IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.43/99

In the matter between:

RECKSON MAWELELA APPELLANT

VS

MB ASSOCIATION OF MONEY LENDERS 1st RESPONDENT

DEPUTY SHERIFF - LUBOMBO DISTRICT 2nd RESPONDENT

CORAM : LEON J P

: STEYN J A

: TEBBUTT J A

FOR THE APPELLANT : MR. MABELA

FOR THE RESPONDENTS : MR. ZWANE

JUDGMENT

Tebbutt J A:

This appeal against a decision in the High Court refusing to set aside a default judgment and to stay a sale in execution of a property, is an extraordinary one. Extraordinary because of the relief granted in the default judgment. Extraordinary because of the procedure adopted by the learned Judge in the court a quo in dismissing the application to have the default judgment set aside. Extraordinary because of what appear to be the learned Judge's reasons for dismissing the application, there being no judgment reflecting those reasons. And extraordinary because of the attitude and behaviour of counsel for the first respondent in this appeal. All these facts emerge from the history of the matter. It is the following.

On 15th January 1998 the appellant and his wife borrowed from the first respondent an amount of E5 000 at an interest rate, according to a statement of their account supplied to

them by the first respondent, of 30% per month. That statement, which is dated 20th June 1998 and is signed by first respondent's treasurer states that it-

"... serves to confirm to you concerning your loan account which was advanced to you during the above date (i. e. 15th January 1998 up to the end of June 1998 ".

It reflects that during January 1998 an interest payment on the capital sum of E5 000 of El 300 (which represents an interest rate of 26% per month) was made by appellant. No further payments were made during the months of February, March or April 1998 but during May a payment of E6 300 was made to first respondent, leaving a balance owing, according to the latter, at the end of June of E9 923 68.

On 25th May 1998 first respondent issued summons against appellant and his wife, citing him as first defendant and her as second defendant, for (a) payment of the sum of E5 000; (b) interest thereon "at the agreed rate of 26% (sic) per month from 15th January 1998 to date of final payment"; and (c) that a Toyota Cressida motor vehicle, which first respondent alleged had been pledged as security for the loan, be declared executable.

According to the Deputy Sheriff's return of service, the summons was served on 18th June 1998 at appellant's place of residence on his daughter "being a person apparently not less than sixteen (16) years of age."

No appearance was entered by appellant or his wife and on 10th July 1998 default judgment was granted by Maphalala A J (as he then was) for payment of the sum of E5 000, interest at the rate of 9% per annum a tempore morae and costs. The Toyota Cressida motor vehicle was declared executable. Pursuant thereto a writ of execution was issued on 28th April 1999, but for some unexplained reason it was only served by the Deputy Sheriff on appellant on 9th August 1999. The motor vehicle was attached by the Deputy Sheriff on that date. The sale in execution of the vehicle was advertised for 25th August 1999.

On 24th August appellant brought an application on notice of motion for a stay of the sale and for an order rescinding the default judgment. In his supporting affidavit, appellant advanced four grounds on which he relied for his application that the default judgment be rescinded.

1. that he was not served with the summons nor had it been brought to his attention before he was served with the writ of execution.
2. that in any event the service was defective, the summons having been served on his daughter who at the time was under the age of 16.
3. that as at the end of May 1998 he had paid first respondent the sum of E7 600 and in terms of the so called "in duplum rule" he was only indebted to first respondent in the sum of E2 400,

4. that in any event, the entire loan agreement between himself and the first respondent was null and void ad initio in that in terms of Section 3(1) of the MONEY LENDING AND CREDIT FINANCING ACT NO.3 OF 1991 interest on the loan of E5 000, being more than E500, could not exceed 8% per annum and in terms of Section 6 of that Act, where interest charged on a loan agreement (as in casu at 26% per annum) is not in accordance with the provisions of the Act, the agreement is rendered of no force and effect.

On 25th August 1999 the application came before Matsebula J who dismissed it with costs. It is against that decision that appellant now comes on appeal to this Court

It was common cause before us that the learned Judge heard the matter in his chambers and not in open court, despite a request by counsel for the appellant, then appearing for the applicant, that he should hear it in open court. As a result no judgment, either written or oral was given by the learned Judge. It would appear that in dismissing the application he merely stipulated certain points of a technical nature upon which he non-suited the appellant. I shall return to these in due course.

It is necessary, I think, to express this Court's views on the hearing in chambers of applications, particularly where, as in this case, the application is opposed. This is undesirable practice, unless there are very special circumstances requiring it, such as possibly the public security, or the safety of some person. Hearing cases in chambers, particularly opposed matters, do not merely involve questions of procedure but they represent a fundamental departure from a deep-rooted tradition in our legal system, which, in common with those of civilised communities world-wide, dictates that the conduct of legal proceedings

must be open to public scrutiny. The adage that "justice must not only be done but must be seen to be done" is a paramount principle of our law

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both in the metaphysical and in the literal sense. Its aim is to ensure that the public has the confidence that equal justice is administered to all in the most certain, most speedy, and least burdensome and, I may add, most reliable way (See the South African cases of FINANCIAL MAIL (PTY) LTD VS REGISTRAR OF INSURANCE AND OTHERS 1966(2) SA219(W) at 220 E - G cited with approval by Kriealer J in BOTHA VS MINISTER VAN WET EN ORDE EN ANDERE 1990(3) SA937(W) at 940V), It is necessary that not only the parties' legal representatives should be present at the hearing but, particularly, that the parties themselves should be there to see that their case is properly conducted by their representatives and that the Court's treatment of their case has been fair and just, apart from any public interest in it.

In Botha's case supra, Kriegler J quoted from what the American Supreme Court said in relation to in camera proceedings. In RICHMOND NEWSPAPERS INC. VS COMMONWEALTH OF VIRGINIA US SUPREME COURT REPORT VOL. 65 LAWYERS 2nd ED at page 973 Chief Justice Burger said:

"A result considered untoward may undermine public confidence and where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted... And the appearance of justice can best be provided by allowing people to observe it.... People in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing.,.. "

In the same case Justice Brennan said:

"Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. "

And in South Africa in the Financial Mail case supra at 221F, Marais J said:

"In civil matters the Court must decide whether in the particular circumstances of a specific occasion such "a special case" is constituted as to justify a departure from what has actually been the absolute rule in parts of the country for more than one and a half centuries and in none for less than half a century, namely, that the civil court never closes its doors to the public."

Clearly no special circumstances existed in the present case requiring that the application be heard in chambers rather than in open court and the learned Judge erred in adopting the incorrect and undesirable expedient of hearing it in chambers - a circumstance made

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even less acceptable when viewed in the light of counsel's request that it be dealt with in open court.

A further unfortunate result of hearing opposed matters in chambers is that, unless special arrangements are made in regard thereto, there is no judgment given by the Court to which reference can later be made. That happened in this case. Lower courts must always remember that litigants generally want to know the reasons why the court has come to its decision and that dissatisfied litigants may wish to appeal against that decision. The absence

of the court's reasons prejudices them in pursuing an appeal. It also places the appeal court in an impossible position. That has also happened in this case.

This Court had no oral or written judgment from the court a quo. It has had to glean what were apparently the learned Judge's reasons from the appellant's notice of appeal and his counsel's heads of argument. Mr. Mabila, for the appellant, told this Court that he had noted down what the learned Judge had said in chambers as to why he was dismissing the appeal and based the appellant's appeal and his heads of arguments on the points stated by the learned Judge.

From these it would appear that the court a quo did not deal at all with the merits of the appellant's application but dismissed it on what the learned Judge obviously considered to be technical defects in the application. The points in question are the following: (i) the appellant's wife who was the second defendant in the summons upon which default judgment was granted should have been cited by appellant in his rescission application; (ii) the rescission application should have been given a new and separate case number from the default judgment case number by the Registrar of the High Court; (iii) the appellant should have specified whether the rescission application was brought under the common law or in terms of Rules of Court and, if the latter, which Rule; (iv) the attorneys Mngomezulu, Mnisi and Associates, who were instructed by appellant to apply for rescission of the default judgment on receipt by appellant of the writ of execution, should have been cited in the rescission application.

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Appellant's failure to do what is set out in points (i) to (iv) was apparently regarded by the Judge a quo to be fatal to his application, making it unnecessary for him to consider the merits at all.

That these were the learned Judge's reasons for dismissing the application would seem to be borne out by counsel for the respondent at the appeal before us. Mr. Zwane stated at the outset of the proceedings before us that respondent would "abide the decision of the Court" on points (I) to (iii) above. He therefore did not dispute that they were the points upon which the application was dismissed. As to point (iv) Mr. Zwane said that he did not remember it as being one of Judge's points but said that "he could not be expected to remember everything" and conceded that it may well have been a point mentioned by the learned Judge.

Mr. Zwane's approach to this whole appeal was most unhelpful to this Court. He received appellant's notice of appeal on 2nd September 1999 (the date of receipt is stated on the notice to be "2nd August 1999" but this is clearly an error and should be "2nd September 1999," the appeal having been noted on 31st August 1999). Despite this and despite having been furnished with appellant's counsel's heads of argument on 20th October 1999, Mr. Zwane took no steps whatsoever on respondent's behalf in the appeal. He failed to supply the Court with any heads of argument. Moreover, despite a clear notice issued to practitioners by the Registrar of this Court on this Court's instructions to attend a roll call on the first day of this session of the Court to notify the Court as to what was happening in the appeals in which they were involved, Mr. Zwane failed to do so. I would seem that it was only when the Court informed Mr. Mabila on Tuesday, 23rd November 1999 that, in accordance with the Court's running roll, the appeal would be heard on the following day, 24th November 1999 and requested him to inform Mr. Zwane of that fact, that Mr. Zwane came to Court on the last mentioned day. He was clearly entirely unprepared for the appeal and in response to Mr. Mabila's arguments both on the points mentioned above and on the merits stated that he, and therefore respondent, were prepared to abide by the Court's decision. Despite numerous enquiries from the Court as to whether he wished to make any submissions to it, he remained silent. The Court therefore inferred that he did not wish to do so.

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Mr. Zwane's casual approach to these proceedings is deserving of censure. Not only did he

fail to protect the interests of his client but he gave this Court no assistance in its duty to decide the matter.

Without the benefit of any judgment by the court a quo or of any submissions by counsel for respondent, this Court is obliged to consider this appeal on the basis of what appellant's counsel has stated as being the reasons for the dismissal of appellant's application and his submissions in regard thereto. I turn then to those reasons.

In my view there is no substance in any of them.

As to the non-joinder of appellant's wife in his application, it has long been settled law in this country, following South African precedent cases that the joinder of a third party in proceedings is only necessary where the latter has or may have a direct and substantial interest in any order the court may make or if such an order cannot be sustained or carried out without prejudicing that party (see HERBSTEIN AND VAN WINSEN: THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4™ ED. page 170; AMALGAMATED ENGINEERING UNION V MINISTER OF LABOUR 1949(3) SA637(A). A direct and substantial interest means a legal interest in the subject matter of the litigation and not merely a commercial or financial interest (see HERBSTEIN & VAN WINSEN op cit page 172 note 53 and cases there cited).

In the present case there is no allegation that the appellant and his wife are married in community of property or that she has, because of this or any other reason, a direct interest in the Toyota Cressida car. On the contrary there are specific allegations by appellant that it is "my car," that "I have a clear right to the motor vehicle " and that he was seeking to safeguard "my interests in the motor vehicle." She could therefore have had no direct and substantial interest in the staying of the sale in execution of the vehicle, nor could any order rescinding the default judgment prejudice the appellant's wife. It would indeed have been of benefit to her. Her non-joinder in the proceedings should therefore not have been held to be fatal to the appellant's application.

Nor could the failure to open a new and fresh file or be issued with a new case number have been fatal to appellant's application. Apart from being technical in the extreme and

the sort of point that, if on the merits a rescission was warranted, it could have been condoned by the Court. The application for rescission was clearly interlocutory in nature (see PRETORIA GARRISON INSTITUTES V DANISH VARIETY PRODUCTS (PTY) LTD 1948(1) SA839 (A) at 870). HERBSTEIN AND VAN WINSEN op cit pp880 and 881 refer to the refusal of an application to rescind a default judgment as being "interlocutory in form." It is clear that in interlocutory proceedings no new proceedings are initiated (See e.g. HENDRICKS V SANTAM INSURANCE COMPANY LTD 1973(1) SA45(C)) thus requiring a new case number.

The fact that applicant did not say whether he was proceeding under the common law or the Rule of Court should also not have been fatal to his application. In FIRST NATIONAL BANK (SWD) LTD V GLORIA NGCAMPHALALA, HIGH COURT CASE NO.I188/98, the view was expressed that it was good practice to do so. However, it has nowhere been suggested or held that a failure to do so could constitute a bar to an applicant succeeding in rescinding a default judgment (see also DOMINIC MUHOHO V YVONNE SEILBEA & ANOTHER, HIGH COURT CASE NO.2743/98).

The final point, viz that the application had to fail because the applicant had not cited his attorneys in the proceedings is clearly without substance. In his affidavit explaining a delay of 15 days in bringing his application, applicant said that he had instructed Mr. Mnisi of the attorneys firm of Mngometulu, Mnisi and Associates to bring the application immediately upon receiving the writ of execution. However, they had not done so. He then instructed his present

attorneys having been told every time he tried to reach Mr, Mnisi that the latter was indisposed. The latter and his firm had no interest in the matter, their only involvement being in their professional capacity. The learned Judge may have felt that they had an interest as it was possibly being alleged that they were negligent. That, however, had nothing to do with the application before him, viz one for rescission of a default judgment and stay of a sale in execution in which they could not possibly have been an interested party.

The learned Judge a quo accordingly erred when he dismissed the application on the grounds set out above. Having focused on the technical points mentioned, he failed to have regard to the merits of the application. Had he considered them, he could, in my view, not possibly have dismissed the application.

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In the first place, it is trite and is well established that a litigant in an ex parte application must observe the utmost good faith and most place all material facts before the Court. In the present case, the first respondent would appear not to have done so. On the day its application was made for default judgment, it failed to disclose that the appellant had paid it the sum of E7 600, which would have been a most material factor which might have influenced the court in deciding whether to grant default judgment or not. It would also not avail the first respondent to contend that the payment of E7 600 was in respect of interest and that it was only claiming repayment of the capital of E5 000. As already stated Mr. Zwane declined to make any submissions to this Court so that no such submission to the latter effect was before us. In any event, good faith, firstly, would have required that the fact that a payment of E7 600 had been made should have been disclosed. Secondly, in terms of the in duplum rule such payment should have been disclosed. If it had been, the Court would have been aware that the maximum amount first respondent could have claimed would have been E2 400.

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. This principle has consistently been applied in South Africa (see UNION GOVERNMENT V JORDAAN'S EXECUTOR 1916 TPD 411 at 413; VAN COPPENHAGEN V VAN COPPENHAGEN 1947(1) SA567 (T) at S81-582 and authorities there cited). When the interest due on the principal debt of E5 000 equalled the said amount of E5 000 it ceased to ran and no more interest could accumulate after that. As appellant had paid E7 600, the excess of E2 600 over E5 000 had to be appropriated towards repayment of the capital sum thus leaving a balance of E2 400 which appellant owed first respondent when the latter brought its application for default judgment.

There is, however, an even more fundamental reason why the court a quo should not have dismissed appellant's application. Section 3(1)(b) of the MONEY LENDING AND CREDIT FINANCING ACT NO.3/1991 (the Act) provides as follows:

"3(1) where in respect of any money-lending or credit transaction the principal debt-

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1. 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, 1974."

Section 6(1) of the Act provides that-

"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."

The use by the legislature of the word "shall" in the sections quoted, is evidence of the fact that it intended that their provisions should be mandatory.

In casu the principal debt is E5 000 and the rate of interest is 26% per month. The transaction is thus in contravention of Section 3(1) (b) and therefore, in terms of Section 6(1) null and void and could not be enforced by first respondent against the appellant.

The raison d'etre of this legislation is obviously to protect borrowers in need of financial assistance by way of monetary loans from unscrupulous lenders. It is to regulate the micro-lending industry.

The present case is one of the clearest examples of the type of transaction that the legislature wished to curb. First respondent's own statement of 20th June 1998 shows that on a loan of E5 000 the borrower had to make monthly payment of interest of E 1 300 i.e. more than a quarter of the sum borrowed. It also shows that six months after borrowing the E5 000 and despite paying the lender E7 600, the borrower still owed the lender E9 923.68. This includes a monthly penalty of 4% for non-payment of interest which obviously accounts for the interest rate being reflected on the statement as 30% per month. In other words the lender stood, after only six months, to receive E17 523.68 on a loan of E5 000. This type of transaction appears to me to be an unconscionable one and of the sort which the courts should not be slow to discourage. Indeed, the courts are obliged to strictly apply the provisions of the Act and should not refuse applications in which those provisions are relied upon, for technical reasons, particularly those of doubtful validity.

The effect of the aforegoing is not only that the Court should have set aside the default judgment and stayed the sale in execution of appellant's car but it should have declared the transaction null and void ab initio Had that occurred first respondent would have been entitled to recover the E5 000 but no interest thereon. Appellant had paid E7 600. Additionally first respondent received the proceeds of the sale in execution which, not having been stayed, took place. This Court has not been told what that amount is but it is clear that such amount together with the difference between the E5 000 and E7 600 i.e. E7 600 must be repaid to appellant and it will be ordered accordingly.

The appellant gave a reasonable explanation as to why it had become necessary for him to apply for rescission of the default judgment, namely that he had not received notice of either the summons or the judgment prior to receipt by him of the writ of execution and that he had immediately given instructions to apply for its rescission the delay of 15 days before this happened was due to the alleged indisposition of his then attorney. Having regard to the merits and to his explanation it is clear that his application should have been granted.

There remains the question of costs. Although no notice was given at any stage prior to the hearing of this appeal by the appellant to the first respondent that he intended to apply for costs against the latter on the attomey-and-client scale, his counsel, Mr. Mabila, prompted by a question from the Court as to what costs order would be appropriate, submitted that, if successful, his client's costs should be paid on the attorney-and-own client scale. Mr. Zwane said he would oppose such an order. The Court then granted Mr. Zwane time to file written submission in this regard, with Mr. Mabila being afforded the opportunity to reply thereto. It has been held that failure to make a special prayer for attorney-and-client costs or to give notice of intention to claim them is not necessarily fatal to such an application (see SOPHER VS SOPHER 1957(1) SA589(W) at 600E-G).

As stated above, Mr. Zwane chose to make no submissions during the hearing of the appeal. In his written submissions on costs he has, however, sought to make submissions on at least two of the technical points on which the learned Judge dismissed the appeal. He contends

that the appellant's application contained "a plethora of irregularities, sloppiness and vexatiousness " and that he is "grossly and utterly unworthy of an order for costs on an attorney-and-client scale". Appellant had, so Mr. Zwane submitted,

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for costs on an attorney-and-client scale ", Appellant had, so Mr, Zwane submitted, proceeded "recklessly" in the court a quo, that his application was "ineptly prepared", "patently sloppy " and showed "gross tardiness " on his part. In one of his submissions, Mr. Zwane said that for this Court to believe the appellant on the question of service of the summons, would be "asking the Court to believe a hell of a lot indeed". The use by an officer of the Court of the sort of language contained in the last sentence quoted is clearly improper and offensive. It is incompatible with the dignity of the Court and is discourteous not only to the Court but to the opposing litigant. Many of counsel's other submissions are also couched in intemperate language which is not only unnecessary but which this Court does not expect from counsel. Arguments can be forcefully advanced without resorting to the use of language such as that used by Mr. Zwane in his submissions. Mr. Zwane, moreover, save for his criticisms of appellant's application does not advance any reasons why, on the merits of the appeal, appellant is not entitled to the order it now seeks. In his criticisms of the application, he seeks to advance submissions that the appellant's wife should have been cited in the proceedings in the court a quo and that the appellant should have said whether his application for rescission was brought under the Rules of Court or the common law. As to the first of these, he says that this Court "must not be seduced away from the stark reality that on the merits the Judge a quo was quite correct that the second respondent in the main action should have been cited in the stay and rescission proceedings ". This Court has not in any way been "seduced away" from considering the point of non-joinder. I have dealt with it fully in my earlier reasons. I have also dealt with the second aspect Mr. Zwane has raised. There is no substance in either of these nor in his submission that appellant had been tardy in bringing his application before the Court a quo. There is accordingly no basis whatsoever that appellant had proceeded recklessly, that the application was sloppy, and particularly that it had in any way been brought "vexatiously ". Appellant, as he was entitled to do, sought to have a judgment obtained against him by default rescinded on the basis that he had a good and bona fide defence to the claim in issue in the judgment and an acceptable reason as to his default in not entering appearance to defend.

Mr. Mabila has based his application for attorney-and-own client costs on a number of grounds. I shall deal with them seriatim. Before doing so, I must state that while costs on an attorney-and-client scale may be warranted, the more stringent order for costs on an attorney-and-own client scale is not so justified. The first of Mabila's grounds is that

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good faith required of a litigant by failing to disclose (a) that appellant had paid E7 600; (b) that in terms of the in duplum rule it was not entitled to judgment in the amount claimed by it viz E5 00 and; (c) that in terms of the MONEY LENDING AND CREDIT FINANCING ACT it was not entitled to judgment at all, the loan transaction upon which its claim was based being an unenforceable contract. In the light of these factors, so Mr, Mabila argued, first respondent had acted "fraudulently, dishonestly, maliciously and recklessly ". Again here, although the words '"fraudulently, dishonesty, maliciously and recklessly" are used in some of the cases referred to in HERBSTEIN AND VAN WINSEN op cit, in my view using all of them to describe first respondent's conduct in failing to put material facts before the Court in its application for default judgment is not justified. Counsel should remember that invective is no substitute for advocacy. The aforesaid conduct of the respondent does, however, in my view, warrant a special order as to costs (of H.R. HOLFELD (AFRICA) LTD VS KARE WALTER AND CO GMBH AND ANOTHER (1) 1987(4) SA850(W) at 861 B - D, applying SCHLESWGER VS SCHLESINGER 1979(4) SA342(W). I am also of the view that such an order is warranted in the light of first respondent's applying for default judgment on a claim precluded by the terms of the MONEY LENDING AND CREDIT FINANCING ACT. As a money-lender first respondent - and also its legal representative — knew or at the very least should have known,

of the terms of the Act. Moreover, when the application for rescission of the default judgment was heard the provisions of the Act were pertinently drawn to its attention but, despite this, it persisted in its opposition to the application. Nowhere has it been suggested that first respondent was not bound by the Act. Its application for default judgment, knowing that it had contravened the provisions of the Act, and its persistence in its opposition to appellant's application in the light of that fact are considerations meriting a departure from the usual order as to costs.

Many of these considerations apply to this appeal. Again, first respondent, despite knowing of its contravention of the Act, did not abandon its judgment but persisted in its opposition to the appeal, compelling appellant to come to this Court. However, before this Court, as set out above, its counsel filed no heads of argument nor sought to advance any submissions in support of its opposition to the appeal and, particularly, in defence of its seeking to obtain relief on an unenforceable contract. Its conduct in persisting in its opposition to the appeal but in then declining to give the Court any assistance by setting

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opposition to the appeal but in then declining to give the Court any assistance by setting out why it was so persisting is conduct meriting censure. This conduct therefore also merits a departure from the usual order as to costs, In all these circumstances this Court is of the view that first respondent should pay appellant's costs, both in the court a quo and on appeal, on the scale of attorney and client.

The Court accordingly makes the following order:-

1. the appeal is allowed;
2. the default judgment granted on 10th July 1998 is set aside;
3. the first respondent is ordered to pay to appellant forthwith –

i. the sum of E2 600, being the difference between the sum of E7 600 and E5 000 together with interest thereon at 9% per annum from 15th January 1998, the date of the null and void loan agreement to date of payment of the said sum;

ii. the amount of the proceeds which it received of the sale in execution of appellant's Toyota Cressida motor vehicle; together with interest thereon at 9% per annum from the date of the sale in execution to the date of payment of such amount.

(d) the first respondent is ordered to pay, on the scale as between attoraey-and-client, the appellant's costs,

1. in respect of the proceedings in the court a quo;

2. of the appeal to this Court.

P. H. TEBBUTT J A

I AGREE :

R. N. LEON J. P

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I AGREE :

J. H. STEYN J A

Delivered on this 3rd day of December 1999.