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# IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO.16/09

In the matter between:

SWAZILAND BUILDING SOCIETY

APPELLANT

VS

UMZIMNENE INVESTMENTS (PTY) LTD

RESPONDENT

CORAM

RAMODIBEDI ACJ

MAGID AJA

MASUKU AJA

FOR THE APPELLANT

ADV. P.E. FLYNN

FOR THE RESPONDENT

ADV. L. DE KLERK

## JUDGMENT

**MAGID AJA:**

[1] In the court *a quo*, the present respondent, as applicant, launched an urgent application against the present appellant, in which it sought the following relief:

- " 1. Dispensing with the usual forms and procedures relating to the institution on proceedings and allowing this matter to be heard as a matter of urgency.
2. Directing that the sale in execution advertised for the 2<sup>nd</sup> day November 2007 be postponed, stayed or cancelled.
3. Declaring that the Applicant has paid the capital and interest to the Respondent in full.

ALTERNATIVELY

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4. Ordering and directing the Respondent to debate the interest and capital amounts due.
5. Granting such further and/or alternative relief as to this Honourable seems just.
6. Granting costs of this application to the Applicant."

**[2] HISTORICAL BACKGROUND**

The sale in execution referred to in prayer 2 of the application was due to be held pursuant to a judgment which the appellant as plaintiff had obtained against the respondent as defendant in the High Court under Case No.614/2003. The appellant's cause of action related to the respondent's liability to it in terms of a certain registered Mortgage Bond and the prayer contained in its Particulars of Claim read as follows:

"WHEREFORE THE PLAINTIFF prays for judgment against Defendant for the following:

1. Payment of the sum of E249,502-62;
2. Interest on the said sum of E249,502-62 at the rate of 17.25% per annum from date of summons to date of payment;
3. An Order declaring the property mortgaged by Mortgage Bond No.844/ 1990 to be executable;
4. Costs of suit on the scale as between Attorney and Client including collection commission."

[3] In the action, the respondent challenged the manner in which the appellant had charged interest under the Bond and in fact counter-claimed for an amount of interest which, so it was alleged, had been overpaid. When the matter came to trial, the counter-claim was withdrawn and, after hearing evidence and argument, Mamba AJ (as he then was) granted an order in the following terms:

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- "1. Judgment is granted in favour of the Plaintiff against the Defendant for:
- (a) Payment of the sum of E249,502.62 as at 31/03/03.
  - (b) Interest on the sum of E249,502.62 at the rate of 17.25% per annum from the 31<sup>st</sup> day of March, 2003 to date of payment.
  - (c) The property mortgaged by Mortgage Bond 844/1990 is hereby declared executable.
  - (d) Costs of suit on the scale as between attorney and client including collection commission and fees of counsel to be certified under Rule 68(2) of the Rules of Court.
2. The Defendant's counter-claim is dismissed with costs, such costs to include the costs of counsel as well."

[4] It will be observed that, save for the reference therein to 31<sup>st</sup> March 2003, which I take to have been the date of service of the summons in the action, paragraph 1 of the Order granted by Mamba AJ ("the Mamba judgment") was in precisely the same terms as the prayer contained in the Particulars of Claim.

[5] A dispute arose between the respondent and the appellant as to whether the respondent had, to all intents and purposes, paid the full amount owing to the appellant, save for the costs awarded to the latter in the order (which costs had not yet been taxed) and the collection commission which had not been assessed. The appellant contended that as the Bond had provided for compound interest, the Mamba judgment must be interpreted as providing for compound and not simple interest; and as it had, in accordance with the terms of the Bond, paid various disbursements, such as insurance premiums etc., the respondent was obliged to re-imburse it for such amounts.

[6] In the Court *a quo*, the issues set forth in paragraph [5] *supra* were argued before Maphalala J who granted an order in terms of the prayer in the Notice of Motion which is quoted in paragraph [1] *supra*.

[7] The appellant has appealed against the judgment and order made by Maphalala J on the following grounds:

"1. The Court *a quo* erred in granting a declaratory order in that there could be no dispute as to the method of calculation of the interest payable which was a matter of law to be applied to terms of the judgment granted.

2. The Court *a quo* erred in finding that Mamba J did not grant compound interest but granted simple interest at the flat rate of 17.25% per annum. The Court *a quo* erred in this regard in that there was no factual basis for this finding as Mamba J granted interest in terms of the agreement between the parties and at an agreed rate as the interest claimed in the action was in terms of the agreement and was compound interest.

3. The Court *a quo* erred in finding that the appellant had claimed insurance premiums in its claim for interest in that the appellant's further affidavit and the schedule thereto provided a calculation of interest on the judgment amount and did not seek to claim insurance premiums."

As will appear shortly, nothing turns on the question of insurance premiums. It will accordingly not be necessary to deal with ground of appeal 3.

[9] In *Administrator, Cape & Another v Ntshwaqela & Others 1990(1) SA 705* (A). Nicholas AJA said at 714J-715D:

"In legal language the word *judgment* has at least two meanings: a general meaning and a technical meaning. In the general sense it is the English equivalent of the American *opinion*, which is -

'(t)he statement by a Judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based'.

(Black's Law Dictionary 5<sup>th</sup> ed sv *opinion*.) In its technical sense it is the equivalent of order....

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When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment."

[10] The learned Judge then proceeded to quote with approval a passage from the judgment of Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977(4) SA 298 (A) at 304D-H which reads as follows:-

"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another*, 1928 A.D. 82 at page 87; *West Rand Estates Ltd v New Zealand Insurance Co. Ltd.*, 1926 A.D. 173 at page 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. (*cf. Post-masburg Motors (Edmns) Bpk. v Peens en Andere*, 1970(2) S.A. 35 (N.C.) at page 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it."

[11] After quoting this passage from the *Firestone* case Nicholas AJA summarised the principle thus, at 716B-C.

"It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

**[14]**

[12] Mr. Flynn for the appellant urged us to take account of the undoubted fact that in the course of the Mamba judgment, the learned Judge frequently referred to the passages in the Mortgage Bond relating to the payment of interest and submitted that that fact demonstrated that the learned Judge intended to provide for interest to be paid in accordance with the terms of the Bond.

[13] But, unfortunately for Mr. Flynn's argument, that is not the test. The intention of the learned Judge can only be derived from the language he used. And in the order which we are asked to interpret he used the word "interest" without any qualification. In its normal usage the word "interest", standing alone, means simple and not compound interest. If authority for such a trite proposition were required, it is to be found in *Boland Bank Limited v The Master and Another 1991(3) S.A. 387 (A) at 389G*.

**[14]** It follows that in my opinion the word "interest" as it appears in the Mamba judgment is clear and unambiguous and cannot be "restricted or extended by anything else stated in the judgment." Moreover that clear and unambiguous meaning is simple and not compound interest and the judgment of the Court *a quo* was therefore plainly correct.

[15] The appeal is dismissed with costs.

P.A.M. MAGID

Acting Justice of Appeal

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I agree

M.M. RAMODIBEDI

Acting Chief Justice

I agree

T.S. MASUKU

Acting Justice of Appeal

Delivered in open court on this day of November 2009.

