**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE CASE NO. 876/2001

In the matter between:

**DUMSANI MKHONTA** **1ST APPLICANT**

**EMAHLUNGWANE (PTY) LTD** **2ND APPLICANT**

and

**SWD. DEV. & SAVINGS BANK** **1ST RESPONDENT**

**FLORA DUBE N.O.** **2ND RESPONDENT**

In re:

**SWD. DEV. & SAVINGS BANK** **PLAINTIFF**

**and**

**DUMSANI HARRINGTON MKHONTA**
**t/a EMAHLUNGWANE (PTY) LTD** **DEFENDANT**

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|---|---|---|
| CORAM | : | Q.M. MABUZA –J |
| FOR THE APPLICANTS | : | ADV. L. MAZIYA<br>INSTRUCTED BY<br>MR. T.L. DLAMINI |
| FOR THE RESPONDENTS | : | ADV. VAN DER WALT<br>INSTRUCTED BY CURRIE & SIBANDZE |

## RULING 22/8/08

[1] This application was brought on a certificate of urgency wherein the Applicant sought the following prayers:

1. **Dispensing with normal provisions of the rules of this Honourable Court relating to form, service and hearing this matter urgently.**

2. **Condoning Applicant's non-compliance with the rules of this Honourable Court.**

3. **Condoning Applicant's late filing of this application.**

4. **That the Respondent be and is hereby directed and ordered to produce loan agreement(s) entered into by and between Applicants and Respondent under Account Numbers 5L569603, 11615690, 116168343, 111202206 or any other account**

5. **That the Respondent be and is hereby directed and ordered to produce a reconciled statement of account under account numbers 5L569603, 11615690, 116168343, 111202206 or any other account showing amounts paid by Applicants to Respondent and vice-versa.**

6. **That the Respondent be and is hereby ordered and directed to produce a certificate of indebtedness under account number 5L569603, 11615690, 116168343, 11202206 or any other account relating to Applicants.**

7. **That the judgement of the above Honourable Court under Case Number 876/2001 be and is hereby stayed pending finalisation of this matter.**

8. **That the sale in execution of Lot No. 377, Pigg's Peak Township, be and is hereby stayed and/or suspended pending finalisation of this matter.**

9. **That the order of this Honourable Court granted on the 27th May 2001 under Case Number 876/2001be and is hereby varied, set aside and/or rescinded.**

10. **That prayers 1, 2, 3, 4, 5, 6, 7, 8 and 9 operate with immediate effect as an interim relief pending finalisation of this matter on a date to be determined by this Honourable Court.**

11. **Costs of suit at the scale of attorney and own-client.**

12. **Any further and/or alternative relief.**

[2] The facts herein are that the Applicant signed an acknowledgment of debt on the 13th September 2000 in which he acknowledged that the second Applicant was indebted to the 1st Respondent in the following amounts:

**1.1 Real Estate L/A No 116156960 - E1,237,468.43**

**1.2 Business L/A No. 116168343 - E93,782.40**

**1.3 Business L/A No. 111201106 - E75,808.61**

The use of the word "Plaintiff" presupposes that an earlier action was instituted against the applicant, after which the acknowledgment of debt was drawn up but

the court was not apprised of a possible earlier action.

[3] The acknowledgement of debt was used to launch the present proceedings sought to be rescinded. The Bank's attorneys issued provisional sentence summons against the applicants and obtained judgment on the 27th May 2001 against them. It is not clear who the Plaintiff is that is referred to in the acknowledgment of debt and why has she/he/it has not signed the acknowledgement of debt. It is not clear with whom the debtor was contracting. I agree with Mr. Maziya that there should be two parties to the acknowledgment of debt. The acknowledgment of debt does not state whether the Plaintiff is the Swazi Bank or not. It merely states the "Plaintiff" who remains undisclosed. It could be anybody making false claims upon false amounts.

[4] It is trite knowledge that the Swazi Bank normally registers mortgage bonds against the immovable property of a debtor. It would have been easy for it to found its action on such a bond: to use the bond to issue provisional sentence summons instead of drawing up an acknowledgment of debt for such a purpose. It would seem that the acknowledgment of debt was prepared in order to improve a poor case. A bond is so

much better evidence.

[5] Suppose that the acknowledgment of debt was drawn up to improve a poor case why was the ***in duplum*** rule not taken into account and the correct amounts stated? The amounts of E60,000.00 and E30,000.00 that were disputed by the bank surfaced only after the acknowledgment of debt was signed. When these amounts were subtracted and the ***in duplum*** rule applied the figure of E1,407,059.44 was considerably reduced.

[6] A further puzzling issue are the letters from the bank dated 5/5/2003 and 6/10/2004 (Annexures "DM 2"). The letter dated 5/5/2003 states:

> ***"We refer to your letter dated 25th March 2003.***
>
> ***The issue of E60,000.00 regarding loan increase of the 14th July 1994 and E30,000.00 cheque No. 2961 dated 2nd September 1994 has been resolved internally. Enclosed herewith is the corrected statement but the correct outstanding balance on the account is E662,276.76".***

It is not clear what the phrase **"… has been resolved internally"** means. This must be clarified by oral

evidence.

The letter dated 6/10/2004 states:

> ***"We advise that we are investigating the issue of the deposit books and the cheque stubs and shall revert to you shortly.***
>
> ***Further we advise that the amounts of E60,000.00 and E30,000.00 were erroneously added to you client's account and that when these amounts were reversed the interest applied to the accounts was also adjusted accordingly.***
>
> ***Finally we advice that the amounts of interest written off were to ensure that the accounts were in compliance with the "in duplum" rule".***

There is an admission of negligence that the amounts of E60,000.00 and E30,000.00 were added erroneously. It is not clear how a bank of such repute would make such a glaring error and yet go ahead and try and obtain a huge amount of money back door through an acknowledgment of debt. Perhaps Mr. Mkhonta was too trusting or like many Swazis not sufficiently educated fell victim to unscrupulous predators at the bank. The letter goes on to state that when these amounts were reversed the "interest" applied to the accounts was also adjusted accordingly. In the same breath the writer states: "***Finally we advise that***

***the amounts of "interest" written off were to ensure that the accounts were in compliance with the "in duplum" rule.***

[7] It is not clear which interest the writer is referring to my assumption is that the interest that went with the amounts that were reversed is separate from the interest that still had to be adjusted in terms of the ***"in duplum"*** rule. Oral evidence must be led to clarify the different interests and the **amounts** pertaining thereto.

[8] It seems to me that there is substance in what the applicant states in paragraph 15 of his founding affidavit:

> ***" In actual fact, it was later discovered that the Manager at the time at Swazi Bank, Pigg's Peak Branch, Mr. Duma Mtsetfwa fraudulently dealt with my account for his own benefit and thus after discovery he was thereafter dismissed from work by the bank"***

I agree with Mr. Maziya that the bank does not seem to know how much the Applicant owes. The Applicant states that he recalls that he was granted a loan of and or overdraft of E217,820.00 (Two hundred and seventeen thousand, eight hundred and twenty Emalangeni only) sometime in August 1990. Oral evidence must be led and this should be the starting

point no matter what legal processes have gone in between. Justice should not only be done but be seen to be done.

[9] I agree with Mr. Maziya that between obtaining the judgment and the application for rescission a lot has happened, most of which shows the bank to have made certain bad errors which the Applicant would have borne had he not been persistent and resolute in pointing them out. No wonder he was heard to say that he was leaving everything in the hands of God through sheer frustration. I agree too that the writ has been novated. The matter is fraught with irregularities and I have no doubt that had these been brought to the attention of the court, this judgment would not have been granted.

I take the point made by Mr. Maziya that the summons does not distinguish between the juristic person and natural person and this makes it fatally defective and it should be set aside. So also must the acknowledgment of debt and I so order under further and alternative relief.

[10] Miss Van der Walt submitted that legal principles of the common law required that for rescission to avail, good

or sufficient cause must be shown:

- Reasonable and acceptable explanation for the default and

- a bone fide defence on the merits which prima facie carries prospects of success.

[11] I am satisfied that the delay in bringing this matter to court was caused by the protracted communications between the parties. The Applicant has stated that he did not receive the summons, there is no reason to disbelieve him.

[12] With regard to the second requirement, I am satisfied that the applicant has shown that he has a good defence to the action which ***prima facie*** carries the prospects of success. He denies owing the bank any amount. He has managed to get the bank to reduce the amount. The bank does not seem to know how much he owes. It keeps changing the figures. The matter will be put to rest once and for all if the parties go to trial. It should not be difficult to prove the banks case. The latter is a professional bank with professional staff and accountants who presumably keep proper books of accounts.

[13] It is my considered view that there are too many material disputes and the only prudent way to deal with these is by way of oral evidence.

[14] The application is granted with costs on the ordinary scale, together with the certified costs of counsel in terms of rule 68 (2).

**Q.M. MABUZA-J**