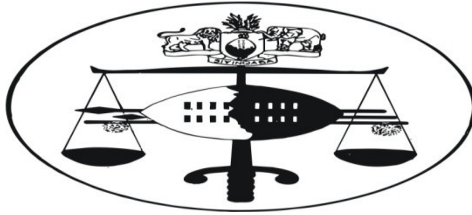

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO: 71 /2015**

In the matter between:

JIMSON JEKE TFWALA APPELANT

AND

SWAZILAND DEVELOPMENT FINANCE CORPORATION RESPONDENT

Neutral Citation:	Jimson Jeke Tfwala *vs. Swaziland Development Finance Corporation (71/2015) [2016] SZSC 72 (30th June 2016)*
Coram:	**MCB MAPHALALA, CJ** **DR. B.J. ODOKI, JA** **R. CLOETE, AJA**
Heard:	**17 May 2016**
Delivered:	**30 June 2016**

Summary: *Civil Procedure – Judgment obtained by default – No proper notice to defend filed or served on the respondent – Application for rescission order refused – Appeal against refusal – Principles applicable to setting aside default judgments – Whether default judgment erroneously made in the absence of the Appellant – Applicant partly paid the debt to the Deputy Sheriff in execution of the judgment – Whether the in duplum rule should be considered – No error made by the court a quo in rejecting application for rescission – Appeal dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI, JA

[1] This is an appeal against the decision of the High Court dismissing an application for a rescission order against a judgment obtained by default against the Appellant.

[2] The Appellant launched an application by notice of motion in the court *a quo* seeking the following orders:

"1. Pending determination of this application, staying execution of the judgment by default of this Honourable Court made on 26 April 2014 in favour of the Respondent.

2. Rescinding and setting aside the order of this Honourable Court for the payment by the Applicant to the Respondent of a sum of E815, 617-64, interest thereon of 14% per annum calculated from the date of summons to date of final payment and costs of suit at attorney-and-client scale.

3. Directing the Respondent to pay the costs of the Applicant.

4. Granting the Applicant such further and or alternative relief as the Honourable Court deems fit."

[3] The Application was accompanied by a Founding Affidavit sworn by the Appellant where he outlined the background facts leading to the grant of the default judgment.

[4] The Appellant obtained a loan from the Respondent to start a feedlot business. The amount of the loan was E200, 000-00 and was subject to an annual interest of 19%. The capital and interest were payable over 36 months in the sum of E7, 331-20 per month starting at the end of August 2014.

[5] On the 14th October 2005 the Appellant applied for an additional loan of E200, 000-00 from the Respondent which was granted on 11 November 2005.

[6] For the period between August 2005 and May 2006, the business went well but thereafter the business started encountering problems such as insufficient supply and reduced purchasing price from cattle wholesaler, Swaziland Meat Industries which was the entity to which cattle farmers were selling their cattle.

[7] Due to the above problems the Appellant defaulted in paying his monthly installments. In May 2006, the Appellant requested a consolidation of the two loans which was granted. The combined outstanding amount as at May 2006 was E370, 821-89. This amount

was acknowledged and accepted by the Appellant as a compromise and revision of the initial agreements.

[8] The Appellant once again defaulted on his obligation in relation to the consolidated balance and was again soon in arrears. No payments were received between August 2007 and November 2010. The outstanding balance inclusive of interest as at November 2010 stood at E721, 935-49 (seven hundred and twenty one thousand nine hundred and thirty five Emalangeni and forty nine cents).

[9] The Appellant then approached the Respondent seeking a rescheduling of the loan in terms of which the parties agreed on a compromise figure of E741, 000.00 (seven hundred and forty one thousand Emalangeni) as the outstanding balance. The parties also agreed to new terms for the repayment of the loan. Hitherto, in terms of the first and second loans as well as the consolidated loan, the Applicant had been obliged to pay monthly installments. However, in terms of the rescheduled agreement, he was now obliged to pay an annual installment. The interest rate was reduced from 19% to 14% per annum.

[10] Following default by the Appellant in payment of the installments the Respondent brought on the 24th April 2013 an application for judgment by default in terms of Rule 31 (3) (a) of the Rules of the High Court, for payment of the sum of E815, 617-64.

[11] The Appellant was served with the summons personally on 26 April 2013. However he claims that having suffered from financial problems, he did not have enough resources to instruct and attorney to defend the proceedings instituted by the Respondent. Hence he sent on Zweli Themba to deliver his notice of intention to defend to the Registrar of the High Court. The notice had the Registrar's stamp of 12 April 2013 at the back.

[12] The Appellant states that the Deputy Registrar who served him with the summons only told him that he had to respond within 14 working days and it did not occur to him that he had to serve the Respondent with his notice to defend.

[13] The Appellant also claimed that he had even filed a plea although he admitted that he was unable to trace a copy of it.

[14] On 24 April 2013, the Respondent launched an application for judgment by default in terms of Rule 31 (3) (a) of the Rules of the High Court. The default judgment was duly entered on the 26th April 2013.

[15] On the 23rd July the Appellant was served with a writ of execution by the Deputy Sheriff. The Appellant agreed to make payment of the least 10% within seven days and thereafter make monthly payments to him who would remit the same to the lawyers of the Respondent.

[16] On the 7th November 2013, the Appellants motor vehicle was attached and sold.

[17] On the 8th November, the Appellant's attorneys wrote to the Respondent that the Appellant was willing to sign a deed of settlement for E711, 047-64.

[18] On the 20th November 2013, the Appellant launched an Application for rescission of the default judgment in terms of Rule 42 (1) (a) of the Rules of the High Court.

[19] On the 9th October 2015, the High Court ruled that the default judgment had not been granted erroneously in the absence of the Appellant, and dismissed the application for rescission with costs.

[20] On the 13th November 2015, the Appellant launched a notice of appeal against the judgment of the High Court on basically three main grounds,

1. The Learned Judge in the court *a quo* erred in law by not considering and holding that the agreement of 24 May 2011 relied on by the Respondent was null and void as it was not in conformity with the provision of the Money Lending and Credit Financing Act 3/1991 especially Section 3 (1) (b) read with Section 6 (1) thereof.

2. The Learned Judge in the court a quo erred in law and in fact in not considering and upholding the fundamental issue of the error of the default judgment against the Appellant in the court a quo arising from the Respondent's reliance on a specific written agreement between the parties dated 24 May 2011 which the Respondent alleged it had complied with in order to obtain judgment when in fact the evidence in the rescission application established that the Respondent had not.

3. The Learned Judge in the court *a quo* erred in law and in fact in dismissing the Appellants application for rescission, particularly in the following material respects:-

   a) In rejecting as not in conformity with High Court Rules the Appellant's notice of intention to defend the action proceedings instituted by the Respondent.
   b) In not finding that the aforesaid notice to defend was duly served on the Respondent's attorneys in the court *a quo* in the absence of an affidavit by the said attorney in this regard.
   c) In holding that there was a requirement of an affidavit to be deposed by the messenger sent by the Appellant to deliver his notice of intention to defend even when the allegation was not materially disputed.
   d) In taking judicial notice that none of the clerks accept for filing any document which is not served on the other party.
   e) In holding that the judge who entered judgment by default against the Appellant could not have missed the Appellant's notice to defend and plea if they were indeed in the file.
   f) In assessing probabilities without resort to be oral evidence in the determination of the question as to whether there

was service of the notice of intention to defend on the Respondent.

g) By holding that the Appellant had not disputed that he was in violation of the loan agreement between the parties in the face of the clear allegations in paragraph 27 of the founding affidavit of the Appellant that the sum of E741, 000-00 had never been advanced to him.

[21] The main issues raised on the grounds of appeal are as follows:

1. Whether the court *a quo* erred in relying on the loan agreement of 24 May 2011 which according to the Appellant the Respondent did not comply with.

2. Whether the court *a quo* erred in relying on the loan agreement of 24 May 2011 when it contravened the Money Lending and Credit Financing Act 3/1991.

3. Whether the court *a quo* erred in law in dismissing the application for rescission on the ground that the Appellant's notice of intention to defend did not comply with the rules of the High Court, nor was there evidence that it was served on the Respondent.

[22] I think it is convenient to start with the consideration of the first issue because it is key to the question whether the court a quo erred in holding that the Appellant had not filed a valid notice to defend the action. The other two issues relate to the question whether the Appellant had a *bona fide* defence to the action.

[23] The Appellant submitted that the evidence established that his notice of intention to defend was on the court file. He referred to paragraphs 24 and 25 of the founding affidavit where he stated that the default judgment was entered against him notwithstanding the fact that he had filed a notice of intention to defend the action. The Appellant maintained that the writings and the court stamp on the reverse side of his notice of intention to defend lend support to his claim that the said notice was filed in court. It was the Appellant's contentions that the Learned Judge in the court *a quo* should have accepted the Appellant's assertion that his notice was simply unsighted when the Learned Judge perused the file.

[24] The Appellant further contended that the Learned Judge *a quo* erred in taking judicial notice of the fact which was not so notorious as to deserve judicial notice namely that clerks at the Registrar's office do

not accept for filing any document which is not served on the other party.

[25] The Appellant surprisingly argued that there is no denial of the receipt of the notice of intention to defend by the Respondent's attorneys as there is no affidavit filed by either the receptionist in the firm or the attorney seized with the matter at the material time. It was submitted that mere denials were not sufficient to dispute the allegation.

[26] The Respondent submitted that the letter which the Appellant relies on to claim that it was his notice of intention to defend does not bear the Registrar's stamp as alleged by the Appellant. The Respondent also contended that the document which appeared in the Book of Pleadings as the back of the notice was suspicious as in ordinary course of events the Registrar's stamp would have appeared on the face of the document and not on the back. It was argued that in any event, this document was never brought to the attention of the Respondent's attorneys, and therefore could not constitute a notice to defend in terms of the Rules.

[27] The Respondent further submitted that the notice does not comply with the Rules of the court and as such could never have been considered as a valid notice. It was contended that the notice does not provide an address within five (5) kilometers of the seat of the court, and it was not brought to the notice of the Respondent's attorney.

[28] Finally, it was argued by the Respondent that the existence of the notice of intention to defend was not raised with the Deputy Sheriff when he came to execute the writ in July 2013, nor was it raised by the Applicant's two attorneys (C.S. Dlamini Attorneys and Madzinane Attorneys) when they tendered payment on behalf of the Appellant. It was the contention of the Respondent that the whole issue of the notice of intention to defend was an afterthought as the Appellant was paying in terms of the judgment since July 2013 and never contested the validity of the judgment until after fourteen months.

[29] As the Respondent submitted, the crisp issue for determination in this appeal is whether the Appellant is entitled to a rescission of the judgment under the various heads that it approached the matter. The Appellant sought rescission on the basis of Rule 42 (1) (a) being the contention that the court granted the default judgment erroneously. The Appellant also contended that it was entitled to a rescission under

Rule 31 (3) (b) on the basis that the default judgment had been granted in his absence. Finally the Appellant sought rescission at common law.

[30] The Appellant brought the application for rescission of the default judgment under Rule 31 (3) (b) of the Rules of the High Court which provide as follows:-

> ***"A defendant may, within twenty one days after he had knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of costs of the default judgment and of such application to a maximum of E500-00 set aside the default judgment on such terms as it seems fit".***

[31] It has been submitted that the Appellant also relied on Rule 42 (1) (a) of the Rules of the High Court which provides:-

> ***"(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".

[32] There appears to be some different requirements for rescission of default judgment under Rule 31 (3) (b) and Rule 42 (1) (a) of the Rule of the High Court. Whereas under Rule 31 (3) (b) ***"good cause"*** is required to be shown, under Rule 42 (1) (a), it has been shown that the judgment was ***"erroneously granted in the absence of any party affected thereby".***

[33] It would appear to me that "good cause" is such a broad clause that may cover judgment erroneously granted in the absence of any party affected by it. Good cause is generally the requirement needed to be established at common law. In all the three situations, it seems to me that the applicant needs to give an explanation of his default to file his notice of intention to defend, secondly that the application is bona fide and not intended merely to delay the plaintiff's claim, and thirdly the need to show that he has a bona fide defence to the plaintiff's claim. See **GRANT v. PLUMBERS (PTY) LTD** 1949 (2) SA 470 (0) **DU PLESSIS vs. DU PLESSIS** 1970 (1) SA 683 (0) **KRITZINGER vs. NORTHERN NATAL IMPLEMENT CO LTD** 1974 (4) SA 542 (N) **VAN**

ASWEGEN vs. KRUGER 1974 (3) SA 204 (0) **CHETTY vs. LAW SOCIETY TRANSVAALL** 1985 (2) SA 756.

[34] In his founding affidavit to the application for rescission, the Appellant explained how he had delivered his notice of intention to defend the action as follows:

> ***"22. Having suffered from the problems alluded above, I do not have enough resources to instruct an attorney to defend the proceedings instituted by the Respondent hence I sent one, Zweli Themba, to deliver my notice of intention to defend to the Registrar of this Honourable Court. A copy of the aforesaid notice which I am informed was delivered to the Registrar on the same day it was written (8 April 2013) is annexed hereto marked "JJ9". The original annexure "JJ9" which my attorneys retrieved from the court file however has the Registrar's stamp of 12 April 2013 at the back.***
>
> ***23. The Deputy Sheriff who served me with the summons only told me that I had to respond within fourteen (14) working days. Therefore it did not occur to me that I had to serve the Respondent with***

annexure "JJ9". As a lay person, I was not aware that I had to do so. However, Zweli Themba informed me that a copy was made for him in the office of the Registrar of this Honourable Court which copy he was advised to deliver at the Respondent's attorneys' offices along Gwamile Street in the city centre of Mbabane. Zweli Themba has confirmed that he duly sent it on the Respondent by delivering it at the offices of Robinson Bertram but did not keep a copy to furnish me. We were both unaware of the necessity to keep a copy. Zweli Themba is currently out of the country and is unable to depose to an affidavit in confirmation of the allegations about him. I beg this Honourable Court to file it in one course should it become necessary."

[35] The Appellant also deposed in his affidavit regarding his filing of a plea as follows:-

"26. As I recall, even I filed a plea. I am however unable to trace a copy. In any event, the Respondent was obliged to thereafter notify me of any subsequent

court process it filed. Even if my address did not accord with the Rules of this Honourable Court as I am now informed by my attorneys, I submit that the Respondent was supposed to apply to this Honourable Court to set it aside and not proceed to apply for judgment by default as if it was not there."

[36] The Appellant stated that he became aware of the judgment against him on or about 24 October 2014 after he consulted his current attorneys who investigated the status of the matter pursuant to which they sent a letter dated 27 October to the Respondent's attorneys denying receiving the sum of E741, 000-00, on the basis of which the judgment was obtained against him.

[37] In its judgment, the court *a quo* found that the letter the Appellant sent to the Registrar of the High Court did not conform to the form provided by the Rules of the Court. The letter which was claimed to be the notice of intention to defend was as follows:

"Jimson Jeke Tfwala
41 Tubungu Township
Matsapha Swaziland

Monday 08 April 2013

The Registrar

The High Court of Swaziland

Mbabane.

Re: Notice of Intention to Defend

<u>Case No. 414/2013</u>

I Jimson Jeke Tfwala do hereby with to file with the High Court of Swaziland of my intention to defend against Case 414/13 as detailed in the summon served on me on 26th March 2013.

Yours sincerely,

JIMSON JEKE TFWALA."

[38] The court *a quo* found that the Appellant's notice to defend was flawed in a number of ways which were stated as follows:-

"- It does not conform the form provided by the Rules;

- It lacks an important factor being the address upon which services of further court processes shall be served by defendant. In fact no specific physical address is shown on the face of it. The address "41 Tubungu Township even if one were to consider it, is of no assistance as it lacks necessary details. "41 Tubungu Township" is too wide an area to effect any services let alone that it does not comply with the

Rules of service in that the address thereto does not fall within five kilometers of the seat of court.

- ***Although it bears the Registrar's stamp of 12 April 2013 at its reverse side, which on its own is very strange, it does not show that it was served upon the respondent. One notes that the reverse side of this document purported to be notice to defend is scribbled with a number of hand writings whose contents are not for the court's consumption. One wonders why such an important document could be treated as a scrape paper".***

I am unable to fault the above findings which were based on the evidence on record."

[39] The court *a quo* also found that the notice was not served on the Respondent although the Appellant claimed that he had been informed by his agent Zweli Themba that he had done so. The court *a quo* accepted the denial by the Respondent that it had not received the notice, and rejected the attempt by the Appellant to swift the onus of proof on the Respondent to prove by affidavit that it did not receive the notice. On the contrary it should have been Zweli Themba to swear an affidavit to support his claim that Registrar of the High Court

had received and accepted the notice and that he also served it on the Respondent, but he did not do so.

[40] The court *a* *quo* observed that none of the parties had applied that the question of service be referred to oral service, and held that the probabilities in the case could be assessed from the pleadings or the evidence on record.

[41] In evaluating the evidence regarding the alleged delivery of the notice of intention to defend, the court *a* *quo* took judicial notice of the practice in the Registrar's office as follows:-

> ***"This court takes judicial notice that the clerks at the Registrar's office do not accept for filing any document which is not served on the other party. Where a litigant would attempt to file a document in the nature of the one in casu, the clerks do advise the party to first serve his opponent and later file. From this practice, one would reasonably infer that when the said Themba was advised to first serve the respondent's attorneys, he never came back to file the notice with the Registrar. There is no averment by applicant that in fact at the time of hearing***

the default judgment application, the notice of intention to defend was serving in the file."

[42] The above observations were criticized by the Appellant on the ground that the court could not take judicial notice of the practice in the Registrar's office because they were not notorious. I am unable to accept this submission because the practice of the court is supposed to be known by the judges and the attorneys practising in that court. It is common knowledge to them.

[43] The court *a quo* also took into account the conduct of the Appellant in claiming that he had filed a plea which he admitted he was unable to trace a copy. The court concluded:-

> ***"Throughout the hearing of his application, Applicant did not show the court any copy of his plea. Respondent had vehemently denied ever receiving a plea and the court file does not contain any plea. No further details such as date when plea was filed and by who. Clearly the presiding judge could not have missed both Applicant's notice to defend and his plea if ever both pleadings were filed. The only reasonable inference is that these***

documents were never in the court's file or filed at all. I note that in his reply, Applicant deposes that the "plea has been found and it bears the Registrar's stamp of 29 April 2013". However, no such document was tendered during the hearing and neither was it in the book of pleadings, nor attached in the replying affidavit."

[44] The court *a quo* considered the subsequent conduct of the Appellant in assessing whether the Appellant intended to defend the action. The court noted that the default judgment was obtained on 26 April 2013, and Appellant was served on 23 July 2013. The Appellant through his attorneys, Madzinane Attorneys, made an offer of settlement for the said debt. The letter dated November 201 reads:-

"Madzinane Attorneys

Robinson Bertram
P. O. Box 24
MBABANE.
Dear Sir,

RE: FINCORP/JIMSON TFWALA – HIGH COURT CASE NO. 414/2013

2. Our Client has instructed us that he was served with a writ of execution by a sheriff in the name of Sivesonkhe Masuku on the 23rd July 2013. The sheriff demanded the

whole amount to which our client advised him that he does not have the whole amount. Our Client was advised by the deputy sheriff to make payment to the sheriff's bank account at least 10% within (70 days, thereafter make monthly payments to him and he will remit to yourselves.

3. ***Acting on that instructions, our Client made payments to the bank account of Sivesonkhe Masuku at Standard Bank as follows:***

23/07/2013	***-***	***E05, 000-00***
02/08/2013	***-***	***E50, 000-00***
05/08/2013	***-***	***E15, 000-00***
08/08/2013	***-***	***E15, 570-00***
13/09/2013	***-***	***E07, 000-00***
11/10/2013	***-***	***E12, 000-00***
		E104, 570-00"

[45] Although the Appellant denied giving instruction to the attorneys to write the above letter, he admitted paying certain sums of money to the Deputy Sheriff to tune of E74, 140-00. However there was another letter written by different lawyers namely C.Z. Dlamini acknowledging the debt on behalf of the Appellant. The Court *a quo* held that the Appellant had not challenged the debt when the Deputy Sheriff served him with the writ, but instead agreed to start paying the debt. The

court also held that the Application could not expect the court to rescind a judgment he had partly complied with.

[46] The Respondent submitted that a court will not grant rescission of a judgment where the Applicant has acquiesced to the judgment. The Respondent referred to the book by Herbstein and Van Winsen, THE CIVIL PROCEDURE PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA 5TH Edition at page 717 where the authors state,

> ***"Acquiescence in the granting or execution of a default judgment is a bar to the rescission of that judgment."***

[47] The Respondent argued that the principles of the doctrine of acquiescence were convassed in the case of BOTHA vs. WHITE 2004 (3) SA 184 where the court stated,

> ***"[31]The doctrine of acquiescence is competent to halt cases where its application is necessary to attain just and equitable results. The test for inferred acquiescence is the impression created by the plaintiff or applicant on the defendant or respondent. It can be proven by some act, conduct or circumstances on the part of the plaintiff or***

applicant, for example, by the applicant's delay in taking action, so that the respondent is lulled into a false sense security. Then, in such circumstances the enforcement of a bright would cause a real inequity and the applicant's conduct issued amount to unconscionable conduct."

[48] The Respondent also relied on the case of **HARTLEY, ROEGSHAAN AND ANOOTHER vs. FIRST RAND LIMITED AND ANOTHER** High Court Case No. 27612/2010 where the court held that according to the common law doctrine of peremption a party who has acquiesced to a judgment cannot subsequently seek to challenge the judgment because he cannot be allowed to opportunistically endorse two conflicting positions or both approbate and reprobate, or to blow hot and cold. In other words, a party cannot be allowed to have his cake and eat it too. The conduct of the Applicant must be unequivocal and inconsistent with any intention to appeal. See **BHEKIWE VUMILE vs. STANDARD BANK SWAZILAND**, Appeal Case No. 13/2005.

[49] The Respondent submitted that the conduct of the Appellant invokes the doctrine of acquiescence because when he was served with the writ of execution he tendered and made payments through the Deputy

Sheriff. He therefore gave the Respondent the impression that he acknowledged his indebtedness and was prepared to settle it.

[50] It was also argued that after the attachment of his motor vehicle, and through his attorneys the Appellant tendered and made payments of monthly installments in an attempt to settle the debt. The Respondent also contended that at no stage during the eighteen months period, did the Appellant ever raise the contention that he was defending the matter or that he did not acknowledge his indebtedness, or that the judgment against him had been obtained erroneously.

[51] Although the court *a quo* did not specifically refer to the doctrine of peremption or the principle of acquiescence, the court came to the correct conclusion that the Appellant had not challenged the default judgment for over a year and had acquiesced in the execution process, thereby giving the Respondent the impression that he had accepted the judgment and had no intention of filing an application for rescission.

[52] I think it is trite law that when considering whether judgment was erroneously entered in the absence of the party, his subsequent

conduct is relevant in assessing whether the Application had genuine intention to challenge the default judgment, or was merely taking proceedings to delay the plaintiff to obtain satisfaction of the judgment. In the present case, I agree with the reasons given by the court *a quo* that the Application for rescission was merely an afterthought which was not validly executed as the notice of intention to defend was incurably defective if it was even filed in court. This court takes into account the claim that the Appellant was a lay man who may not have been conversant with the procedures of the court, but his subsequent conduct after receiving the service of the writ of execution demonstrates that he was not vigilant in challenging the default judgment. Therefore, the court *a quo* made no error in holding that the Appellant did not file a notice of intention to defend. The grounds of appeal challenging this holding must fail.

[53] I shall now deal with the second issue in this appeal which is whether the court *a quo* erred in relying on the loan agreement of 24 May 2011 which according to the Appellant the Respondent did not comply with. The Appellant submitted that the Respondent did not disburse to him E741, 000-00 contained in the loan agreement, and that there was no reference to consolidation and rescheduling of the outstanding amount of the loans, in the loan agreement. The Appellant also argued that

the original loan could not be varied as it contained no-variation clause. The Appellant also submitted that the compound interest levied against him instead of simple interest had not been agreed upon and that the sum of the E886, 648-00 demanded from him was in violation of the *in duplum* rule in terms of which interest exceeding capital in not recoverable.

[54] The Respondent submitted that when the Appellant concluded the agreement, he accepted the balances that were confirmed to be outstanding balances which were contained in the facility letter and loan agreement.

[55] Regarding the *in duplum* rule, the Respondent contended that it provides that interest stops running when unpaid interest equals the outstanding capital. It was the submission of the Respondent that the act of making intermittent Payments suspends the application of the *in duplum* rule. The Respondent relied on the case of **STANDARD BANK OF SOUTH AFRICA vs. OREANATE INVESTMENTS (PTY) LTD** (In Liquidation) 1998 (1) SA 811 SCA.

[56] The Respondent further submitted that the **STANDARD BANK CASE** (*supra*) affirms the position that it is unpaid interest as opposed to interest *per se* that triggers the operation of the *in duplum* rule. The court held that according to the *in duplum* rule, interest stops running when unpaid interest equals the outstanding capital. When due to payment of interest it drops below the outstanding capital, interest begins to run until it is once again equal to that amount. See **LTD CONSTRUCTION BPK vs. ADMINISTRATOR, TRANSVAAL 1992 (1) SA 473 (A)**. The Appellant maintained that the *in duplum* rule had not been violated in this case.

[57] The Respondent submitted that it is the Appellant who had applied for the rescheduling of his loan which application was granted. The Appellant had adhered to the conditions of rescheduled loan albeit unsatisfactorily. It was also argued that pursuant to the rescheduling of the loan the Appellant was not obliged to make any payments on a monthly basis but on annual basis and therefore the Appellant understood the terms of the settlement.

[58] The Respondent contended further that the rescheduling of the loan was to the Appellant's benefit in that the repayment period was

extended to ten years with annual installments. The rate of interest was reduced from 19% to 14% per annum.

[59] The Respondent denied that the non-variation clause in the loan agreement was contravened by the facility letter which did not seek to vary the terms of the agreement. It was the contention of the Appellant that non-variation clause was not breached as the letter of 20 May 2011 was reduced in writing and signed by both parties.

[60] The agreement for rescheduling of the Appellant's loan was contained in a letter dated 20 May 2011 from the Respondent addressed to the Appellant as follows:-

"RE: YOUR LOAN ACCOUNT

We are pleased to advise you that on 9th November 2010, the rescheduling of your loan was approved on the following conditions:-

Amount	**:**	**E741, 000-00**
Interest Rate	**:**	**14%**
Duration	**:**	**10 years**
Frequency	**:**	**Yearly**
Yearly installment	**:**	**E138, 033.70**

1st Installment : 20 May 2012.

If you accept the above stated terms and conditions, please sign on the space provided on the copy and return same to the undersigned.

Yours faithfully,

____

Authorised signatory

For and on behalf of FINCORP

I/We JIMSON TFWALA accept the loan offer with its scaled terms and conditions.

______________________ **24 May 2011**

M Signature Date"

[61] It is clear that the Appellant signed the above agreement which rescheduled his loan. It seems that the rescheduling included the consideration of his outstanding loan giving rise to new terms and conditions for his loan. The Appellant now argues that he expected the sum of E741, 000-00 to be disbursed to him by the Respondent. This may have been a misunderstanding of the rescheduling of the loan which he should have cleared with the Respondent if he had a genuine complaint. From the evidence on record it is clear, that the Appellant

was experiencing financial difficulties arising from his non-performing business and it is not clear to me how he was going to service the loan. But he willingly entered into the loan agreement and he is bound to comply with its terms and conditions. I do not find that the *in duplum* rule was violated in this case.

[62] The Appellant raised the issue of the validity of the loan agreement in order to show that he had a *bona fide* defence to the action. However, for the reasons I have given there was no evidence that the loan agreement was invalid and therefore it did not constitute a *bona fide* defence to the action.

[63] The first issue in this appeal was whether the court *a quo* erred in holding that the loan agreement of 24 May 2011 was null and void for not complying with the provisions of the Money Lending and Credit Financing Act 3/1991 especially Section 3 (1) (b).

[64] The Respondent submitted that the issue relating to the violation of the Money Lending Act had not been raised in the rescission application but arose in the context of a stay application. The issue does not appear in the Appellants founding affidavit and therefore was not an issue in the rescission application before the court *a quo*. It was

not even raised in the Appellant's heads of arguments. I agree with the Respondent that the issue is not properly before this court.

[65] In conclusion I find that the court *a quo* was correct in holding that the judgment by default granted against the Appellant was not erroneously made in the absence of the Appellant.

[66] Accordingly I make the following order:-

1) The Appeal is dismissed.
2) The judgment of the High Court is upheld.
3) The Appellant is granted costs of this appeal.

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DR. B.J. ODOKI

JUSTICE OF APPEAL

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MCB MAPHALALA

CHIEF JUSTICE

R. CLOETE

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: **S.K. DLAMINI**

FOR THE RESPONDENT: **Z.D. JELE**