillespie J stated @ 324 in the **Commercial Bank of Zimbabwe** case; namely:

> "There are undoubtedly many capital debits over that period, so too are there many interest debits, and precious few credits. I do not consider it to be my function to attempt to analyse a considerable set

of poorly photocopied ledger pages, all unidentified unauthenticated and unsupported by evidence or explanation. I would decline to undertake this accounting task, even if it were possible to determine the capital and interest components of a properly supportable opening balance." (There is no complaint about the quality of the papers filed herein)

[16] In the circumstances, the plaintiff's claim cannot succeed and it is dismissed with costs. As in the MM BUILDERS case in the **Commercial Bank of Zimbabwe case (supra),** this does not constitute a judgement for the defendant. The plaintiff is at liberty to pursue its claim anew on fresh papers, if so advised.

[17] Although it is not necessary for me, because of the above conclusion to consider the correctness of the interest charges as raised by the defendant I find it appropriate to make the following observations.

[17.1] The plaintiff accepts that in terms of the bond agreement interest on the loan was to be charged quarterly in advance on the amount of capital outstanding, and not monthly in advance even after the commencement of the first quarter after the granting of the loan. The plaintiff argues that it unilaterally decided to charge interest on a monthly basis because this was to the advantage or benefit of the defendant. The Plaintiff contends that since the defendant was required to make monthly instalments these instalments had the logical effect of reducing the balance owing, each month and therefore calculating and charging interest monthly was to the benefit of the defendant as such interest was calculated on a reduced sum owing as compared to it being calculated and charged quarterly in advance; on an unreduced amount, (at least for that quarter).

[18] Mr Msibi's assertion on this point was, however, qualified. He said this was to the advantage of the defendant because the defendant was expected to honour his obligations to make monthly instalments. So, as long as the defendant paid its monthly instalments, the benefit accrued to it. However, it should be remembered that the defendant stopped making payments altogether in August 2001 but the plaintiff continued charging interest monthly instead of quarterly. My preliminary rough calculations would seem to suggest that this was more burdensome on the defendant than where the interest had been charged and calculated quarterly in advance. The margin is not that substantial, I believe.

[19] In order to succeed, it is not enough for the defendant just to show that it did not authorize or acquiesce to the act complained of. It must go further and prove that it was prejudiced by the said act. The defendant has neither pleaded nor shown that it was prejudiced or placed in a worse off position than it would have otherwise been by this unilateral measure by the plaintiff. I do not think that the defendant can legitimately complain that it was prejudiced by this unsolicited advantage or benefit unilaterally extended to it by the plaintiff.

MAMBA J