IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No.39/2015

In the matter between:

CEBILE NOMZAMO SIMELANE **Appellant**

VS

MICRO PROVIDENT SWAZILAND LETSHEGO FINANCIAL SERVICES SWAZILAND (PTY) LTD **1st Respondent**

THE ACCOUNTANT GENERAL **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

SWAZILAND ROYAL INSURANCE CORPORATION **4th Respondent**

Neutral citation: *Cebile Nomzamo Simelane v Micro Provident Swaziland Letshego Financial Services Swaziland (Pty) Ltd (39/2015) [2015] SZSC 42 (9 December 2015)*

Coram: **M.D. MAMBA AJA, M. DLAMINI AJA AND M.J. MANZINI AJA**

Heard: 17 November 2015

Delivered: 09 December 2015

[1] Civil law – Appeal – filing of Appeal in terms of Rule 8 of the Rules of Court. Appeal to be filed within four (4) weeks of the delivery of the judgment appealed against, rule 8 (1). Appeal filed out of time. Application for condonation necessary in terms of Rule 17, and good cause to be shown for such late filing.

[2] Civil law – law of contract – contract regulated or governed by Money Lending and Credit Financing Act No. 3 of 1991. Contract in violation of section 3 (1) (b) of the Act rendered null and void in terms of section 6 (1). Whether collection fees and insurance premiums are in conformity with the provisions of the Act.

[3] Civil law – law of contract – credit receiver and credit lender. Credit receiver complaining that interest charges on loan in violation of the in duplum rule. Credit receiver never in arrears in her monthly instalments. In duplum rule inapplicable.

JUDGMENT

MAMBA and MANZINI AJJA

[1] We have had the privilege of reading the judgment in draft form of our Learned Sister and colleague Judge Dlamini in this matter. We have also had the privilege of discussing it with her. Needless to say that our discussion was very frank, collegial and fruitful as we were able to agree on quite a number of issues such as *inter alia* the calculation of interest. We also agreed that the appellant was not obliged to pay Insurance premiums in respect of an insurance contract entered into by and between the first and fourth respondents, and that appellant be refunded all premiums paid by her. Finally, we agreed that the appellant's founding affidavit contained sufficient averments to satisfy the requirements of a

declaratory order. However, at the end of our discussions we agreed to disagree on some of the issues that we address in the following paragraphs.

[2] We respectfully do not agree with the conclusion reached by our colleague at paragraph [46] of her judgment, and our reasons appear from below.

[3] It is common cause that each of the three contracts entered into by the parties included a "*collection fee*", payable by the Appellant in addition to the interest rate charged by the 1st Respondent. The first contract included a "*collection fee*" of E650.00; the second a "*collection fee*" of E690.00; and the third, a "*collection fee"* of E690.00.

[4] Our colleague concluded that this "*collection fee*" falls under "*expense*" which is expressly prohibited by Section 6(3) of the Act. The three contracts are to be condemned and declared null and void purely on this ground.

[5] The starting point, in our view, is Section 4 of the Money Lending and Credit Financing, Act 3/1991 (the Act) which reads as follows:

> *"4. A lender shall, in connection with any money-lending or credit transaction for which finance charges are payable, state in the instrument of debt executed in respect of any such transaction, the following particulars:*
>
> *(a) The cash amount in money, or the value of the use or enjoyment, of movable property or services actually received by or on behalf of the borrower or the credit receiver;*
>
> *(b) All other charges shown separately but which form part of the principal debt;*
>
> *(c) The principal debt, that is , the sum of the amounts referred to in paragraphs (a) and (b);*
>
> *(d) The amount in Emalangeni and cents the finance charges;*
>
> *(e) The finance charges expressed at an annual finance charge rate; and*
>
> *(f) As the case maybe,*

(i) the date upon which or the number of instalments in which the principal debt <u>together with the finance charges</u> shall be paid;

(ii) the amount of each instalment; and

(iii) the date on which each instalment becomes due and the manner in which the date is determined."

(Underlining provided)

[6] Before dealing with Section 6(3) it is imperative to establish the meaning of "*finance charges*". The Act, unfortunately, does not define what are "*finance charges*".

[7] A useful base for comparison is the now repealed South African Usury Act 73 of 1968. The repealed Act contained provisions which are in *pari materia* to our Money Lending and Credit Financing Act.

For instance, it contains a provision on "*compulsory disclosure of finance charges"* (Section 2), which is comparable to our Section 4 of the Act. The Section reads as follows:

"A money lender carrying on the business of money lending or his authorized representative shall, on demand before the conclusion of any money lending transaction in connection with which finance charges are or will be payable, furnish separately, distinctly and in writing to the prospective borrower, and, whether or not any such demand is made, shall set out separately and distinctly in every instrument of debt executed in respect of any such transaction, in so far as the same way be known or determinable, the following particulars:

a) *the cash amount in money actually received by or on behalf of the borrower or which will be received by or on behalf of the borrower or prospective borrower;*
b) *all other charges, shown separately, forming part or which will form part of the principal debt;*
c) *the principal debt, that is, the sum of the amounts referred to in paragraph (a) and (b)*
d) *the amount in rand and cents of the finance charges calculated at the annual finance charge rate mentioned in paragraph (e);*

e) the annual finance charge rate; and

f) as the case may be, the date upon which or the number of instalments in which the principal debt together with the finance charges must be paid, the amount of each instalment and the date upon which each instalment must be paid or the manner in which that date is determined."

[8] The Usury Act, unlike our Money Lending and Credit Financing Act, defines "*finance charges*" as follows-

"means the total value of any valuable consideration, which the borrower or credit receiver or lessee has given or is owing, whether as part of the principal debt or otherwise, directly or indirectly, to a money lender or credit grantor or lessor or to or on behalf of any intermediary between himself and a money lender or credit grantor or lessor in terms of a money lending transaction or a credit transaction or a leasing transaction, and includes, in the case of an agreement in terms of which goods are sold under a condition of repurchase of such goods at a higher price, the difference between the higher price at which the goods are

repurchased and the lower price at which the goods are sold, but does not include –

a) a ledger fee;

b) Any amount referred to in Section 5 (1)(b);

c) The costs referred to in Section 5(1)(e) or (f)

d) The costs of repair and maintenance of the movable property leaned in terms of a leasury transaction;

e) Any valuable consideration specifically included in the principal debt by this Act;

f) Any underwriting fee

g) Any amount or costs referred to in Section SA (1) (a) or (c).”

[9] The limitations in Section 5(1)(b) of the Usury Act concern disbursements in respect of maintenance and repair and renewal of premiums for fire insurance policies over immovable property. Section 5(1)(e) and (f) relate to legal costs where judgment against the borrower is obtained. Section 5 (1) (a) simply states that finance charges shall not exceed the principal debt.

[10] Thus, what is clear from the scheme of the now repealed Usury Act, is that "*collection fees"* are not, either expressly or by implication, excluded from the realm of finance charges. It can conclusively be argued that, barring any express exclusion, in the language of the Usury Act, they constitute valuable consideration which the borrower gives to a money lender in terms of a money lending transaction.

[11] To the economist or accounting professional, "*finance charge*" is commonly known as a fee representing the cost of credit or the cost of borrowing. In our view, "*collection fees*" are charges incidental to the cost of borrowing. The Money Lending and Credit Financing Act expressly permits the levy of finance charges by money lenders and places few limitations thereon, unlike the now repealed South African Usury Act.

[12] The only limitation we find relevant in the Money Lending and Credit Financing Act in respect of finance charges is set out in Section 3(3), which reads as follows:

> *"Where in connection with a money- lending or credit transaction it is agreed by the parties that payment of the principal debt and*

finance charges shall be effected in any manner other than by way of regular payments, the annual finance charge rate at which finance charges may be levied shall be calculated on the balance of the principal debt owed from time to by the borrower or credit receiver."

[13] However, this must be read in conjunction with Section 3 (4) which provides that there is nothing in Section 3 (3) which prohibits "*the recovery of finance charges according to periods of one month…".*

[14] We conclude, therefore, that our colleague has mischaracterized the "*collection fee*" in respect of each of the contracts as "*expens*e" prohibited by Section 6 (3), hence her conclusion. If one proceeds from the premise that the Act, per Section 4, permits a money lender to charge finance charges on a loan, and that collection fees are finance charges, in that they are incidental to the cost of borrowing, then, not only is a levy of collection fee in conformity with the Act, but it is also expressly recoverable from the borrower in terms of Section 6 (2) (d).

[15] It must be borne in mind that Section 6 (1) condemns only transactions that are not in conformity with the Act.

[16] Now turning to Section 6, which reads as follows:

> *"6 (1) 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.*
>
> *(2) No lender shall in connection with any money-lending or credit transaction obtain judgment for or recover from a borrower or credit receiver an amount exceeding the sum of –*
>
> *(a) the principal debt owed by the borrower or credit receiver;*
>
> *(b) the interest charges on the principal debt;*
>
> *(c) the additional finance charges calculated in the manner prescribed by 7*
>
> *(d) in the case where judgment is obtained for recovery of the principal debt or finance charges due from the borrower or credit receiver, legal costs awarded in terms of such judgment.*

(3) No lender shall in <u>any proceedings</u> against a borrower or credit receiver in respect of any loss, damage or expense alleged to have been incurred by him in connection with a money-lending or credit transaction, obtain judgment for any since not recoverable under subsection (1) of this Section". (Underlining provided)

[17] Now, once parties have agreed, at the conclusion of a money-lending transaction, that the lender shall levy finance charges (which of course is permitted by Section 4), and it is proved that these were incidental to the costs of borrowing, there is no basis for characterizing these as "*expenses*" prohibited by Section 6 (3).

[18] Finally, we have considered, and find that the case of **<u>Sosebee v Boswell 242 Ark 296 414 SW 2d 380 (1967) ,</u>** relied upon by our colleague is distinguishable. In that case, in issue was an Escrow agreement which had been concluded as a <u>side contract</u> in terms of which one of the parties expected to increase its profits. The pivotal question in the case was whether the additional profit must be treated as interest. If so, the loan was usurious; otherwise not. The Court applied, to the Escrow agreement, <u>and not the main loan agreement</u>, the test that a moneylender cannot impose upon the borrower charges that in fact constitute the

lenders overhead expenses or costs of doing business. There was an admission that the additional profit would cover overhead expenses. Hence, the decision. In any event, the majority (Harries C.J and Fogleman J) did not agree with the judgment of George Rose Smith, Justice.

[19] On this basis, we conclude that the "*collection fees*" charged by the 1st Respondent in respect of the three contracts are "*finance charges*" permitted by Section 4 of the Act, and therefore, not unlawful and wrongful as contended by the Appellant. This ground of appeal is dismissed.

[20] Section 8 of the Money Lending and Credit Financing Act 3 of 1991 provides that:

> 'Any borrower or credit receiver who in connection with the money-lending or credit transaction pays an amount in excess of the amount in excess of the amount which in terms of this Act is lawfully recoverable from him may, at any time within three years from the date of such payment, recover from the person to whom

the payment was made a sum equal to the amount overpaid by him.'

Again, with due respect to Dlamini J, the question she poses in paragraph [35] of her judgment is not the correct one. The provisions of this section are not complicated or ambiguous, in our view. What is not recoverable outside the period of three years referred to are the payments and not the contract or contracts under which these payments were made. The period of three years must, we think, be calculated, backwards, from the date on which the claim by the credit receiver is made. Any payment that falls or was made outside of this period is not recoverable. In the present case, the appellant filed her application on 25 June 2013. Going back three years from that date takes us to 25 June 2010. Any payment made by the credit-receiver or borrower to the Lender (1st respondent) before 25 June 2010 has prescribed and is not recoverable.

[21] At paragraph 51 the Learned Judge states that:

'[51] …the appellant received a total cash in respect of the three transactions a sum of E56 900 and it yielded E77 320 extra. This sum [of E77 320] far exceeds the capital loan and in accordance with Reckson's case, it violates the in duplum rule. It stands to be declared null and void for that reason also.'

This is repeated in paragraphs 53 and 54 of the judgment. We do not, with due respect to the Learned Judge think that this is the correct statement of the rule. It is worth and remembering that both *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited (CCT 61/14) [2015] ZACC 5; 2015 (3) SA 479 (CC) (24 March 2015)* and *Standard Bank of South Africa v Oneanate Investment (Pty) Ltd (in liquidation) 1998 (1) SA 811 (SCA)* were concerned with whether the operation of the in duplum rule is suspended pendente lite or not.

[22] In its basic form the in duplum rule 'provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital.' (*Paulsen supra* at para 42).

[23] In *Commercial Bank of Zimbabwe v W.M. Builders Supplies (Pty) Ltd 1997 (2) SA 285 @ 303C-D* the Court had this to say:

> '…it is a principle firmly entrenched in our law that interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of the capital outstanding. Upon judgment being given, interest on the

> full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted.'

From the above cited authorities, it is plain that it is possible for a credit receiver or borrower to eventually legitimately pay interest in excess of the capital loan advanced to him. A clear case of this situation is where the credit receiver is either in arrears with his monthly or periodic instalments or his instalments are so low that he merely tinkers with the capital sum of loan. Therefore, the mere fact that in any given situation, the credit receiver pays interest that is more than the capital amount loaned to him, is no indication that the rule has been violated. The standard rule of practice and the common law is that, unless otherwise agreed between the lender and the borrower, payments to the lender are appropriated first to interest and then only to capital. This obviously has an effect on the rate at which the capital is being reduced. In the present appeal, there is not even a shred of evidence suggesting that the appellant was at any given period charged interest that was more than 100% of the capital loan owing. The defence, founded on the *in duplum* rule was raised by the appellant. She had to satisfy the court below that she was at a particular given period charged interest that was more than 100% of the amount of the capital owing or that the interest owing at any given time

had exceeded the amount. She failed to do so. Similarly, on appeal, she has woefully failed in this regard. The rule governs not just interest but arrear interest in relation to the capital amount owing at the relevant time. (See *Paulsen supra* at para 107 and 122). The appellant was never in arrears and thus the rule does not come into play in this case.

[24] We have already stated above that *Oneanate (supra)* and *Paulsen* (*supra*) are distinguishable from the present appeal. Both were concerned with the question eloquently posed by Madlanga J at paragraph [20] (c) namely:

> 'Does the in duplum rule apply during the pendency of litigation?

The Learned Judge ultimately answered this question in the following way:

> '[67] Applying the in duplum rule pendente lite does not inhibit creditors' access to courts nearly to the same extent that lifting the rule inhibits debtors' access to courts. It is difficult to imagine that creditors will abandon meritorious claims against debtors merely because the amounts they are set to recover upon victory will be limited to double the principal amount of the loan.
>
> [68] To allow for uncapped, and possibly exorbitant, interest to run pendete lite grants a powerful tool to creditors to bully and

possibly annihilate debtors using the litigation process to their best advantage. And this is made possible by the sheer imbalance in financial muscle. By allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by suspending the *in duplum* rule *pendente lite* we risk rendering the debtors' right of access to courts tenuous, if not illusory.'

[25] The appellant relies on the judgment *in Reckson Mawelela v M B Association of Money Lenders and Another Civ Appeal 43/99* where this court stated:

'In casu the principal debt is E5000.00 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.'

It must be noted of course that this case is distinguishable from *Mawelela supra* where the rate of interest was usurious and clearly contrary to section 3(1)(b) which capped the rate of interest at no more than 8 percentage points above the rate for discounts and rediscounts as set down from time to time by the Central Bank. *Mawelela* was also in arrears in his monthly instalments and that is why he was sued. This is not the position in this appeal. It is common cause here that the rate of interest charged did not offend against the provisions of the Money

Lending and Credit Financing Act. Further none of the agreements under consideration herein have been shown to have violated the *in duplum* rule.

[26] For the foregoing reasons, the following order is made:

(a) The appeal succeeds in part to the extent that the Insurance premiums paid by the appellant to the first respondent are unlawful and ought to be refunded to the appellant.

(b) Because of the partial success referred to in (a) above, each party is ordered to pay its own costs of this appeal.

(c) As ordered in the condonation application, the appellant's counsel Mr Thabiso Fakudze is ordered to pay the costs of suit consequent upon such application at attorney and own client scale including the costs of Senior Counsel.

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MAMBA AJA **MANZINI AJA**