IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:	Case No.819/2020
ESWATINI DEVELOPMENT AND SAVINGS BANK	Applicant
And	
LUBOMBO PROPERTY GROUP (PROPRIETARY) LIMITED	First Respondent
NORMAN MAJUBA SIGWANE	Second Respondent
TIMOTHY JOHN MCSEVENEY	Third Respondent
NICHOLAS CHARLES MCSEVENEY	Fourth Respondent
MCEBO MBHUTI DLAMINI	Fifth Respondent
COLIN GEORGE RIES	Sixth Respondent

Neutral citation	**:**	***Eswatini Development and Savings Bank vs Lubombo Property Group (Proprietary) Limited and Five Others (819/20) [2020] SZHC 225 (30th October, 2020).***
Coram	**:**	**M. Dlamini J**
Heard	**:**	**2nd October, 2020**
Delivered	**:**	**30th October, 2020**

Consumer Credit Act	***:***	***…the mere fact that the borrower is a legal persona does not exclude the parties entering into a credit agreement from liability under the Act [27] Section 25(1) calls upon the consumer to answer questions fully and truthfully put to it by the service provider [31] Section 25(2)(a)(i) calls upon the service provider to assess the borrower before granting credit. Section 26 gives liberty to the service provider to formulate its own tool or mechanism together with the procedure for purposes of assessing the credit worthiness of the consumer [32]***
Turquand Rule	***:***	***a third party transacting with a company or body corporate or institution is entitled to assume that the company or body corporate as the case may be has complied with all its necessary internal procedures and formalities. Commercial transactions or business would regress if a third party was required to investigate and interrogate whether a company or institution has complied with all its internal measures before approving or authorising an agreement or transaction. It is my considered view that the Consumer Act is not intended to supersede or overthrow this principle of our law***

which resonates well with commercial transactions *[48]*

Summary: By means of a summary judgment application, the applicant seeks for the total sum of E50 000.000 (E50 million) advanced to the 1st respondent. The 2nd to 6th respondents stood as sureties and co-principal debtors. The application is strenuously opposed on ground of a *bona fide* defence.

The Parties

[1] The applicant is a financial institution established under Order No. 49 of 1973. Its principal place of business is Gwamile Street, Mbabane, region of Hhohho.

[2] The 1st respondent is a *legal persona* duly incorporated and registered as such. Its main branch is at Siteki, Lubombo Region.

[3] The 2nd respondent is an adult Liswati male and resides at Endlini Yetjani area, Lubombo Region.

[4] The 3rd and 4th respondents are a male adults. They reside at Cottage 2 Mabuda Farm, Siteki, in the region of Lubombo.

[5] The 5th respondent is an adult Liswati male of Mnyamatsini, Malagwane, and region of Hhohho.

[6] The 6th respondent is an adult male of Farm 962, Maseyisini area, Nhlangano in the region of Shiselweni.

Claim by applicant

[7] According to the applicant and as borne out of the Particulars of Claim, there are three distinct loans advanced to the 1st respondent on two various times. At all material times, the 2nd to 6th respondents stood as sureties and co-principal debtors. On the 9th May 2018, the parties concluded two distinct loan contracts. The first was for payment of value added tax (VAT). The sum advanced was E2 000 000 (E2m). The second loan was for construction of a mall. The sum advanced was E25 000 000 (E25m).

[8] Both loans were payable within 6 months and 120 months respectively. The loan of E25m was open to redrawing. In such instances, instalments amounts were to be adjusted in conformity with the 120 months payment period. The first payment would commence on 31st January, 2019 with regard to the E25m. Payment commenced on the date of contract with regard to the E2m loan.

[9] On 7th February, 2019, a third loan was advance by applicant at the instance of 1st respondent. The 2nd to 6th respondents stood as surety and co-principal debtors. The sum advanced was E23 000 000 (E23m). It was for development of a mall at Siteki. It was to be repaid in equal instalments within 120 months.

[10] At all material times during the three loans, the 1st respondent was represented by 3rd respondent. In the two loan contracts concluded on 9th May 2018, the applicant was represented by **Nozizwe Mulela** while in the February 2019, **Sithembile Shabangu.**

[11] In order to secure applicant's interest, a mortgage bond against Portion 149 and 150 of Farm Flame Tree No. 180, situate Siteki, Lubombo region, was registered by the 2nd to 6th respondents in favour of applicant. Respondents further ceded their rights over collection of rentals in the above properties, and their right to reimbursement of VAT in respect of the first loan. The rate of interest charged in respect of each loan was prime, plus 2% and this amounted to 12:25% per annum at that time.

[12] Despite that the 1st respondent received the three advances, it failed to honour its side of the bargain either at all or in according with the terms agreed upon. In the result, the plaintiff claimed the following:

> *"(i) E1,684 298.66*
> *(ii) E24 885 842.39*
> *(iii) E26 642 594.75"*

[13] The plaintiff also claimed *mora* interest at the rate of 9% per annum and costs of suit at a high scale.

Respondents' position

[14] This matter is only opposed by 1st, 2nd and 5th respondents. Instead of taking the back bench, the 2nd, 3rd and 6th respondents decided to support the applicant's cause. I shall for this reason refer to the 1st, 2nd, and 5th respondents as opposing respondents and 3rd, 4th, and 5th respondents as supporting respondents. I must point out that learned Counsel for the supporting respondents pointed out that on his client's position, part of 1st respondent was in support of applicant's application for summary

judgment. I do accept that proposition. For purposes of not burdening this judgment however, I shall proceed as though 1st respondent is in opposition to the application.

The Opposing Respondents

Procedure adopted

[15] The procedure taken by the opposing respondent's upon service of the combined summons upon them was that they filed their notice to defend. Four days thereafter, they filed what they termed "*Special Plea.*" This pleading raised a special plea, irregular step, exception and a pleading over to the combined summons. The applicant however ignored the opposing respondents pleading and filed a summary judgment application.

[16] It is not clear as to who between the contesting parties set the matter down. The fact of the matter is that the matter was enrolled before my brother **Nkosi J** who refused to entertain the opposing respondent's special plea. He ordered them to plead to the summary judgment application. When the matter appeared before me, the opposing respondents contended that I should firstly, rescind my brother's order to the effect that the matter should be decided on the merits of the summary judgment application. Secondly, I should entertain their "*Special plea*" and make a decision on it.

[17] I must point out that on the hearing date before me, the pleadings had closed by reason that all the parties had filed their pleading on the

summary judgment application. On that premise, I invited **Mr. Magagula**, learned Counsel for the opposing respondents, to submit on the rescission application. I reserved my ruling on the rescission application. I also ordered the parties to address me on the summary judgment application as well.

Ruling on rescission application

[18] I must point out that the opposing respondents had filed a formal application for the rescission. It reflects the Registrar's date stamps as 15th July, 2020.

Rescission Principles

[19] Writing on rescission, **Maphanga J**[1] espoused:

> *"As a general rule of our common law once a Court has granted an order or pronounced judgment on a matter [Sic] becomes functus officio and subject to circumscribed exceptions it has no authority [Sic] alter and supplement it. It is into that this rule does not affect interlocutory orders which are regarded by their nature as susceptible to amendment and or variation."*

[20] I must point out that I agree with learned Counsel for the opposing respondents that the order by my brother **Nkosi J** was interlocutory in nature and therefore susceptible to amendment or variation as pointed out by **Maphanga J** *supra*. However, this is not the end of the enquiry.

[1] **(Attorney General v Timothy Tsabedze in re Timothy Tsabedze v Justice B. N. Magagula and Others (923/2018) SZHC 188 [2019] (7th October, 2019)** para 14

It is imperative for the court to determine whether the order sought to be rescinded falls within the ambit of Rule 42.

[21] Rule 42 reads:

> *"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary;*
>
> *(a) an order or judgment erroneously granted in the absence of any party affected thereby;*
> *(b) an order or judgment granted as the result of a mistake common to the parties.*
> *(c) an order or judgment granted as the result of a mistake common to the parties."*

Case *in casu*

[22] In the case at hand, it cannot be said that the order was granted in the absence of any of the parties by reason that they were all present. No ambiguity or obvious error or omission has been alleged. Further, no mistake common to the parties have been asserted. In the result a rescission based on any of the sub-rules under Rule 42 does not assists the opposing respondents case with regard to rescission. The question however, still remains, what about under common law?

[23] Learned Counsel on behalf of the opposing party argued strenuously that there was an error at law. The question often asked in such proceedings is whether there is a *justus error* at the instance of the court. I agree

with **Mr. Magagula** that the honourable Justice ought to have considered the Special plea filed. However, his failure to do so does not necessarily amount to travesty of justice for the reason that he took the view that is prevailing in our jurisdiction that it is unnecessary to decide matters on piece meal basis. Procedurally, there was nothing wrong in law to order the opposing respondents to answer to the summary judgment application that was already serving before court. That as it may, it does not mean that the court should ignore the special plea raised by the opposing party. It remains to be determined as I hereby do.

Special plea

[24] The opposing respondents relied on the provisions of the Consumer Credit Act of 2016 as follows:

> *"The manner in which the Plaintiff granted the credit to the 1st, 2nd and 5th Defendant is in contravention with Section 25(1), and (2) (a) (i) of the Consumer Credit Act of 2016, in that the aforementioned Defendants were not involved in the application for such a Credit."*[2]

[25] They further authored:

> *"1.4 The Plaintiff is guilty of reckless lending as defined in Section **25(3)** of The Consumer Credit Act of 2016. The manner in which the credit (being the loan in claim 1 and claim lll) was granted to the 1st, 2nd and 5th Defendants. The*

[2] Page 107 paragraph 1.1 of the book of pleadings

loan was not only properly applied for by all the Defendant's directors, but the 2nd and 5th Defendants were not personally engaged, in respect of the loan and the consequences of the loan. Yet the Plaintiff now seeks to bind them personally, in the repayment.

Determination on Special Plea

[26] Counsel for the applicant referred the court to the same Act under Section 3. The Section's title is "*application*". In other words, any reader who intends to know the parties bound by the provisions or activities regulated under the Act, must resort to its Section 3. The provision reads:

"3.(1) This Act applies to a credit agreement between parties dealing at arm's length and made in, or having an effect in the Kingdom of Swaziland.

(2) This Act shall not apply to a credit agreement in terms of which-

(a) the consumer is –

(i) ***a company or body corporate whose asset or turnover value equals or exceeds the threshold determined by the Minister in terms of section 11;***

(ii) the Government:

(iii) Parliament and Judiciary as defined in the Constitution: or

(iv) local Government;

(a) the credit provider is the Central Bank of Swaziland;

(3) This Act does not apply to a credit agreement of a liholiswane or group saving scheme.

(4) The Act applies to a credit agreement or proposed credit agreement irrespective of whether the credit provider resides or has its principal office within or outside the Kingdom of Swaziland."[3]

[27] I must say from the onset that the mere fact that the borrower is a *legal persona* does not exclude the parties entering into a credit agreement from liability under the Act. What excludes a credit transaction where a consumer is a company or body corporate from the provisions of the Act is the threshold of its turnover profits or assets as fixed by the Minister of Finance.

[28] Now the first question is, what is the Minister's determined threshold? I have not been referred to any Gazette by the Minister of Finance in terms of Section 11. The fact of the matter is, there is no Gazette where the Minister sets out the threshold. So what should the court do in this circumstances? Should it find that the service provider herein, the applicant ought to have complied? On what ground if the honourable Minister did not affix a threshold?

[3] Page 14 paragraph 3 of the book of authorities

[29] It would be grossly injustice to find that the applicant herein is subjected to the provisions of the Act in the absence of the opposing respondents demonstrating that the provisions of the Act were applicable to the applicant at the time the three loan agreements were concluded. The cardinal rule, he who alleges must prove, is wanting in the case at hand especially in light of Section 3 of the Act.

[30] I must further point out that nothing is averred by the opposing respondents that at all material times they were subjected to the provisions of the Act. They did not allege that it was the intention of the parties to the various agreements that the provisions of the Act would apply. This averment was critical in view of Section 3(2)(a)(i) and the fact that there is no threshold.

[31] Suppose, for a second, the court agrees with the opposing respondents that the three transactions were to be regulated in terms of the Act, the respondents are challenging the applicant's failure to comply with "*Section 25(1) and (2)(a)(i).*"[4] Section 25(1) calls upon the consumer to answer questions fully and truthfully put to it by the service provider. It is not clear therefor how the service provider contravened this section as this provision is directed to the consumer to answer questions faithfully.

[32] Section 25(2)(a)(i) calls upon the service provider to assess the borrower before granting credit. Section 26 gives liberty to the service provider to formulate its own tool or mechanism together with the procedure for

[4] See page 107 of the book of pleadings

purposes of assessing the credit worthiness of the consumer. In all fairness, could it be that the 1st respondent was given loans to this magnitude without assessment by the applicant? Which business entity would take such a risk to itself? The property mortgaged was said to far exceed the value advance to the 1st respondent. The applicant went beyond to secure individual guarantee from the shareholders and directors of the 1st respondent. On the part of the consumer, the applicant reduced into pen and paper the terms of each loan. The 1st respondent was represented by the 3rd supporting respondent in that regard. This is the mechanism and procedure chosen and adopted by applicant to ensure compliance with section 25(2). At any rate, section 25 is meant to safeguard more the interest of the service provider. I do accept however, that the purpose of the Act is to ensure that consumers are not heavily burden with credit after credit such that they find themselves into deeper debts. In the case at hand, it cannot be so said. The opposing respondents have not so contended themselves that by virtue of the three loan advances they found themselves into deeper debts. In fact not an iota of averment was adduced in support of the Special Plea except to say that the applicant has contravened the Act.

[33] In the final analysis, the Special Plea must fail. It is unnecessary for me to deal with the rest of the defences alleged as they are repeated in the affidavit resisting summary judgment. I shall consider them under the main application therefore.

Summary Judgment application

Adjudication

E2m

[34] The affidavit resisting summary judgment was deposed to by 5th respondent. The 2nd respondent did not file anything. It is not clear why he failed to depose to any defences as he is alleged to have stood as surety and was a co-principal debtor in all three credit agreements. He was expected to file at least a confirmatory affidavit to 5th respondent's affidavit. The failure by 2nd respondent to file any pleading, opposing applicant's averments leads to one conclusion. It is that he has no defence. Silence means consent in such circumstances. It remains for me therefore to consider the case of 1st and 5th respondents.

[35] The deponent, 5th respondent deposed:

> *"The Plaintiff's averments contained in paragraph 10 of its particulars of claim constitute an irregular step and they offend the provisions of Rule 18(b) of the Rules of court."*[5]

[36] I must hasten to point out that there is no Rule 18(b) in the Rules of this court. The 5th respondent proceeded:

> "*The resolution attached to the Particulars of Claim marked 'EB3' is only signed by the 3rd, 4th and 5th Defendant [sic] to the exclusion of the 2nd and 5th Defendant. This renders the resolution inefeective (sp) and therefore not binding on the 1st, 2nd and 5th Defendant. Such a resolution is therefore defecting and very much wanting."*

[5] ~See page 133 at pars 9 "Irregular Step"

[37] Critical to the resolution is that by his own say so, 5th respondent signed the resolution. He cannot by any stretch of imagination be allowed to argue that it is defective. This is moreover when he has failed to refer this court to any clause in the 1st respondent's articles of association calling upon all directors or shareholders to sign such a resolution.

[38] Clause 45 of the 1st respondent's articles states that any Director or any two members of the Company may convene a meeting. Clause 79 reinforces this position as it categorically states that "*two directors shall form a quorum*." [6]

[39] From the averments by 5th respondent, three directors signed the resolution to borrow the sum of E2m. It further conferred its powers to sign all necessary documents or agreements and securities to the 3rd respondent. 3rd respondent has confirmed the same and does not dispute the powers conferred upon him by the other two directors, including 5th respondent.

[40] The authority to confer power to the 3rd respondent was in terms of clause 73 of the 1st respondent's Articles. Again, it is not clear why 5th respondent is contesting the resolution of 6th March 2018 that led to the advance of E2m.

[41] The 5th respondent's averment with regard to para 9.1 are again without basis in light of the above clauses in 1st respondent's Articles. The

[6] See pages 296 and 302 of book of pleadings

resolution of 6th March 2018 was signed in terms of the 1st respondent's provisions of its Articles. Any subsequent document in relation to the resolution such as the loan agreement to bind the 1st respondent was in order therefore. 1st respondent cannot renege from the terms of the subsequent agreement with applicant.

[42] Similarly, the deposition by 5th respondent that the resolution is to be set aside by reason that 2nd respondent did not sign the resolution, holds no water in view of the above cited clauses of 1st respondent's Articles authorising any two directors to form a quorum and allowing them to confer powers to any director or manager of 1st respondent. At any rate the averments by 5th respondent are hearsay as 2nd respondent did not file any supporting or confirmatory affidavit to 5th respondent's assertions.

[43] I must point out that the opposing respondents do not challenge the loan agreement of 6th March 2018 which led to the loan agreement of E25m. Of significance from the none contestation of this loan agreement is that: (a) it was taken in the same meeting of 6th March, 2018 or on the same day as the E2m resolution; (b) the same signatories that re reflected in the resolution pertaining to the E2m advance are reflected also the resolution for the loan of E25m from the same bank, applicant. These signatories reflected in both the E2m and E25m resolutions as correctly pointed out by 5th respondent belong to 3rd, 4th and 5th respondents. Now the averments by 5th respondent is that the court must find the E2m loan resolution defective by reason that there are no five or six signatures of the directors but at the same time find the same signatories in order.

This is tantamount to approbating and reprobating, a position that cannot be countenanced by law. What is good for the geese must be good for the goose. Now that by 5th respondent accepting the similar resolution of E25m, there is no basis for the court to reject the resolution for the E2m.

E23m

[44] The resolution to borrow from the applicant the sum of E23m was taken in a meeting dated 14th January, 2019.'[7] I must point out that the first document reflecting a resolution for the sum of E23m was dated 14th January, 2018.[8] Then the second dated 14th January, 2019, with the third being 12th February 2019.[9] All these documents reflect the signatories of the same parties. The signatories thereto according to their sequence from above to the bottom, are 5th respondent, 2nd respondent and 3rd respondent. Now like the uncontested claim of E25m, there are three signatories, the first two belonging to the opposing respondents. On what basis are the opposing respondents, namely, 2nd and 5th respondents opposed to the loan advance of E23m which was as a result of their very own resolution to borrow from the applicant the said amount? The 5th respondent has deposed that it never borrowed any such amount and if it did, the resolution is defective. How, when he is the architect of it as borne out by his signature and that of 2nd and 3rd respondents?

[45] I need not repeat the finding with regard to the E2m. The same applies with regard to the E25m claim. Three signatories served before the

[7] See page 256 of the book of pleadings
[8] See page 96 *supra*
[9] See page 231 *supra*

applicant as a resolution by 1st respondent to be advanced the sum of E25m. This time the signatories are the opposing respondents' who lamented that 2nd respondent's signature was absent in the E2m resolution. This time 2nd respondent's signature is there. He actively participated in the decision to apply for the loan. So did the 5th respondent as he had done in the other two loan resolutions. The totality of the matter is that the opposition by 2nd and 5th respondents is a non-starter.

[46] What exacerbates the opposing respondents' case is that they each signed guarantees to the sum claimed, binding themselves individually and in *solidum* with 1st respondent for the various loan advanced. This was not surprising as they approved and signed the resolutions to secure the various loans.

Disbursements

[47] The opposing respondents reasoned that there was no need to source a loan for E2m to pay VAT. However, a disbursement to SRA was signed for by 2nd respondent together with 3rd respondent.[10] Worse still as soon as the sum of E23m was credited to the account of 1st respondent, 2nd and 5th respondents signed out a number of disbursements. Glaring ones are the sum of E4.5m signed by 2nd respondent with 3rd respondent and the creditor was 6th respondent.[11] This is beside many disbursement signed by 3rd and 5th respondents and sometimes with 2nd respondent. It is not clear how in these proceedings, 2nd and 5th respondents can deny the

[10] See page 201 of book of pleadings
[11] See page 242 of book of pleadings

authority of the 3rd respondent when they co-signed with him various payments to creditors of 1st respondent. Another disbursement which is of interest is one signed on 26th March, 2019 by both the opposing respondents, namely 2nd and 5th respondents and the creditor was 5th respondent himself. It is again not clear how the opposing respondents can deny the sum of E23m.

Legal Principle governing institution's internal affairs

[48] The **Royal British Bank v Turquand (1856) 6 E & B 327** espoused the principle of our law to the effect that a third party transacting with a company or body corporate or institution is entitled to assume that the company or body corporate as the case may be has complied with all its necessary internal procedures and formalities. Commercial transactions or business would regress if a third party was required to investigate and interrogate whether a company or institution has complied with all its internal measures before approving or authorising an agreement or transaction. It is my considered view that the Consumer Act is not intended to supersede or overthrow this principle of our law which resonates well with commercial transactions. In the result, the applicant was within the confines of the law, namely the turquand rule to rely on the various resolutions presented to it to assume that the Directors of 1st respondent had a consensus on the contested loans for E2m and E23m.

[49] The opposing respondents raised another point that the applicant was negligent in that it ought to have supervised the loans and ensure that all disbursement went to the construction of the mall. This submission stands to be rejected for among other reasons: (i) no contract of that

nature binding the applicant to that effect was pointed to the court. As correctly submitted by learned Counsel for applicant, the mere fact that the respondents made an application for an advance to construct a mall did not oblige the applicant to supervise disbursement; (ii) the opposing respondents are the last persons to accuse the applicant about negligence on disbursements as they were the signatories on various disbursements as demonstrated above. As already pointed out, part of the sum of the denied E23m was disbursed among themselves. Are they saying the applicant ought to have policed them or the blame must squarely lie at the door step of the applicant for their conduct? It cannot be by any stretch of imagination.

Costs

[50] The applicant sought for costs at punitive scale on the basis that the opposing respondents opposed the summary judgment application on flimsy ground. Flimsy as they are, I am not inclined to grant costs at high scale. Their constitutional right to access courts must be upheld.

Order

[51] In the final analysis, I enter as follows:

51.1 Applicant's application succeeds in the following manner:

1. The 1st, 2nd, and 5th respondents are, each and severally, one paying, the other to be absolved, ordered to pay applicant the following sums:

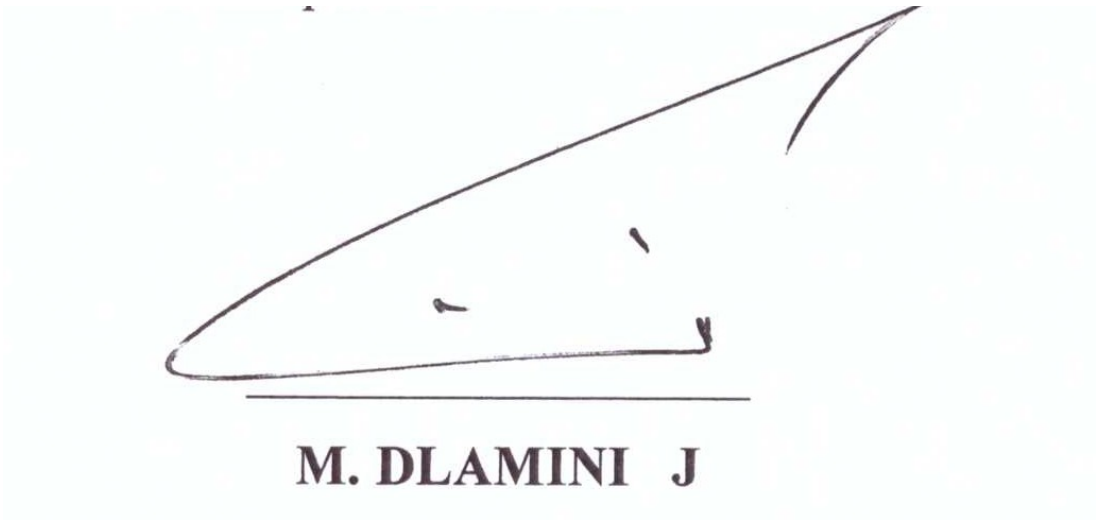
1.1.2. E 1, 684, 298.66

1.1.3. E26, 642, 594.75

1.1.4. E24, 885, 842. 39

2. Interest thereof at 9% per annum *a tempore morae*.

3. Costs of suit.



For the Applicant	**:**	**K. Motsa** of Robinson Bertram
For 3rd, 4th & 6th Respondents	**:**	**S.B. Shongwe** of Sibusiso B. Shongwe and Associates
For 1st, 2nd and 5th respondents	**:**	**B. M. Magagula** of Magagula attorneys