THE HIGH COURT OF SWAZILAND

STANDARD BANK OF SWAZILAND LIMITED

Plaintiff

ASHLEY FRIEDMAN

Defendant

Coram	S.B. MAPHALALA-J MR.
For the Plaintiff For	K. MOTSA MR. S.
the Defendant	SIMELANE

JUDGMENT

(16/04/2004)

The Plaintiff issued summons against the Defendant for monies lent and advanced on overdraft in the sum of E33, 983-92 and interest at 24% arising from a revolving credit agreement (the RCP). The Defendant filed a notice of intention to defend.

Upon filing a declaration the Plaintiff alleged that the Defendant had borrowed the money, upon a revolving credit plan agreement having been entered into by the parties which agreement was annexed to the papers.

In an application for summary judgment, it was averred that the Defendant had actually acknowledged his indebtedness to the Plaintiff and an acknowledgement of debt is, or what purports to be it, was annexed to the papers.

The Defendant does not deny signing the RCP agreement (hereinafter referred as "A") The

RCP agreement provided ***inter alia.***

- That the Defendant was being lent a sum of El5, 000-00 from 31st July 1996 at 24% per annum, and that;
- The Defendant agreed that the account number 01300183558/01 was for the RCP

The Defendant pleads in his defence that the revolving credit plan entered into by both parties was with the sole purpose of making available to him a sum of E12, 000-00, which was required by the him as a deposit towards a home loan account in the amount of E60, 000-00. Defendant further pleads that in October 1996 it was agreed with the Plaintiffs Manager Mr. Lindsay Verloso that all accounts operated by the Defendant and his wife with the Plaintiff, would be placed in "lock-up" to reserve interest, whilst the Defendant sought a buyer for their house, the proceeds of which sale were to be paid to the Plaintiff. At the time the total of such accounts was the amount ofE231, 192-48.

The Defendant's house was eventually sold for the sum of El 90, 000-00 of which the sum of El82, 000-00 was paid to the Plaintiff leaving a balance of E49, 192-48. It was then agreed that the balance of E49, 192-48 would be settled by the Defendant's wife, Lucelle Friedman, by way of monthly instalments of El, 550-00 and the Defendant's wife signed an acknowledgement of debt in respect of that amount. Further, the Defendant's wife paid the total sum of E51, 150-00 between the 30lh June 1997 and the 28th Feb ruary 2000, in settlement of the balance for which the acknowledgement was signed.

The Defendant denies that he failed to make timeous payments to the Plaintiff in respect of his indebtedness. The Defendant denies that he is indebted to the Plaintiff in the sum stated, nor any sum at all. Defendant admits demand but denies liability to pay on the demand.

In reconvention the Defendant prays for a judgment against the Plaintiff for payment of the sum of E29, 968-00, interest thereon at 9% per annum a ***tempore morae*** and costs of suit.

The basis of the defence on the merits of the matter is that, the Defendant admits that he was party to the revolving credit plan agreement and that he was lent the money by the bank but states that the money was paid back by his wife after an agreement had been reached with the bank to amalgamate his account as aforesaid with his wife's account and other accounts which were operated by the Defendant and his wife.

In the present case there is no dispute as to whethei the Defendant's wife did pay money to the bank. It is only alleged by the bank that the Defendant's wife was not paying for the Defendant's account, but was paying for the other accounts.

It is contended by the Plaintiff that there was never an amalgamation of the accounts as pleaded by the Defendant. The Plaintiff alleged and pleaded that the RCP account was never amalgamated with the other accounts and that the only account that were amalgamated were the overdraft of the Defendant's wife and the home account.

Therefore, the issue to be decided by the court, firstly, is whether or not there was an agreement to amalgamate the accounts, and if the court finds that there was an agreement to amalgamation of the accounts, then the court should find for the Defendant and the claim should be dismissed, and where however, the court were to find that there was no agreement to amalgamate the accounts, then the court should find in favour of the Plaintiff and also satisfy itself that, the ***induplum*** rule has not been contravened.

The Plaintiff led the evidence of its Credit Manager, a Mr.Dlamini who testified that the sum of E33, 928-92 arises out of the RCP and that the Defendant still owes it as

interest has been debited until February 2001. This witness testified on what ***lock-up*** of interest means. He explained that "lock-up" means that a debtor's account are treated as non-performing as they have not paid according to the previous arrangement with the Plaintiff. In other words, the interest is put into a suspense account. The interest is charged on the customer, but the bank is not treating it as profit because the customer is not able to repay the loan. If the account is repaid thereon the interest is treated as profit. But if it is not repaid it is considered as a loss.

This witness testified that the accounts which were amalgamated were the Manzini Oak account, the Home Loan account and Mrs. Friedman account. The acknowledgement of debt by Mrs Friedman signed on the 26th June 1997 to pay instalments towards her own overdraft and the balance of Manzini Oak left out Mr. Friedman. She finally settled in full the whole amount covered by the acknowledgment of debt of the 26th June 1997. This acknowledgment of debt signed by Mrs Friedman has nothing to do with the present claim before court.

This witness was cross-examined at great length where he took the court through the various accounts held by the Defendant and his wife with the Standard Bank. Essentially, he testified that there was no amalgamation of accounts as understood by the Defendant and his wife.

He further testified in re-examination that the alleged meeting between the Plaintiff, his wife and the bank officials where the amalgamation of accounts is alleged to have been discussed is suspect because there is nothing on record to prove that the meeting took place. He testified in this regard that it is the policy of the bank to record all meetings. The reason for this is for sufficient planning, if for instance the officer in question were to leave the bank, somebody who comes in should get these records in the bank files and proceed from there.

The Defendant led the evidence of his wife and he also gave evidence. Essentially both their testimony centred around the existence of the amalgamation of the accounts. The Defendant admits that he was party to the revolving credit plan agreement and that he was lent the money by the bank but he states that the money was paid back by his wife after an agreement had been reached with the bank to

amalgamate his account with his wife's account and other accounts which were operated by the Defendant and his wife. His wife also gave evidence to the same effect.

Each testified on the circumstances surrounding the signing of the acknowledgment of debt on the 26th June 1997 and the letter of the 17th April 1998. In the letter it is acknowledged that Mr. Friedman owed a sum of El7, 691-58 under account no. 0130018355801 and that he was prepared to pay a sum of E500-00 per month starting from 30th April 1998.

They were both cross-examined by ***Mr. Motsa*** for the Plaintiff. Under cross-examination they were both adamant that the amalgamation of all their accounts were made and generally they stuck to their defence in-chief.

The court then heard submissions from counsel. Both parties filed Heads of Arguments. On the totality of the evidence adduced before me I am inclined to hold that the accounts were never amalgamated as alleged by the Defendant.

It appears to me that the version given by the Plaintiff on a balance of probabilities is more sound. Further, it appears to me that the conduct of the various accounts in this case point to the direction that the Defendant's account was never amalgamated to the accounts by his wife. The evidence of Mr. Dlamini showed clearly that the term "lock-up interest" in the file note of the 4th October 1996, means that interest was to be charged and credited taken to the suspense account instead of interest receiving account (as the Defendant and his wife accounts were not performing). In this regard I agree with the submissions made by ***Mr. Motsa*** for the Plaintiff on the home loan account, advance account and Mrs. Friedman's current account or overdraft support the averment that the various accounts show that interest was charged since 4th October 1996.

The suggestion that the acknowledgment of debt dated the 26th June 1997, was to cater even for Defendant's account and the hire purchase account (VW Jetta) cannot be correct, for a number of reasons. Firstly, the bank statement dated the 30th June 1997 (at page 9.3 of Book "B") shows that the sum of El, 500-00 which Mrs

Friedman undertook to pay was paying the combined account of A/C account and Mrs Friedman's account. According to the Plaintiff only a sum of E56, 562-76 was fully paid up. Hence these accounts are no longer owing. The court has not been shown neither by the Defendant or his wife a figure which is different from the sum of E56, 562-76 and Mr. Friedman when he testified about the accounts at page 9.3 of Book "B" said he was not aware of it as his wife was dealing with it.

Secondly, Mrs Friedman signed the acknowledgement of debt on the 26th June 1997, but on the 3rd April 1998, Mr. Friedman was sued under Case Number 816/1998 and he confirmed this in evidence. This to some extent show that the Defendant's account had not been amalgamated with A/C account and Mrs Friedman's account on 26th June 1997. Mr. Friedman on cross-examination agreed that the amount of E2, 204-96 in the summons did appear in his statement at page 34 of Book "A" being a bank statement dated the 22nd August 1998 for Mr. Friedman. Further in this regard both Mr. Friedman and his wife confirm the action under Case No. 816/1998 in writing. The said letter is signed by both Mr. Friedman and his wife and is addressed to a certain Mr. V. Van Den Heever of the Standard Bank and it reads as follows:

L.E. FRIEDMAN P.
0. Box 2036
MANZINI

17 April 1998

Mr. V. Van Den Heever
Standard Bank P. 0. Box 1
MANZINI

Dear sir

RE: A. FRIEDMAN R.C.P. ACCOUNT 0130018355801 AND CASE 816/1998

I refer to a meeting held between Mr. Victor Van Den Heever, Mrs Arlene Karamitsos and myself, "at your offices today regarding the above matters, and confirm the following: —

1. That you withdraw the above Case SI6/98 in the matter between A. Friedman and yourselves in the High Court of Swaziland, and that client attorney costs be for your account. We agree that cosrs of suit be shared between the bank and ourselves.

2. A. Friedman acknowledges that he is indebted to Standard Bank. Manzini in the amount of E17, 691-58 account no. 0130018355801, and that he is prepared to pay the sum of E500-00 per month starting from the 30lh April 1998 (month-end).

3. That we appoint Mrs Arlene Karamitsos to negotiate on our behalf with all management, regarding our accounts, (L.E. Friedman, A. Friedman and Manzini AUC (PTY) LTD).

Kindly acknowledge receipt of this letter, as we are aware that you are shortly leaving Swaziland and we would appreciate your response in writing.

Thanking you.

L.E. FRIEDMAN A. FRIEDMAN

In the above-cited letter they acknowledged that only Mr. Friedman owed a sum of El7, 691-56 under account no. 0130018355801 and he was prepared to pay a sum of E500-00.

As regards to the interpretation to be given to the letter, I am inclined to agree with the submissions made by ***Mr. Motsa*** that the letter of the 17lh April 1998, should be given a literal and ordinary meaning, that it is an acknowledgement of debt. An acknowledgment of debt is a document containing an unequivocal admission of liability (see ***Raghavjee vs Munsamy 1949 (4) S.A. 426 (D); Adams vs S.A Motor Industry Employers Association 1981 (3) S.A. 1189 (A) at 1198 B to 1199 A to C).***

According to ***Butterworths Forms and Precedents Vol 2 page 5 - 6*** an acknowledgment of debt usually consists of the amount and the signature. The other conditions inserted are usually incidental and subject to the rules of the law of contract. In ***casu,*** in my mind, the letter of the 17lh April 1998 is an acknowledgment of debt as it has all the attributes of such a document as mentioned in ***Butterworths Form and Precedents (supra).*** The said letter has the following attributes;

a) It contains an unequivocal undertaking to pay; and

b)

of Book "A"; and

c) Signed by the Defendant and his wife who confirmed the signatures during their evidence

I further agree with ***Mr. Motsa*** that there was neither evidence nor mention in the plea that they wrote this letter under duress. They testified that they wrote it as a Mr. Van Den Heever said they should write it. In the case of ***Richer vs Bloemfontein Council 1922 A.D. 57 - 70*** the following was enuancited:

> **"Extrinsic evidence is only admissible to explain the construction of a document where words occur which are ambiguous either in the or as read in their context''.**

In the instant case I hold the view that the letter of 17th April 1998 is not ambiguous in anyway. The explanation given of this letter they wrote on the instructions of Mr. Van Den Heever ought to be rejected as it introduces extrinsic evidence. In my view, the said letter is a very straight forward document which should be given a literal and ordinary meaning. Furthermore, on the principle of ***caveat subscriptor*** the Defendant is precluded from disowning the contents of the letter on the principle that when a man signs a contract he is taken to be bound by the ordinary meaning on the effect of the words which appear over his signature, (see ***Burger vs Central South African Railways 1903 T.S. 571*** at ***578).***

It appears further in ***casu*** that the Defendant and his wife on the 17th April 1998, acknowledged the debt of El7. 695-58 and they never paid thereafter hence the summons of E33, 982-92 owing as of 28,h February 2001 arising from this figure. In addition Defendant as neither himself nor his wife produced any proof that the monies they acknowledged on 17,h April 1998 were paid notwithstanding that the Defendant in his testimony said statements in proof of payment were given to his attorney.

On the issue raised by ***Mr. Simelane*** for the Defendant in the Heads of Arguments that no cause of action has been disclosed in the pleadings, I am of the view that a cause of

action has been established in this case. The argument by *Mr. Simelane* is premised on the *dicta* by Shabangu ACJ in the unreported judgment in the matter of ***Mgabhi Dlamini vs Swaziland Government Civil Case No. 3278/2001*** and the South African case of ***Standard Bank of South Africa vs Oneanate Investments (Pty) Ltd 1998 (I) S.A. 811.*** In the present case the summons in this matter should be read with the Plaintiffs declaration as at some point in the history of this matter there were summary judgment proceedings.

Mr. Simelane further argued that, if the court were to find that there was no amalgamation of the accounts, the court should satisfy itself that the *induplum* rule has not been contravened. He cited the case of ***F & I Advisers (EDMS) BPK vs East Nationale Bank Van S.A. 1999 (1) S.A. 515 (A)*** to support his arguments.

On the facts of the present case it is my considered view that the *induplum* principle has no application for the following reasons. When the Defendant was granted the El5, 000-00 in terms of the RCP account (page 1 of Book "B") he already operated a current account (overdraft). On the 31st March 1998 the two accounts were combined to the RCP only to an amount of El7, 691-58 which Defendant acknowledged owing. Therefore, the *duplium* can start operating at E35, 383-16 not at the present claim of E33, 982-92 presently claimed.

As for the interest of 24% per annum claimed by the Plaintiff I agree with *Mr. Motsa* for the Plaintiff that the interest is contractual (consensual interest) not *mora* interest, that is, interest due to the borrower's failure to make payments on due claim.

In the case of ***Senekal vs Trust Bank of Africa Ltd 1978 (3) S.A. 375*** the following was stated at page 384:

> "ordinary, the customer is probably aware of the bank's practice of periodically debiting, as money due and payable, interest to an overdrawn current account and, if the customer may have been unaware of that practice at the time of seeking and obtaining overdraft facilities, he must need have become aware of it and obtaining overdraft facilities, he must need have become aware of it when periodically charged and added to his current account. It appears to me that a customer who receives such periodical

statements without protest or objection acquiesces in the system and thereby tacitly agrees to be bound thereby" ~

In the present case the Defendant when he signed the revolving credit plan agreement at page 1 of Book "B" to a contractual interest of 24% per annum and this was confirmed by him his evidence. Defendant never protested about this interest.

The other issue that was raised in argument by *Mr. Simelane* is that the interest charged offends against the provisions of the Money Lending and Financing Act No. 3 of 1991. In this regard it appears that *Mr. Motsa* is correct that Section 10 (c) of the said Act does not apply to an institution licenced under the Financial Institution (Consolidation) Order 1975.

Section 10 of the 1991 Act provides as follows:

"Exemptions

10 The provisions of this Act shall not apply to: 11

4. Any money-lending or credit transaction to which the Pawn Broking Act, 1894 applies;
5. Any money-lending or credit transaction to which the Land and Agricultural Loan Act, 1929 applies;
6. Any institution licenced under the Building Societies Act, 1962 or the Financial Institutions (Consolidation) Order, 1975;
7. Any hire-purchase transaction of which the Hire-Purchase Act, 1969 applies;
8. Any credit card scheme recognized and adopted by any institution licenced under the Building Societies Act, 1962 or the Financial Institutions (Consolidation) Order, 1975." (my emphasis).

Section 6 of the Financial Institutions (Consolidation) Order, 1975 provides as follows:

Financial Institutions deemed to be licensed under the order.

The following institutions shall be deemed to be licensed in terms of the order:

9. The Swaziland Development and Savings Bank established under the Swaziland Development and Savings Bank Order, No. 49 erf 1973:

10. Barclays Bank of Swaziland Limited; and

11. Standard Bank Swaziland Limited.

Section 10 (c) of the 1991 Act read with Section 6 (c) of the 1975 order clearly show that the provisions of the Money Lending Act and Credit Financial Act do not apply to the Plaintiff.

From what I have said above the following conclusions can be drawn on the main action:

12. Defendant acknowledges that he signed a RCP agreement on 31st July 1996;

13. Defendant agrees that because he was unemployed he could not pay, hence the account was non-performing and it was put on lock-up on 4th October 1996;

14. Therefore, lock-up is not amalgamation, hence interest continues to be charged to all accounts even to Defendant's accounts.

15. Mr. Friedman was sued on 3rd April 1998 because his wife's payments did not cover his account (see page 3 of Book "B");

16. On the 17th April 1998, the Defendant and his wife acknowledged the debt and there have been no payments from 17th April 1998 to date hence the present claim of E33, 982-92.

17. The *induplum* rule does not apply in the present case.

18. Section 10 (c) of the Money Lending Act does not apply to the Plaintiff which is licenced under the Financial Institution (Consolidation) Order.

On the issue of the counter-claim I agree with *Mr, Motsa* that it has no merit for a number of reasons. Firstly, the accounts never amalgamated; secondly, the house was sold at El 179, 201-00 instead of E151, 127-37; thirdly, Mrs Friedman paid E56, 562-76 not E49, 192-48, hence the above figures alone amount to E235, 764-71 which is above the figure stated in file note of 4th October 1996. Furthermore, the summons of 3rd April 1998 and the letter of 17,h April 1998 establish beyond doubt that Defendant

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was owing after 26' June 1997. His wife's instalments of E1, 550-00 would not cover either his account'or his vehicle's account hence the latter was repossessed in September 1997 after his wife had signed the acknowledgment of debt.

In the result, judgment is entered in favour of the Plaintiff in terms of prayers a), b) and c) of the Plaintiffs declaration.

S.B. MAPHALALA

JUDGE