



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 2196/2010

In the matter between:

**SWAZILAND DEVELOPMENT FINANCE  
CORPORATION**

**Plaintiff**

**And**

**OLIVE MHLOBISO SIKHONDZE  
t/a MNTIMANDZE FLATS**

**1<sup>st</sup> Defendant**

**PETROS MANDLA TSABEDZE**

**2<sup>nd</sup> Defendant**

**Neutral Citation:** Swaziland Development Finance Corporation v Olive Mhlobiso Sikhondze t/a Mntimandze Flats & Another 2196/2010 [2012] SZHC 206 (14<sup>th</sup> September 2012)

**Coram:** M. Dlamini J.

**Heard:** 4<sup>th</sup> July 2012

**Delivered:** 14<sup>th</sup> September 2012

*Summary judgment application – interpretation of section 3 and 6 of Money Lending and Credit Financing Act of 1991, in duplum rule – meaning of interest.*

Summary: The parties hereof, which I will refer to as plaintiff and defendants entered into a loan agreement where the plaintiff advanced 1<sup>st</sup> defendant the sum of E155,000.00. The interest was calculated to be ‘*prime plus 4.5% currently at 14.5 per annum*’ according to plaintiff’s particulars of claim. 2<sup>nd</sup> Defendant bind himself as surety to the contract. As a result of 1<sup>st</sup> defendant’s failure to discharge his obligation under the contract, plaintiff claims the sum of E191,713.17. This contract was concluded on 2<sup>nd</sup> October 2007.

[1] Having instituted action by way of combined summons, defendants filed a notice to defend. Plaintiff moved for a summary judgment on the basis that defendants had no *bona fide* defence and that they have filed a notice to defend for purposes of delaying the action.

[2] The merits of the case are not in issue. The defendant contends however that the entire agreement *null and void ab initio* for reasons that it was contrary to section 3 of the Money Lending and Credit Finance Act 1991.

[3] It was their contention that following the *dictum* in **Reckson Mawelega MB Money Lenders Association – Civil Appeal Case No.43/1999** unreported, and the reading of section 6, the contract between plaintiff and defendant should be declared a nullity.

[4] Section 6 (1) of the Money Lending and Credit Financing Act 1991 prescribes:

“*Any agreement in connection with any money-lending or credit transaction that is not in conformity with the provisions of this Act shall be null and void and shall not be enforceable against the borrower or the credit receiver by the lender.*”

[5] Section 3 (1) (b) of the said Act stipulates:

*“where in respect of any money lending or credit agreement the principal debt -*

*(b) exceeds E500 or such amount as may be prescribed from time to time, no lender shall charge an annual interest rate of more than 8 percentage points or such amount as may be prescribed from time to time, above the rate for discounts rediscounts and advances announced from time to time by the Central Bank under section 38 of the Central Bank of Swaziland Order 1974.”*

[6] The interest rate *in casu* was set at prime plus 4.5% giving a total interest rate to be 14.5%. By simple arithmetic, the prime rate at that time was therefore 10%. Defendant did not dispute that the interest rate was 4.5%. He however read the 8% under the section without reading the proceeding phrase:

*“above the rate for discounts, rediscounts and advances announced from time to time...”*

[7] On the basis of that, the defendant misreading section 3 (1) (b) I dismissed his submission on declaring the contract void and there being no dispute on the merits, I then ordered the parties to file a schedule of the discounts, rediscounts and advances from the Central Bank in order to ascertain the rate of discounts, rediscounts and advances at the time of conclusion of the contract between the parties viz. 27<sup>th</sup> October 2007 as envisaged by the Act.

[8] I ordered for the filing of the schedule much conscious of **Scrutton L. J.** who grumbled:

*“It is difficult to know what Judges are allowed to know though they are ridiculed if they pretend not to know.”*

**[Tolley v J.S. Fry & Sons Ltd (1930) 1 KB CA at 475]**

[9] An affidavit by the Legal Advisor, Central Bank Mr. Refiole Manogobo was filed together with the schedule on 7<sup>th</sup> August 2012. The rate of discounts, rediscounts and advances was in 2007 reflected as 14.5%. This therefore renders the contract between plaintiff and defendant to be without interest in so far as plaintiff is concerned. I say this on the basis of the definition of the discounts, rediscounts and advances as highlighted by Mr. Manogobo. He avers at his paragraphs 3 and 4 of his affidavit:

*“The rate of discount commonly referred to as the repo rate or repurchase rate, is the rate at which commercial banks can borrow money from the Central Bank. The Central Bank periodically fixes the repo-rate based on a variety of economic consideration.*

*The prime rate refers to the rate at which commercial banks lend out money to their own client. This rate is necessarily higher than the repo rate, because the banks need to make profit”*

[10] Credence to the averments by Mr. Manogobo is given to by my brother, **Hlophe J. in Swaziland Development Finance Corporation v Mzuzu Construction (Pty) Ltd and 3 Others (20/2011) 92012] SZHC 117** when he wisely propounded in defining discounts, rediscounts and advances at page 8:

*“I understand the rate of discounts, rediscounts and advances to refer to what is known as prime rate.”*

- [11] The repo rate in 2007 was fixed at 11% while the prime rate was 14.5% as already highlighted.
- [12] Had the parties actually considered the 4.5% above prime, the interest rate would be 14.5% plus 4.5% giving a total interest of 19%. However, plaintiff in its particulars of claim states interest is for 14.5% and therefore the court would award him interest shown in his particulars and not any other order to avoid prejudice on the part of defendant. It is for this reason, that the court concludes therefore that considering the prime rate to be 14.5% as set by the Central Bank in 2007, plaintiff in actual fact did not make any profit from the contract unless of course the capital so advanced was borrowed from the bank prior when the prime rate was 10%. However, from the schedule attached, since 1985 the prime rate has been higher than 10% although it dropped to be 10% in 2009.
- [13] I note that the particulars of claim refers to 14.5% interest while the prayers seeks for interest at the rate of 15.5%. The contract itself refers to interest rate of 18%. It is not clear as to the reason for the confusion created by plaintiff. In that instance, I will grant an order which is not prejudicial to the defendant as he is not the author of the confusion for the reason that it is the *“universal principle of law and justice that no man should take advantage of his own wrong”* as cited by **Melamet J. in De Wet & Others v Western Bank Ltd 1977 (4) 770**.
- [14] Having granted the plaintiff such interest, I must draw the parties' attention to section 3 (2) of the Money Lending and Credit Act No.3 of 1991 which reads:

*“No lender shall calculate interest charges according to periods which are shorter or longer than those according to which the installments or outstanding balance of the principal debt shall be paid in terms of an agreement in connection with the money lending or credit transaction.”*

[15] *In casu* the period of the loan as per the First Schedule as appears at page 16 of the book of pleadings is 60 months. Therefore, applying section 3 (2) herein, the interest shall be the loan of E155,000 and interest being 14.5% should not be calculated beyond or lesser than the period of 60 months. This section of our law is based on public policy in that it protects both debtor and investor.

[16] I note further that the plaintiff has prayed for collection fee. However, the contract as attached herein is silent on the collection term, nor has plaintiff stated the value of the collection fee. In the circumstances, it is difficult for the court to grant such a prayer in the absence of proof that the parties were at *ad idem* as to the collection of such fee and more so when the amount is not specified.

[17] There is another puzzling aspect of plaintiff’s claim. Although in its particulars of claim, it alleges that the capital loan was for the sum of E155,000, it prays for payment of the sum of E191,713.17 besides interest, costs of collection commission plus costs of suit. In its statement of account however, it reflects that defendant has already paid the sum of E33,000 in installments towards this debt. It is not explained as to where the figure E191,713.17 emanates from in the light of the payment already made by defendant. One can only assume that the figure E191,713.17 is inclusive of interest. This means therefore that the difference between

E191,713.17 and E155,000 plus E32,000 installment is interest already charged. Over and above this interest, the plaintiff claims for further interest upon interest already accumulated to the sum of E191,713.17 inclusive of capital amount. Surely this is totally unacceptable, for if allowed, it would offend against the *in duplum* rule at the end of the day and worse still violate the Money Lending and Credit Act No.3 of 1991.

[18] **De Villiers J. P. in Union Government v Jordans Executive 1916 TPD 411 at 413** stated in relation to *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.”*

[19] **Blieden J. in Sanlam Life Insurance Ltd v South African Breweries Ltd 2000 (2) S.A. 647 at 652-653** summarises:

*“The purpose of the rule is to ensure that debtors whose affairs are declining should not be entirely drained dry. For these reasons the rule is based on public policy.”*

[20] In **Reckson Maweela op.cit.** the court held that it is the duty of the court to protect debtors from shrewd creditors.

[21] However, on the definition of interest as highlighted by **Blieden J. in Sanlam supra** that it is:

*“the price of making money available or penalty for not paying what was owing on the date when payment was due,”*

[22] *In casu* the interest claimed is “*the price of making money available*”, or rather fruits of the capital as it were. 2<sup>nd</sup> defendant stood as surety. He is liable in the event 1<sup>st</sup> defendant fails to pay. Should 1<sup>st</sup> defendant property only realise part of the debt, 2<sup>nd</sup> defendant shall be liable for the portion of the debt that could not be realised by 1<sup>st</sup> defendant.

[23] In the final analysis, I order as follows:

1. The plaintiff’s application for summary judgment is granted.
2. 1<sup>st</sup> Defendant is ordered to pay the sum of E155,000 less installments paid;
  - 2.1 Interest of the sum E155,000 at the rate of 14.5% to be calculated for a period not exceeding or less than 60 months;
  - 2.2 Costs of suit.
3. Should 1<sup>st</sup> Defendant fail to pay the above, the 2<sup>nd</sup> Defendant is ordered to pay.

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**M. DLAMINI**  
**JUDGE**

For the Plaintiff : **Mr. B. Ngcamphalala**

For the Defendant : **Mr. L. Simelane**



