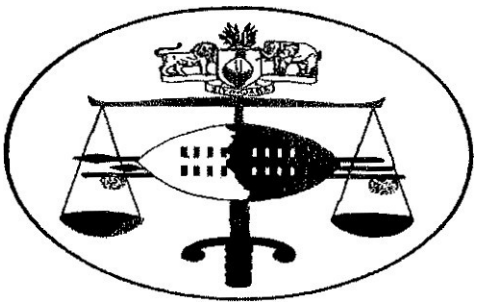

# IN THE HIGH COURT OF ESWATINI

## JUDGMENT

HELD AT MBABANE CASE NO. 1461/14

In the matter between:

SWAZILAND DEVELOPMENT FINANCE

CORPORATION PLAINTIFF

And

KUNANI SIPHILA INVESTMENT (PTY) LTD 1 st DEFENDANT

GCINA SCHUSTER SENGWAYO 2nd DEFENDANT

DENNIS DANIEL DENISHA MAHLALELA 3 rd DEFENDANT.

LUBOMBO ORAL HEALTH SERVICES (PTY) LTD 4th DEFENDANT

Neutral Citation: Swaziland Development Finance Corporation vs Kunani Siphila Investments(Pty) Ltd & 3 Others (1461/14) SZHC . 154[2021]

Coram .. M. S. LANGWENYA .

Heard .. 19 June 2018; 29 June 2018; 24 June 2019; 1 July 2019;

12 June 2020

Delivered .. 21 st September 2021

Summary: Plaintiff and defendants entered into written loan agreement-

agreement secured by surety mortgage registered byfourth defendantplaintiff alleges breach of contract by defendants-breach of contract denied by defendants-defendants aver defence of performance impossibility-requirements ofperformance impossibility defence.

Impossibility of performance-defence unavailable if impossibility complained of is due to defendants' fault-onus of proving impossibility on defendants-impossibility must be absolute and not subjective-inability to perform must be permanent and not temporaryDefendants ' inability to perform held to be temporary-defence of impossibilityfails.

Fourth defendant instituted proceedings seeking to extricate immovable property registered through surety mortgage bondplaintiff foreclosed on transaction-reasons foreclosure-internal disputes ofpartners offirst defendants-failure by defendants to pay instalments due timeously or at all.

Surety mortgage bond cancellation-no principle for release of surety from his obligations when conduct complained of is not that of creditor-absent breach of obligations on behalf of creditor, fourth defendant cannot be releasedfrom obligations under surety mortgage bond-fourth defendant has not argued that a contractual obligation has been breached by plaintiff-release refused.

Plaintiff argues that breach of contract has resulted in unjust enrichment-defendants received monies from plaintiff and did not repay money-defendants bought certain machinery from loan and continues to keep and used said machinery.

Unjust enrichment-requirements set out-function of law of unjust enrichment-restoration of economic benefits to the person at whose expense they were obtained-law concerned with corrective justice-it removes a benefitfrom the patrimony ofthe enrichment debtor.

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JUDGMENT

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Introduction

[l] The plaintiff issued summons against the defendants based upon a written agreement concluded between the plaintiff, first, second and third defendants on 3 April 2014. In terms thereof, plaintiff advanced to the defendants the sum of E2 475 210.00 to the defendants which was to be disbursed in trenches. The fourth defendant, represented by Mr Willie Matsebula (Matsebula) bound itself through the registration of a surety mortgage bond over its immovable property as security in solidum to the plaintiff as coprincipal debtor in lieu of the 20% deposit for the loan advanced to the defendants.

[2] The plaintiff avers that the defendants are in breach of the loan agreement that they failed to make payment of the instalments as well as interest thereon on the dates on which the instalments were due. The breach of the loan agreement and the defendants' liability is in dispute.

[3] The defendants deny that they breached the agreement by failing to make payments in terms of the agreement and cite impossibility of performance occasioned by plaintiff. They state that plaintiff failed to disburse the balance of the loan for the operation of business; imposed Mr Matsebula as a director/shareholder of the first defendant and supplied defendants with

defective machinery thus making it impossible for the defendants to perform their obligations in terms of the agreement.

PlaintifPs Particulars of Claim-Excerpt

[4] According to plaintiffs particulars of claim, as of I October 2014 when legal proceedings were instituted against defendants for non-payment, the outstanding amount which was due and payable to the plaintiff was El 879 054.35.

Consequently, the plaintiff seeks the following relief:

> 'a) payment of the sum ofEl 879 054.35; b) Interest on the aforesaid amount at the rate ofprime +4.5% currently at 13% per annum from the date of summons td the date of final payment; c) an order declaring mortgage bond No: 358/2014 to be executable; d) costs of suit on the scale as between attorney and own client including collection commission; e) further and or alternative relief '

Excerpt-Defendants' Plea

[5] The first, second and third defendants allege in their plea that their obligation arising from the loan agreement was frustrated by the plaintiffs 'refusal to disburse monies due to [defendants] to pay for the cane trailer as well as working capital [1] .' Defendants averred in their plea that the 'plaintiff further unduly and negligently disbursed monies to Swaziland Revenue Authority' which monies cannot be accounted for by the defendants . It is noteworthy that in their plea, defendants do not state how much was 'unduly and negligently disbursed to eSwatini Revenue Authority. Defendants averred also that plaintiff refused to disburse to them the amount of E300 000 being money for the purchase of a cane trailer[3] .

[6] Defendants aver also that a state of impossibility of performance of defendants' obligations under the agreement was created by plaintiff when it supplied the defendants with defective machinery and equipment to wit: a John Deere 1850 loader. Defendants aver further that the plaintiff imposed certain people and forced defendants to work with Mr Matsebula without their consent.

[7] Defendants deny breach of the agreement and aver that it is the plaintiff who breached the agreement, consequently the outstanding balance is not due and owing.

[8] The defendants contend further that the registration of the surety mortgage bond to secure the loan deposit by Mr Matsebula was not a matter between

See Defendants' plea at paragraph 6.2 at page 40 of the Book of Pleadings. See paragraph 6.2 of defendants' plea at pages 40-41.
See paragraph 6.3 of defendants' plea at page 41 of the book of pleadings.

the first, second and third defendants and plaintiff as much as it was a matter between the plaintiff and the fourth defendant.

[9] With that in mind, I proceed to consider the evidence tendered at the hearing.

The Facts

[10] The defendants' indebtedness to the plaintiff arises from the following facts: On 3 rd April 2014 the parties entered into a written loan agreement (the loan agreement) in terms of which the plaintiff, at the instance and request of the defendants advanced a loan in the amount of E2 475 210.00 subject to certain terms and conditions.

[1 1] The parties agreed to divide the amount so advanced under the following headings:

1 1.1 Lease facility (for buying machinery)-E2 251 500.11; and

11.2 Working capital-E223 709.89

1 1.3 Interest rate: prime +4.5% currently at 13% per annum;

1 1.4 Facility fee: 2% of borrowed money with maximum of E20 000; Deposit (20% of loan)-E495 042.00.

[12] The loan was secured by a security mortgage bond in the amount of E495 042.00 in lieu of deposit registered in favour of the plaintiff over the immovable property of the fourth defendant described as follows: Mortgage bond No: 358/2014

Certain: Remaining Extent of Farm No. 595, situate in the District of Shiselweni eSwatini;

Measuring: as such 362, 8726 (Three Six Two Comma Eight Seven Two Six) square metres;

Extending: as Crown Grant No. 49/1930 with diagram annexed made in favour of Susanna Elizabeth Susara Roberts (born Swart) divorcee on the 1 1 August, 1930 and several subsequent Deed of the last of which Deed of

Transfer No. 13/1984 made in favour of SIDVUKANE PROPERTIES (PROPRIETARY) LIMITED dated 18th January 1984.

Held: under Deed of Transfer No: 330/2010 dated the 21 st May 2010. Subject to the terms and conditions set out in such deed.

[13] The purpose of the surety mortgage bond was to secure the defendants' present and future indebtedness to the plaintiff including interest and costs.

[14] The surety mortgage bond provides that upon the happening of an event of default or breach of the loan agreement, 'the capital with interest and all other sums due hereunder shall become due and recoverable without any notice... [4]'

[15] It is the case of the plaintiff that the defendants failed to make proper and timeous repayments of instalments of both the working capital and the lease facility loan. According to the plaintiff, as of 1 October 2014 when the present proceedings were instituted against the defendants, the defendants were indebted to the plaintiff in respect of the facility loan in the sum of El 879 054 plus interest at prime plus 4.5% at the rate of 13% per annum. In terms of the first schedule of the loan agreement, the defendants had to repay the first loan instalment within sixty days from the first disbursement, The

[4] See paragraph 15 of Annexture 'E' at page 30 of the Book of pleadings.

first disbursement was on 29 April 2014. The monthly instalment was set at E57 220.00. The first instalment was therefore due sometime in July 2014.

[16] The first defendants paid their first instalment on 7 July 2014. The first instalment paid was not the agreed upon amount as defendants paid E35 881.

58. The other subsequent payments were also short of the agreed upon monthly instalments and they came in drips and drops from 30 July 2014 ending on 30 January 2015. Defendants acknowledged that they did not make payments to the plaintiff as agreed in terms of the loan agreement. The defendants argued that plaintiffs refusal to disburse monies due to the defendants to pay for the cane trailer made it impossible for defendants to pay back the money. This argument is problematic and therefore flawed in that defendants kept and used the loader and truck without repaying the loan. When plaintiff, through Mr Shadrack Ntshalintshali proposed to second and third defendant that they surrender the truck and loader so that these could be sold and defendants' loan account credited with profit and plaintiff would not go after them, they turned down the proposal and offered no alternative to repay the loan.

[17] Gcina Sengwayo testified that the plaintiff was largely to blame for defendants' failure to perform their side of the loan agreement in the following ways: first, plaintiff refused to buy a cane trailer for the business venture an inaction which resulted in defendants losing business; second, plaintiff actively discouraged people and associations from giving defendants contracts and at times forced some people and associations who had contracts with defendants to cancel same; third, plaintiff violated the contract by not buying the trailer for defendants instead busied itself with interfering in internal affairs of the first defendants to the detriment of the business venture. Lastly, defendants argued that plaintiff 'unduly and negligently' disbursed monies to eSwatini Revenue Authority-such monies cannot be accounted for by the defendants.

Applicability of Defence of Impossibility of Performance

[18] Defendants rely on the contractual defence of impossibility of performance. The law on the defence of impossibility of performance is defined by the learned Acting Justice Cilliers in the case of Rosebank Mall (Pty) Ltd and another v Cradock Heights (Pty) Ltd in the following terms:

> The legal rules relating to initial and supervening impossibility of performance, with their consequence, in certain circumstances of the voidness of an agreement or the extinction of the obligations created by an agreement, relate to the initial or supervening impossibility of performance of the obligations purported to be created or created by the agreement.'

[19] The defence of impossibility of performance will not avail a defendant if the impossibility complained of is self-styled and is due to defendants' fault.

[20] Expanding on the defence of impossibility of performance, Scott AJ in MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crysta1[6] stated as follows:

> 'As a general rule, impossibility of performance brought about by the vis major or casus fortuitous will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, relationship of the parties, the circumstances of the case and the nature of the impossibility invoked by the defendant to see whether the general rule ought, in particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving impossibility will lie upon the defendant.'

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2004 (2) SA 353(W) at paragraph 64

[6] 2008 (40 SA 111 (SCA) at paragraph 28

[21] The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation 7 .

[22] In LAWSA[8] the defence of impossibility of performance is defined in the following terms:

> 'The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.'

[23] In my view, the defence of impossibility of performance does not avail the defendants because the impossibility of performance complained of was self-created. The defendants did not personally write to plaintiff to request that a cane trailer be bought on their behalf, instead they instructed their attorney to write the said letter on their behalf. This, according to plaintiffs evidence was against the agreed upon policy between the parties namely that defendants, and not third parties acting on behalf of the defendants would write and ask for disbursement of the money to secure machinery. Defendants failed to provide plaintiff with an invoice from a supplier where the said trailer would be sourced, much against the agreed upon operational policy between the parties. On this ground, defendants' case must fail.

[241 The defence of impossibility of performance further requires that the inability to perform be permanent. This is not so in this case. The defendants' impossibility to perform in this case is temporary because, from

See: Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd 2000 (4) SA 191(W) at 198B-C. [8] Volume 5(1) First Reissue at paragraph 160 D45 1 137 5; see also Frye's (Pty) Ltd v Ries 1957 (3) SA 575(A).

their evidence, it was not impossible for defendants to find contracts for the job at hand. In fact, defendants were able to secure contracts and use the loader and truck for self-enrichment to the detriment of the plaintiff. In law,

temporary impossibility of performance does not itself bring a contract to an immediate end[1] . At best, defendants showed it would be difficult for them to perform optimally-and this is subjective impossibility. It is objective and not subjective impossibility that terminates a contract. As such defendants' case must fail on that basis as well.

Acceptance of Loan Conditions .

[25] According to the evidence of Zenzele Dlamini (Mr Dlamini) the first defendants as represented by the second and third defendants accepted the conditions of the loan and signed an offer letter which they subsequently followed with registration of surety mortgage bond before the loan was approved. Mr Dlamini testified that Mr Sengwayo and Mr Mahlalela (the second and third defendants respectively) brought Mr Sibusiso Nxumalo and Mr Patrick Maziya who, in turn spoke to Mr Matsebula (a representative of the fourth defendant) and asked him to put forward fourth defendant's immovable property as surety.

[26] It was Mr Dlamini's evidence that Mr Nxumalo and Mr Maziya were partners of the first defendant because they were brought in by the second and third defendants to work on the project of sugar haulage. According to Dlamini's evidence, the partners had a verbal agreement that Mr Nxumalo, Mr Maziya and Mr Matsebula would be included as directors/shareholders of the first defendant. Mr Nxumalo had assisted the second and third defendants to draft the proposal for the business venture. Mr Dlamini testified that Mr Matsebula arrived with the second and third defendant to register the surety mortgage bond at plaintiff's offices in Mbabane.

1 World Leisure Holiday (Pty) Ltd v Georges 2002 (5) SA 531(W) at 533F-534G.

[27] Contrary to defendants' evidence that Mr Matsebula was imposed on the first defendant by plaintiff] [O], Mr Dlamini testified that plaintiff never pressured the directors of first defendant to work with Nxumalo, Maziya and Matsebula on the sugar haulage business venture.

## Attempts to Resolve Dispute between Partners

[28] Mr Dlamini testified that after the machinery (truck, loader and cane trailer) had been bought and some of the working capital had been disbursed, the partners of the business venture had a disagreement about who should be director/shareholder of the first defendant.

[29] Meetings were held with a view to resolve the disagreement for the good of the business. The meetings were convened at the instance of the plaintiff first at Mpala Arms, Tshaneni and subsequently at plaintiff's offices in Mbabane. The first meeting was attended by four of the five partners. Mr Matsebula could not attend because he was out of the country on business engagements in Mozambique. Matsebula had however delegated Nxumalo to represent him at this meeting..

[30] In the meeting that was held at. Mpala Arms, plaintiff was represented by Mr Dlamini and Mr Hadzebe. The second and third defendants were unhappy that Mr Nxumalo and Mr Maziya be made directors of first defendant because they had not contributed towards the payment of the 20% deposit

[O] See paragraph 5.2.2 of the second defendant's affidavit resisting summary judgment at page 52 of the Book of Pleadings on summary judgment application.

for the loan; only Mr Matsebula put forward fourth defendant's immovable property as surety for the loan deposit. The meeting ended with no resolution

Of the impasse. The same was true with subsequent meetings for this purpose. The plaintiff had an interest in the success of first defendant's business venture because they had supplied the loan for its operations. The nature of the dispute posed a serious risk to the plaintiff given that shareholder disputes invariably affect the financial well-being of a business and by extension, the ability of a borrower of money to repay the loan. Mr Matsebula confirmed in his oral evidence that the dispute he had with the defendants posed a financial risk to the plaintiff. It cannot therefore in my view be said that plaintiffs interest in defendants' business was meddling in the internal affairs of the first defendant.

Defendants' Reasons for non-compliance with loan conditions

[31] Sengwayo denied knowledge of Mr Matsebula. The denial was quite inconsistent with his averments in the summary judgment application where . he states that Mr Matsebula volunteered his immovable property to be used as surety mortgage bond for the loan they had secured with plaintiff. This, defendants stated, Mr Matsebula did to empower the defendants. Conversely, Mr Matsebula testified that when he put forward his immovable property as surety mortgage for the loan, he expected to reap financial reward from the business venture. The attempt by defendants to deny knowing and dealing with Mr Matsebula is devoid of the truth. Defendants' denial that they agreed to use fourth defendants' property as collateral for the loan is akin to running with the hare and hunting with the hounds. It shows that second and third defendants were opportunistic. When it suited them, they agreed that Mr Matsebula's immovable property be used as collateral for the loan and when it was inconvenient to their defence during the trial, they denied knowing Mr Matsebula.

[32] Mr Sengwayo denied also that defendants agreed that fourth defendant's immovable property be used as collateral for the loan. He concedes however that it was a pre-condition of accessing the loan to pay upfront an amount of E495 042 as security for the loan. Sengwayo testified that defendants did not pay the said deposit because they got assurance from Hadzebe that they did not need to make a down payment of 20% of the total loan amount-a prerequisite for securing the loan. Sengwayo told the court that Hadzebe assured them that plaintiff assisted emaSwati who did not have a deposit for a loan to access same and that depended on the viability of the applicants' business plan. Sengwayo asserted further that Hadzebe told them they did not need to provide any security for the loan because the assets purchased through the loan constituted security. This was denied by Hadzebe. Hadzebe testified that the plaintiff required security for a loan to be paid up-front. He stated that the assets purchased through the loan could never constitute security for the loan because, unlike immovable property, the machinery depreciated through use and age. Even if Hadzebe had not made such a denial, the non-variation clause in the loan agreement requires any variation to be in writing. As such defendants' case must fail on that basis as well.

[33] The defendants had to comply with the conditions of the loan agreement before they were given loan monies. This they did when they brought Mr Matsebula who registered the surety mortgage bond on behalf of the defendants on 30 April 2014.

Attempts at Cancelling Surety Mortgage Bond: The Law

[34] When the disagreement between the partners to the business venture of first defendant could not be resolved, Mr Matsebula instituted legal proceedings with a view to extricate fourth defendants' immovable property from the surety mortgage bond. One cannot but feel empathy for the predicament Mr Matsebula found himself in when the second and third defendants reneged on the oral agreement to make him shareholder of first defendant in exchange for his property being used as surety for the loan. Absent a principle that, if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released-there is not much this court can do to come to his aid. The following authority is instructive.

ABSA Bank Ltd v Davidson where Olivier JA stated as follows:

> 'As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances.'

[35] It would appear that Mr Matsebula's request that a finding be brought out that he be totally released from his suretyship obligations, this in the face of the fact that the second and third defendants were reneging on the oral agreement he would be shareholder/director of the first defendant must also

2000 (1) SA 1117 (SCA) [20021 1B All SA 355) at paragraph [14].

[36] In our law, there is no general principle of release when conduct which is prejudicial to the surety is proven. When looking at prejudice, one must consider whether there is a breach of obligation(s) on behalf of the creditor. The fourth defendant did not contend that a contractual obligation had been breached by the plaintiff. One looks in vain for such an obligation and the breach thereof. I accordingly find that this defence is in fact and in law unsustainable.

Disbursements at instance of Defendants

[37] The defendants, through their letter of 5 May 2014 requested plaintiff to buy them a truck, cane trailer and a loader which were priced E520 000; E300 000; and E950 000 respectively. The plaintiff did as instructed and paid the suppliers for the machinery ordered by defendants. Plaintiff further paid E58 516 as insurance for the truck, cane trailer and loader. Plaintiff paid E50 000 for fuel to the defendants. For the machinery, fuel and insurance, the plaintiff paid El 993 316.

[38] The other disbursements were in respect of working capital, insurance, equipment, salaries and sundries.

[39] Mr Dlamini denied that plaintiff supplied defendants with a defective trailer. He stated that plaintiff did not supply defendants with machinery but only paid such suppliers after they were identified by defendants who also produced invoices from the suppliers to the plaintiff before payment was made.

[40] The plaintiff paid E300 000 at the instance of the defendants for the trailer. Plaintiff was informed by defendants later that the cane trailer had

developed mechanical problems and was returned to the supplier. The supplier paid

back the E300 000 to plaintiff when the trailer was returned. The money meant to buy the trailer was not again disbursed to defendants because the defendants did not write to plaintiff requesting that the money for the purchase of a trailer be disbursed. Defendants also did not give plaintiff an invoice from a new supplier for a trailer.

[41] It follows therefore that the defendants cannot, in all fairness be ordered to pay back the E300 000 for the cane trailer they never ordered nor received; nor can defendants be expected to pay for other ancillary costs attendant to the purchase of the trailer like the insurance and value added tax (VAT) for the trailer.

[42] Defendants conceded that unlike when they personally wrote to plaintiff requesting that a truck and loader be purchased on their behalf by plaintiff, they did not personally write a similar letter requesting plaintiff to buy them a trailer. Instead, they did so through their attorney-much against the policies agreed upon by the parties.

[43] I agree with plaintiff's evidence that they could not have supplied defective machinery as alleged by defendants in their plea. Defendants identified sellers of the machinery and further supplied plaintiff with invoices from the said suppliers so that payment could be effected. Plaintiff provided the finance and not the implements and machinery required by the defendants to do business.

Unjust enrichment

[44] It was the evidence of the second and third defendants that the loader and truck remains with them long after they stopped repaying the loan. Mr Dlamini testified that the defendants are using the truck and loader for their private benefit. Defendants denied using the truck and loader but proffered incoherent if intelligible reasons for keeping the truck and loader. Defendants testified that they were waiting for plaintiff to give them the registration documents for both truck and loader so they could surrender same to their lawyer. Defendants also stated that they did not surrender the truck and loader because they did not understand what they were expected to surrender. The court heard that the truck and loader were used by defendants at Mhlume and at a Siphofaneni among other places. Defendants benefited from the use of the machinery and did not repay the loan to the ruination of the plaintiff.

Requirements for Unjust enrichment

[45] The law on unjust enrichment is clear that: a) the defendant must be enriched; b) the plaintiff is impoverished; c) the defendants' enrichment must be at the expense of the plaintiff and d) the defendants' enrichment must be unjustified [2] . I have no doubt that with the facts before the court, the defendants have been unjustly enriched at the expense of the plaintiff who has been impoverished by defendants' breach of the loan agreement.

[46] According to Visser, the function of the law of enrichment is to 'restore economic benefits, for the retention of which there is no legal justification to the person or institution at whose expense they were obtained.' The law of

2 Jacques Du Plessis The South African Law of Unjustified Enrichment at page 24. See also Daniel Visser Unjustified Enrichment at page 157. Visser lists three instead of four elements of enrichment liability to wit: enrichment of the defendant at the expense of the plaintiff which is unjustified. He appears to assume the 'causation' element.

unjust enrichment is essentially concerned with corrective justice in the sense that 'it aims to restore the position that existed before the enriching

fact took place, by removing a benefit from the patrimony of the enrichment debtor[13]'

[47] The defendants were in breach of the agreement when they failed to pay the instalments agreed upon on the due dates. Where a party acts in breach of the agreement, the innocent party is at large to cancel the contract and claim damages in lieu of breach[i4] . It is of no moment therefore that the defendants argue that there was no breach of contract in light of clause 11 of the loan agreement which states as follows:

> Breach
>
> 11.1 It will be considered breach of this agreement if any of the following events take place:
>
> 11.1.1 The borrower fails to pay the instalment owing to Swaziland Development Finance Corporation on due date;
>
> 11.1.2 Any information supplied by the borrower is found to be false;
>
> 11.1.3 The borrower commits any act of insolvency or is provisionally or finally sequestrated
>
> 11.1.4 or the borrower dies.

[48] In terms of the loan agreement and specifically clause 11.1. l, the plaintiff was entitled to cancel the agreement and demand the outstanding balance when defendants failed to pay the agreed upon instalment on due date. That defendants are making song and dance that the contract was cancelled before due date of instalment is mischievous at best and dishonest at worst. Evidence before court is that in July 2014 when the first instalment

was due, defendants were unable to pay the full amount of the instalment agreed

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13 Danie Visser Unjustified Enrichment in Francois du Bois (ed) Willie's Principles of South African Law (9th ed) at page 1043.

14 Swaziland Polypack (Pty) Ltd v Swaziland Government & another (44/2012) [2012) SZSC 30 (31 May 2012).

upon. Long after they stopped repaying the loan, defendants still keep the machinery that was bought through the loan for their benefit. For these reasons, plaintiff was entitled to cancel the agreement as a result of defendants' failure to pay the instalments on due date.

[49] I have carefully considered the inherent probabilities, the documentary evidence and the quality of plaintiffs witnesses and that of defendants' witnesses. I reject the version of the defendants and conclude that judgment is granted against the first, second, third and fourth defendants jointly and severally, the one paying the other to be absolved in the following terms:

(a) Payment of the sum of El 879 054.35 (One Million Eight Hundred Seventy Nine Thousand, Fifty Four Emalangeni and Thirty Five Cents).

(b)lnterest thereon at the rate of prime +4.5% currently at 13% per annum calculated from the date of summons to date of final payment. (c) Mortgage Bond No. 358/2014 is declared to be executable

(d)Costs of suit on the scale as between attorney and own client including collectio ion commission. ommission.

LANGWENYA

JUDGE OF THE HIGH COURT

For Plaintiff: Mr Z. Jele

For 1 st , 2 nd and 3rd Defendants : Mr M. S. Diamini

For 4th Defendant: Mr W. Matsebula