IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between: Case No. 1716/2006

BHOKILE ELLIOT SHIBA **Applicant**

And

SWAZILAND DEVELOPMENT AND SAVINGS BANK **1st Respondent**

DUMA MSIBI **2nd Respondent**

JOSEPH DLAMINI N. O.

DEPUTY SHERIFF-SHISELWENI REGION **3rd Respondent**

REGISTRAR OF DEEDS **4th Respondent**

THE ATTORNEY GENERAL **5th Respondent**

Neutral Citation: Bhokile Elliot Shiba v Swaziland Development and Savings Bank & 4 Others (1716/2006) [2012] SZHC 150 (17th July 2012)

Coram: Dlamini J;

Heard: 26th April 2012

Delivered: 17th July 2012

Application for rescission of an order of court granted on the basis of acknowledgment of debt entered into between the parties and

subsequently by consent of both parties made an order of court – allegation of fraud on the part of applicant's own legal representative as basis for application for rescission – requirements thereof for the application to succeed - in duplum rule part of our law.

Summary: The applicant seeks for rescission of this court's order granted by consent of both applicant and 1st respondent. The terms of the acknowledgement of debt were drawn and agreed upon by both parties on 15th March 2007 and made order of court on 16th March 2007.

[1] The applicant alleges that his erstwhile attorney had misrepresented certain facts upon him such that the acknowledgment of debt was fraudulently obtained.

Chronicles:

[2] The applicant was a businessman running agricultural and farming enterprises. The 1st respondent was financing applicant in his businesses. This relationship dates way back as early as in the 1980s.

[3] In September 2006, the 1st respondent issued out simple summons against the applicant. A declaration, detailing various accounts held by applicant for monies owing and due to 1st respondent was served upon applicant on 1st September 2006.

[4] I will refer to the details of the declaration later in my judgment. It suffices for now to highlight that the amount claimed by 1st respondent against applicant summed to

E1,679,107.51 (one million six hundred and seventy nine thousand one hundred and seven Emalangeni fifty one cents). Applicant having served a notice of intention to defend, 1st respondent lodged an application for summary judgment. An affidavit resisting summary judgment was filed in turn by the applicant. It would seem that applicant was simultaneously sued by Standard Bank, another financial institution, for a claim inclusive of law suit costs amounted to E100,000 (one hundred thousand Emalangeni). A default judgment was entered against applicant in favour of Standard Bank by reason of applicant's failure to enter a notice to defend and a subsequent plea despite service of process upon his person. A writ of execution was obtained and applicant's property was attached in favour of Standard Bank. A sale was scheduled for 16th March 2007.

[5] One can safely conclude that in order to salvage his immovable property from the grip of Standard Bank, an acknowledgment of debt was prepared and signed on 15th March 2007, just a day before the execution of sale of his immovable, between applicant and 1st respondent where *inter alia* 1st respondent was to settle the debt of E100,000 on behalf of applicant to Standard Bank. The acknowledgment of debt stipulated as follows:

> "***ACKNOWLEDGMENT OF DEBT/AGREEMENT OF SETTLEMENT***
>
> *1. PREAMBLE*

1.1 The plaintiff has instituted proceedings against the defendant in the above matter for the relief as set out in the summons.

1.2 The defendant has appointed the law firm of Ntiwane & Partners to defend the proceedings on his behalf.

1.2 The parties have since agreed the matter out of court.

2. <u>ACKNOWLEDGMENT</u>

The defendant hereby acknowledge to be indebted to the plaintiff in the agreed amount of:

2.1 E1,546,145.86 (One million five hundred and forty six thousand one hundred and forty five Emalangeni eighty six cents) in respect of money lent and advanced.

The breakdown of which is as follows:

2.1.1 The of E1,446,145.86 being the amount which represents the total amount due to the bank in respect of Case No.1716/2006;

2.1.2 The amount of E100,000.00 being the amount the plaintiff is to pay to Standard Bank Swaziland Limited for purposes of canceling the sale in respect of Case 4525/2005;

2.2 *Interest on the balance outstanding from time to time at the rate of 9% per annum from date of issue of summons in respect of the sum of E1,446,145.86 and interest to be computed at the rate of 9% per annum from date of payment of the sum of E100,000.00 which is in respect of Case No. 4525/2005;*

2.3 *Costs to be taxed on an attorney and own client scale;*

2.4 *Deputy Sheriff's costs;*

2.5 *Costs of preparing this agreement.*

3. *PAYMENT*

It is further agreed between the parties that the defendant will be given an opportunity to sell the property currently bonded to the plaintiff and that the defendant is to sell such property within five (5) months of signature of this agreement. Should the defendant fail to secure a buyer within the above-mentioned period, the plaintiff will be entitled immediately sell the property in settlement of the debt of E1,546,145.86 (One million five hundred and forty six thousand one hundred and forty five Emalangeni eighty six cents).

4. *DEFAULT*

Should the defendant default in the due performance of any of his obligations in terms of this Agreement of Settlement all of which are material, including in particular if any payment is not made on due date, or in the event of defendant being sequestrated, or in the event of a judgment having been

obtained against the defendant by another person and such judgment not being satisfied within 7 days of the date that it is granted; then:-

4.1 The full balance then outstanding in terms hereof will immediately become due and payable;

4.2 The plaintiff shall in addition to any other rights which it may have in law, be entitled to enforce the provisions of this Agreement of Settlement as if it were a judgment of the Court;

4.3 The plaintiff shall be entitled to recover, in addition to all the aforegoing amount, , all costs incurred by itself to its attorneys in securing the defendant compliance with the provisions hereof which costs may be taxed and recovered on the scale as between attorney and his own client and shall include the costs of necessary attendance, tracing and opinions given.

5. <u>NOVATION</u>

Neither this Agreement of Settlement nor any payment in terms hereof shall constitute a novation of the present obligation of the plaintiff to the defendant.

6. <u>DOMICILIUM</u>

The defendant hereby chooses as his domicilium citande et executandi for all purpose in terms hereof:

C/O NTIWANE & ASSOCIATES

1ST FLOOR, RICHARD HOUSE
MBABANE.

7. *GENERAL*

7.1 *The clause headings shall not be used in the interpretation o this agreement.*

7.2 *No latitude or indulgence granted by the plaintiff shall be binding upon the plaintiff or be deemed to constitute a waiver or novation of any of the plaintiff's rights hereunder, nor shall the plaintiff be stopped from enforcing any rights which it may have, by its failure to enforce any of its rights timeously.*

7.3 *No additions to, alterations, variations or consensual cancellation hereof shall be of any force or effect, unless reduced to writing signed by the plaintiff and the defendant or their agents or any person authorized in writing.*

8. *CERTIFICATE*

A statement signed by any authorized officer or the attorney of the plaintiff (whose appointment it shall not be necessary to prove) specifying the amounts owing by the defendant in terms of this agreement or the amount by which the capital liability has been reduced shall be

conclusive proof of its contents and sufficient for all purposes hereunder including the issue of Writs of Execution.

9. *APPLICATION OF PAYMENTS*

Payments shall be applied first towards costs, interest, and collection commission, and thereafter towards capital and shall be paid to the plaintiff by paying same to S. V. Mdladla and Associates, Lot No. 306, Lomadvokola Chambers, Cnr. Lomadvokola & Nukwase Streets joining Somhlolo Road, Mbabane.

10. *ORDER OF COURT*

The plaintiff shall be entitled to make this Agreement of Settlement an Order of Court under the same case number as above stated whereupon judgment shall be entered against the defendant in terms of paragraph 2.1 to 2.3 by the consent of the parties, without notice to defendant/or his attorneys.

Dated at Mbabane this 15th day of March 2007."

[6] This acknowledgment of debt was subsequently made an order of court on the following day 16th March 2007.

[7] As fully appears under paragraph 3, "payment of acknowledgement of debt" *supra* the appellant failed to sell the property and pay the sum of E1, 546,145.86 to 1st respondent. The end result was that a sale in execution of applicant's

immovable properties was conducted at this court's premises on 16th January 2009.

[8] On the 19th October 2009, applicant moved the present application seeking for orders, *inter alia* cancelling the acknowledgment of debt and thereby setting aside the said acknowledgment of debt as an order of this court and further setting aside the auction of his properties conducted on 16th January 2009 mention in paragraph 7 herein.

Parties Contention

[9] The applicant avers to a number of damning allegations against his erstwhile attorney in support of his application. I shall refer to them later in this judgment.

[10] In support of the averments that but for the acknowledgement of debt, the court would not have granted judgment in favour of 1st respondent, the applicant debated the account showing a number of inconsistencies and further that the interest charged offended the *in duplum* rule.

[11] The 1st respondent strenuously disputes applicant's averments and referred this court to applicant's affidavit resisting summary judgment and pointed out that at all material times, the applicant signed the acknowledgment of debt after deposing to the affidavit resisting summary judgment. In his affidavit, applicant debated the account in the same manner as he does in the founding affidavit in support of the application in *casu*. Further, 1st respondent reasoned, when the

acknowledgment of debt was prepared, the issues raised by applicant were discussed in details and the sum of E1,546,145.86 was suggested by applicant upon consideration of all the issues raised by applicant. In fact, 1st respondent merely accepted the figure proposed by applicant as duly represented by his financial advisor, one Mr. Sabelo Mkhonta.

Issues

[12] This court is called upon to adjudge on whether the acknowledgment of debt dated 15th March 2007 could be declared *pro non scripto* on the basis that the applicant was coerced into signing it; certain facts were misrepresented to the applicant before signing it; and that it was tainted with fraud.

[13] I must mention from the onset that none of these factors which negate the acknowledgment of debt alleged by applicant are attributed to any of respondents in *casu.* The applicant apportions blame squarely upon his legal representation for all his woes.

Legal position

[14] The applicant has moved a rescission application on the basis of common law.

[15] The general position of our law is that once a court has pronounced on a matter, the court becomes *functus officio* and the matter is *res judicata*. Should any party wish to have a judgment of court revisited, its option lies in a superior court**.**

Erusmus, "Superior Court Practice" at page **B-309** eloquently writes on the subject:

> *"...court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction in the case, having been fully and finally exercised, its authority over the subject matter has ceased".*

The rationale was to bring an end to litigation which is usually costly and tedious.

[16] Legislative enactments and common law however have made in roads to this general principle. **Herbstein and Van Winsen, The Civil Practice of Supreme Court of South Africa** at page 686 attest to this:

> "*There are, however, a few exceptions to that rule, which are mentioned in old authorities and have been authoritatively accepted by our courts. Thus provided that the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following. (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example costs or interest on the judgment debt, that the court overlooked or inadvertently failed to grant. (ii) The court may clarify its judgment or order if on the proper interpretation the meaning of it remains obscure, ambiguous or otherwise uncertain so as to give effect to*

its true intention, provided that it does not thereby alter 'the sense and substance' of the judgment or order. (iii)The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order and does not extend to altering its intended sense or substance.(iv)If counsel has argued the merits but not made submission as to costs and the court, in granting judgment, also makes an order relating to costs, it may thereafter correct, alter or supplement that order" .

[17] For an applicant to succeed in a rescission application, it must allege material facts showing a good or sufficient cause for rescission as stated in **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) 345**. Sufficient cause was held in **Clietty v Law Society, Transvaal 1985 (2) S.A. 756** as:

"*Consist of two elements viz reasonable and acceptable explanation for the default and bona fide defence which prima facie carries some prospect of success*"

[18] It is not sufficient if only one of the two elements are shown and the party should do so with a degree of particularity as outlined in **Clietty** *supra* at page 766.

[19] It is a well settled position of our law that a courts' judgment may be set aside on common law ground on the basis of fraud. **Wunsh J.** in **Simon N.O. & Others v Mitsui & Co. S. A. 475** citing **Minister of Local Government and Land Tenure & Another v Sizwe Development & Others:** In re **Sizwe**

Development v Flagstaff Municipality 1991 (1) S.A. 677 at **679** held in support of this practice:

> "*a final judgment is res judicata and will not be lightly set aside, but the court will do so if it was procured by the fraud of one of the parties, whether such constituted forgery, perjury or any other fraudulent act such as the fraudulent withholding of material documents –* ***Schiener v Union Government 1927 A.D. 94***

[20] I have already pointed out that applicant in *casu* basis his application on the allegation of fraud, misrepresentation of certain facts and coercion – absence of consent. These assertion find support in applicant's founding paragraphs as follows:

Page 29 of the book of pleadings highlights:

> "36. *As already mentioned above, that after I had been served with the summons, I duly instructed Messrs Ntiwane and Associates to defend me against Swazi Bank.*
>
> *39. For reasons unknown to me, Mr. Ntiwane never defended the Standard Bank matter whilst he initially defended the Swazi Bank matter.*
>
> *40. As a result of the failure to defend the Standard Bank matter, a judgment by default was granted consequent to which my farms were attached.*

It is this judgment that was eventually used by my erstwhile attorney, Mr. Ntiwane to force me to sign the acknowledgement of debt when clearly I had a defence in both matter against the Banks.

41. *What happened is that Mr. Ntiwane forced me to sign the acknowledgment of debt which now covered both the Swazi-Bank and Standard Bank matter, when clearly I had a good defence as more fully shown by my affidavit resisting summary judgment. Annexed hereto marked* ***ES15.1***

42. *Mr. Ntiwane did not read and explain to me the acknowledgment of debt. He told that if I did not sign the acknowledgment of debt, my farms which had been attached pursuant to the Standard Bank judgment were to be sold on the 16th March 2007. This was despite that the attachment of the farms was in itself wrong as no* ***nulla bona*** *had not been filed in respect of immovable. I had no choice but to sign the acknowledgment on the 15th March 2007 as already my farm had already been advertized for sale on the following day. Annexed hereto is a copy of the advertisement marked "****ES16".***

43. *Mr. Ntiwane misled me to believe that if I sign the acknowledgment of debt my farms would not be sold but I will be given time for the bank to substantiate the amount claimed and also be allowed an opportunity to sell a portion of my outstanding if any.*

46. *Accordingly, it is my humbly submission that Mr. Ntiwane misled me and forced me to sign the acknowledgment of debt knowingly that the bank by having an order, I would not be in a good position to challenge transactions in my accounts that I was not aware of and are prejudicing me.*

51. *Furthermore, I would not have signed the acknowledgment of debt had the implications been properly explained to me nor had I not been coerced and misled by my attorneys.*

To gainsay further, my attorney's failure to properly advise me, he caused me to sign the acknowledgment of debt with costs at attorney and own client scale when the basis of the claim was mortgage bonds which do not provide for costs at that scale. He also allowed the claim for Standard Bank at E100,000.00 without an explanation as to how the money arrived at E100,000.00.

52. *Accordingly, it is my humble submission that the acknowledgment of debt be set aside as I was coerced to sign it by attorney by threatening that if I failto refuse to sign, my farms were to be sold on the 16th March 2007 and also misled me into believing that nothing will happen into my property pending an agreement with the bank as to how much exactly I was owing, any.*

54. The acknowledgment of debt should be set aside as I signed it after having been misled by my attorney into believing that my farm would not be attached and sold by the bank until the bank has accounted to me for all the transactions in my accounts with it.

59. It is my humble submission that the bank's claims could not be sustained even by its own pleadings but for the acknowledgment of debt.

59.1 It is my humble submission that the manner in which the deed of settlement was made an order of court was not in compliance with the peremptory provisions of Rule 31 (2) of the Rules of the High Court and the deed itself did not comply with same in as much as it was not witnessed by Mr. Ntiwane, my attorney at the time".

[21] In counter thereof, the 1st respondent under the hand of its Managing Director, Stanley Musa Nhlanhla Matsebula contends:

"Page 179

3.2 The applicant was served with summons way back in 2006. The parties met wherein the applicant was represented by an attorney, Mr. Colin Ntiwane together with his agent and accounts officer, Mr. Sabelo Mkhonta of SAMKHO. The issues were deliberated and an acknowledgment of debt was eventually signed. For close to two years, the said acknowledgment of debt has been in place and

Applicant has never bothered nor indicated any intention of wanting to set it aside.

3.4 *After the signing of the acknowledgment of debt, an amount of E100,000.00 has been paid to Standard Bank in compliance with the said acknowledgment of debt which is now an order of court. The applicant has never challenged this nor raised this issue as such. The contents of the said acknowledgment of debt were put into effect in the year 2007. The Honourable Court is referred to* ***Annexure "SB1"*** *attached hereto. This is a letter which was addressed by the applicant's accountants who had been instructed to deal with this matter on behalf of the applicant. I further refer the Honourable Court* ***Annexure "SB2"*** *which is the letter appointing S. M. Corporate Services as the rightful individuals to deal with the sale of the property. The Honourable Court is further referred to* ***Annexure "SB3"*** *attached hereto which is a memorandum of agreement which was prepared and drafted by S. M. Corporate Services, which was given to the bank's attorney as proof that the issue was being dealt with by the applicant.*

"Page 187

"20 Ad Paragraph 23

The contents herein are denied. The figures are not confusing. The figures were dealt with, the applicant made an offer through his accountants who were present when the matter was deliberated

and properly ventilated by those duly authorized by him.

"Page 189

"24.3 The figures were properly ventilated as one would see, the offer column states clearly what was being offered by the applicant. The issue of his farm is all included and that figure was subtracted from E1,487,145.86 and a further E24,000.00 in respect of 20 herds of cattle was subtracted from the amount. The remaining amount was E1,446,.86. This is the figure which was arrived at and in fact, it was passed on to the applicant's late attorney, Mr. Ntiwane. It was upon this basis that an offer was made by Mr. Ntiwane.

"Page 190

"26. Ad Paragraph 30

The contents herein are noted and I once again refer the Honourable Court to the schedule or the documents of offer which was made by S. M. Corporate Services (Pty) Ltd. The said document has a breakdown of the figures and shows an amount which was eventually tendered as the figure admitted to. The issue of the cattle which even though was questionable at the time, was dealt with extensively as the said figure was included and subtracted from the amount which was finally made an order of court. The Honourable Court is once again referred to ***Annexure "SB4".***

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"30. *Ad Paragraph 35*

I note the contents herein, however, it is the very same accountant who agreed to this figure. It is on the basis of his calculations and the meetings that this amount was arrived at. It would be too much of a coincidence that Mr. Ntiwane would thumb suck this figure whereas it is the exact figure from the accountant, save to deny the truthfulness of the allegations therein.

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"33. *Ad Paragraph 38*

I note the contents herein, however, I am advised and verily believe by the attorney of the 1st respondent that the applicant instructed Mr. Ntiwane to negotiate for payment. It was well before judgment had been granted in this matter.

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"38.*2 Ad Paragraph 43*

Clearly, the applicant was aware of the acknowledgment of debt and its contents. If he had any objections to sale, he was supposed to have acted timeously. The agreement was signed in 2007 and today is 2009.

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"69. *Ad Paragraph 71*

The contents herein are correct. For the record, it should be made clear that before the sale, there were other sales which were advertised. There were not less than 3 sales which were advertised. The other sale was successful as the property was bought, however, even though it is hearsay, I am advised that the buyer did not proceed as the applicant, as usual proceeded and used other structures to discourage the sale. The Honourable Court is referred to the numerous notices of sale attached hereto as ***Annexure "SB17".***

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"73. *Ad Paragraph 75*

I note the contents herein. However it should be pointed out that even where an application is brought in terms of common law, the applicant has to show just cause and further, applicant has to act immediately. In this particular instance, it has taken the applicant close to 2 years to bring the application before this court for the rescission.

Conduct of applicant's attorney:

[22] The ratio *decindi* in **Webster and Another v Santam Insurance Co. Ltd 1977 (2) S. A. 874** where **Kotze J. A** held as follows, is material in *casu*:

"A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner.

Ordinarily, he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfill his professional responsibility. It is of course not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual and a fortiori to lay client it would be a most unusual and unexpected occurance. To hold, without qualification that a client is bound by the negligence of his legal advisers is, in my respectful view wrong. .....It may well be that to attribute to a client the negligence of his attorney would be justifiable in cases where he (the client) is partly to blame through his sappiness or otherwise for his attorney's dilatoriness".

[23] The learned **Justice Kotze's** *ratio* calls for me therefore to enquire whether in *casu* applicant's erstwhile attorney was negligent in that he withheld crucial information as averred by applicant and made misrepresentation which led the applicant to append his signature to the document entitled "*acknowledgment of debt/agreement of settlement*". As the adage goes "*the test is in the pudding*", I now set to interrogate applicant's founding affidavit as the answer lies therein.

[24] Paragraph 42 applicant states:

" 42. *He, Mr. Ntiwant erstwhile attorney told me that if I did not sign the acknowledgement of debt my farms which had been attached pursuant to the Standard Bank judgment were to be sold on 16 March 2007*".

[24] This advice by Mr. Ntiwane was indeed in order as applicant was fully aware that Standard Bank was armed with a court order and an advertisement for sale in execution of his immovable. It is not clear as to why applicant is attacking such advice based on true facts of the position on the ground.

[25] At his paragraph 43 he alleges:

Page 31

"43. *Mr. Ntiwane misled me to believe that if I sign the acknowledgment of debt my farms would not be sold but I will be given time for the bank to substantiate the amount claimed and also be allowed an opportunity to sell a portion of my outstanding if any.*

[26] The acknowledgment of debt attached by applicant in his founding affidavit reads"

*"**3. Payment***

It is further agreed between the parties between the parties that the defendant to sell the property currently bonded to the plaintiff and that the defendant is to sell such property within five (5) months of signature o this agreement. Should the defendant fail to secure a buyer within the above mentioned period, the plaintiff will be entitled to immediately sell the property in settlement of the debt of E1,546,145.86 (One million five hundred and forty six thousand one hundred and forty five Emalangeni eighty six cents).

[27] Indeed the acknowledgment of debt provided for applicant with the opportunity to sell his farm and settle the debt. This period was five months. There was absolutely nothing amiss therefore that Mr. Ntiwane did.

[28] He proceeds to aver at paragraph 44:

> "*It is my humble submission that despite representations about certain questionable transaction and money I paid to the bank after sale of my farms in the total sum of E819,500.00. I have not been able to agree on a settlement figure with the bank. The bank does not want to account for money or value of my twenty (20) herd of cattle taken by its officers on its behalf nor to take them into consideration*".

[29] The 1st respondent referred this court to annexure marked "**SB4**". This correspondence emanates from applicant's financial adviser trading under the name SAMKHO and is described as "*accounts, trainers and business consultants*". The subject is "*reconciliation of Swaziland Development and Savings Bank loan accounts*". It reflects *inter alia*,

> "*2. Following our meeting at Ntiwane and Company, I met with the Swazi Bank recoveries team and their attorney, Mr. Mdladla"*
>
> *7. Finally, I recommend that you approach your attorneys to investigate the seriousness of missing statements for the sum of E600,000.00, E200,000.00, E17,00.00 as mentioned in paragraph*

3 and 5 above. Otherwise request them to forward a settlement offer of E1,446,145.86 as detailed out in 6 above so as to bring this matter to rest".

[30] It is authored by the Managing Director of SAMKHO one Mr. Sabelo M. Mkhonta who deposed to a confirmatory affidavit in support of applicant's application. This correspondence is addressed to the person of applicant. At paragraph 6, the correspondence debates the five accounts held by applicant in 1st respondents' institution. It was authored on 13th February 2007. It is this correspondence and in line with the advice under paragraph 7 of the correspondence that was incorporated into the acknowledgement of debt. The 1st respondent merely accepted the figure proposed by the applicant. This figure as fully appears at paragraph 2 of the correspondence was reached after a meeting wherein applicant was fully and well represented by both his legal and financial eagles. It is totally inacceptable for the applicant to question a figure in payment which he proposed himself to settle. In support of this finding, I draw an analogy from the case of **De Wet & Others v Western Bank Ltd 1977 (4) S.A. 770** where there was a misunderstanding between the appellants and their legal representation. An application for rescission based his **Lordship Melamet J.** held at **page 771**:

"*Where, however a default judgment had been entered against parties due to their failure to remain in communication with their attorney or agent as to the progress of the case, they cannot divest themselves of their responsibilities in relation to the action and then complain vis-a-viz the other party to the action that their*

agents in whom they vested sole responsibility held failed them"

[31] In *casu* it would be inconceivable to allow the application for rescission as the figure of E1,446,145.86 as settlement amount was generated by no other than the applicant himself.

[32] **Melamet J.** wisely concludes at page 780:

"*The court should not come to the assistance of the appellants. They are the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct*"

[33] Applicant at paragraph 45 avers:

"45. *Furthermore, I disagree in the manner in which the sum of E802,000.00 being money from the sale of my farms in 1991 was used to settle said debts with the bank.*

[34] It is clear from paragraph 7 read with paragraph 6 of the correspondence (**SB4**) that the issues raised in this proceeding were considered by his financial eagle.

[35] At paragraph 46 applicant postulates:

"*46. Accordingly, it is my humbly submission that Mr. Ntiwane misled me and forced me to sign the*

acknowledgment of debt knowingly that the bank by having an order, I would not be in a good position to challenge transactions in my accounts that I was not aware of and are prejudicing me.

[36] This is a completely misconceived conclusion by the applicant. In fact from the totality of the circumstances in which the applicant find itself, it could safely be said that Mr. Ntiwane discharged his duties professionally and exhibited a standard beyond reproach. This is clearly demonstrated by the fact that a farm worth over E1,546,148.86 was salvaged from the hammer under the hands of Standard Bank who was to sell it for a meager debt of E100,000.00. Applicant was further given a gracious period of five months to raise the sum of E1,546,145.86 or sell the farm in a manner best suiting him. To accuse a man who swiftly and expeditiously arranged for a loan of E100,000.00 for a man of straw is difficult to fathom more so when he so lies in his rest bed.

[37] Applicant contends further at paragraph 47:

"*He even without my knowledge organized me a loan of E100,000.00 to pay the matter of Standard Bank from the Swazi Bank".*

[38] It is common cause that at all material times applicant was fully aware that his property was to be under the hammer on 16th March 2007 as judgment had been entered against him by Standard Bank. Worth noting is that applicant does not aver that he paid Standard Bank with the loan from FINCORP rendering Standard Bank to be paid twice for the same debt.

The lack of such averment flies at the very face of applicant and demonstrates lack of *bona fide* on his part.

[39] At paragraph 53 applicant boldly asserts:

> *"53. I submit that the bank furnished my accountant Sabelo Mkhonta with the bank statements way after I had already been made to sign the acknowledgment of debt. Accordingly, I became aware of the questionable transactions after I had already signed. Over and above the believe that I was no more owing".*

[40] This court has extreme difficulty in understanding how applicant could so depose for the following reasons:

- The correspondence upon which reflects the figure E1,446,145.86 and advice to offer as settlement was written on 13th February 2007.

- The acknowledgment of debt accepting the figure E E1,446,145.86 plus E100,000.00 Standard Bank loan was signed by all parties on 15th March, 2007.

[41] From the above, it is inconceivable that applicant can hold that the correspondence came after the acknowledgment of debt.

[42] Further, he submits that he became aware of the questionable transactions after he had signed. This is not supported by the series of events herein as will demonstrate.

[43] The 1st respondent having filed its declaration then filed an application for summary judgment. The applicant responded by serving an affidavit resisting summary judgment. Applicant deposed to this affidavit on 2nd of October 2006. In the affidavit resisting summary judgment, he raises the same issues as raised in the application in *casu*. How then he could state that he become aware of the inconsistencies in his accounts after 15th March 2007, the date of signing the acknowledgment of debt is not clear. In fact, the correspondence by his financial adviser, Mr. Sabelo Mkhonta clearly demonstrates that the meeting between the parties discussed these issues as demonstrated at paragraph 6 of the correspondence. It can only be inferred from the date of the correspondence that the meeting was on or before 13th February, 2007 – a date in which the correspondence was written.

[44] In his paragraph 53 applicant ends by stating:

> *"Over and above the believe that I was no more owing".*

[45] Juxtapose this averment with those at paragraph 69 where he deposes:

> "69. *After having considered all issues, and the bank had failed to substantiate and account for all my monies and cattle, I duly made an offer to pay the bank a sum of E900,000.00 in full and final settlement simply to bring the matter to an end*".

[46] This is a glaring contradiction which unfortunately hold against the applicant. To say that he believed he no longer owed the 1st respondent and aver at the same time that he has made an

offer of 900,000.00 in order to bring the matter to an end is mutually destructive to his cause of action.

[47] In the totality of the above, applicant's application stands to fall.

[48] I may consider applicant's application from the angle that in the totality of his averments, he submits that the terms of the acknowledgement of debt do not reflect his intentions.

[49] In S**aambo Nationale Bouvereniging v Friedman 1979 (3) S,A, 994** it was held:

> "*As long as 1478 and in the context of sale* ***Chief Justice Brian*** *proclaimed "that the intent of a man cannot be tried for the devil himself knows not the intent of a man*"

[50] Their Lordships continue:

> "*In the nineteenth century Lord Eldon protested that his task was not "to see that both parties really meant the same thing, but that both gave their assent to that proposition which, be it what it may, de facto arises out of the terms of their correspondence".*

[51] **Solomon J.** in **Pletsen v Henning 1913 A.D. 82** at 99 held in support of the above principle:

> "*The intention of the parties must be gathered from their language, not from what either of them may have had in mind"*.

[52] I need not delve much on this principle of law as the terms of acknowledgement are clear and applicant must be held to be bound by them.

[53] It would be remiss of me however, not to highlight the position of the law as propounded by decided cases in application for rescission based on misrepresentation or fraud as common law ground.

[54] **De Villiers J. A. in Schienerhout v Union Government 1927 A.D. 94** at **98** stated in this regard:

> "*Now a final judgment of a court of law being re judicata is not to be lightly set aside. On the other hand, it stands to reason that a judgment procured by the fraud of one of the parties whether by forgery, perjury or in any other way such as fraudulently withholding material documents cannot be allowed to stand. "*

[55] At page 345 the learned Judge postulates:

"*the wrongdoer should not be allowed to hold ill-gotten judgment".*

[56] **Wunsh J. in Simon N. O. & Others** *supra,* eloquently summarises as follows:

> "*(2) The successful party must have been a party to the fraud-* ***Makings v Makings 1958 (1) S.A. 338 (A);***

(3) *It must be shown that but for the fraud, the court would not have granted the judgment – **Robinson v Kingswell 1915 A.D. 277** at **285**;*

(4) *There must have been a casual connection between the fraud and the judgment (I refer in this respect to **Smart v Wessels 1924 OPD 187 AT 190**;*

(5) *The fraud can consist of withholding material information from the court with fraudulent intent;*

(6) *The fact that the judgment was obtained by consent is not a bar to an action to having it set aside on the ground of fraud – **Rossouw v Haumann 1949 (4) S.A. 796 (C) at 800**.*

[57] All the above cited authorities point to one direction that the party against whom the application for rescission is sought must have been a party to the fraud. In *casu*, the case is quickly dispensed with because it is common cause that none of the respondents herein are alleged to have been a party to the fraud.

[58] On the above premises applicant's ground for rescission based on fraud, misrepresentation and coercion must fail.

In duplum rule

[59] Applicant has averred that the sum of E1,546,145.86 as claimed by 1st respondent under the acknowledgment of debt offends the *in duplum* rule.

[60] This rule is based on public policy and is part of the Roman law. Its *raisen d'etre* is to protect borrowers from unscrupulous lenders.

[61] **De Villiers J. P. in Union Government v Jordaan's Executor 1916 T.P.D. 411** at **413** states on the dictates of the *in duplum* rule:

> "***Groenewegen*** *says: "Usurae non current ultra duplum",* ***Voet****: "Sortem excedere non potuerent usurae". No interest runs after the amount is equivalent to the amount of the capital".*

[62] In applying the *in duplum* rule **Zulman J. A**. in **Standard Bank of S. A. v Queanate Investment (In liquidation) 1998 (1) S. A. 811** at 827 pronounced:

> *"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".*

[63] The learned judge continue to highlight that interest no matter the method of calculation does not lose its character as interest. This is so in order avoid any inroads to the *in duplum* rule which was referred by **His Lordship Zulman** *supra* as positive law. In brief, whether the lender employed the capitalization system, or the type of a loan such as overdraft, interest must be

calculated in such a way that it does not offend the *in duplum* rule.

[64] As it is designed to protect borrowers from exploitation by lenders, it cannot be waived, altered by banking practice nor can parties contract or agree outside it, neither can they conduct themselves against it. If they do, their agreements or conduct would be declared voidable in so far as the question of interest is concerned. It is the duty of the court to order an interest which conforms to the *in duplum* rule. I am much alive to the *dictum* in **Sanlam Life Insurance Ltd v South Africa Breweries Ltd. SA 2000 (2) 647**. I understand the *dictum* not to abrogate the principle on arrear interest as confirmed in **Ethekwini Municipality v Verulam Medication (Pty) Ltd (457/04 [2005] ZA SCA 98**.

[65] In our jurisdiction it was applied *inter alia* in **Reckson Mawelela v M.B. Association of Money Lenders & Another, Case 43/99** (unreported) where at page 9 **His Lordship Leon J. P**. held:

> "*It is a 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*. "

[66] In this jurisdiction the *in duplum* rule is further fortified by sections 3(1) (b) and section 6(1) of the Money Lending and Credit Financing Act No.3/1991 in matters of money lenders as

per the definition of the Act. In terms of our common law, this rule applies irrespective of the nature of the institution, be it a money lender *strict sensu* or a financial institution.

[67] In *casu*, I have browsed through the declaration filed by the 1st respondent. There are five claims which sum up as follows:

- Claim A: Amount advanced E140,000 overdraft facility: Amount claimed E338,635.07 inclusive of interest.

- Claim B: E98,203.00 and amount demanded E74,913.21

- Claim C: Amount loaned was E5,000 and claimed E10,685.98.

- Claim D: Amount loaned E150,000 – amount claimed E529,031.03

- Claim E: Amount credited to applicant's account E157,500.00 plus
  E100,000.00. Amount due and owing E725,821.94

[68] It would be remiss of me to make a finding on whether the above demonstrates an inroad to the *in duplum* rule as during submission the five accounts were never debated. However, it is imperative that this court before making a final ruling on applicant's application, the applicant demonstrates to it that its claim against the 1st respondent is not contrary to the *in duplum* rule especially in the light of 1st respondent's contention.

[69] On the above I enter the following order:

1. The parties debate the 5 accounts only and solely to address the *in duplum* rule.

2. Question of costs is reserved.

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DLAMINI
JUDGE

For Applicant :	**S. Madzinane**
For Respondent:	**Adv. D. Smith instructed by S. V. Mdladla**
	& Associates