RAILINGS ENTERPRISES PVT LTD

Versus

DAVID BRUNO PHIRI LUWO

And

ROSE SHINGIRAI LUWO

And

DOWOOD SERVICES (PVT) LTD

And

THE SHERIFF OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 NOVEMBER 2020 AND 3 FEBRUARY 2021

Opposed Application

J Tshuma, for the applicant
Advocate Siziba, for the respondents

MAKONESE J: This is an application for an order setting aside the ruling of the 4th respondent (hereinafter referred to as the Sheriff), wherein he upheld an objection raised by 1st to 3rd respondents to the confirmation of a sale of immovable property being Subdivision D of Stands 5, 6, 7 and 8 of Matsheumhlope, Bulawayo. Applicant further sought an order of this court directing the 4th respondent to cause the sale of the immovable property in question by way of private treaty to enable it to recover the full value of its judgment debt in terms of an order obtained under case number HC 1295/16.

The order sought by the applicant is in the following terms:

"IT IS ORDERED THAT:

(a) The ruling by the 4th respondent on the 30th January 2020, upholding the objection raised on the confirmation of the sale of the immovable property being subdivision D of Stands 5, 6, 7 and 8 of Matsheumhlope, Bulawayo be and is hereby set aside.

(b) The 4th respondent be and is hereby directed to cause the sale of Subdivision D of Stands 5, 6, 7 and 8 of Matsheumhlope, Bulawayo by way of private treaty.

(c) 1st to 3rd respondents to pay the costs of suit on an attorney and client scale."

The respondents oppose the application on the grounds that 4th respondent properly objected to the sale in execution as 1st to 3rd respondents had fully settled applicant's debt. Respondents argue that this application has been actuated by greed and a desire by applicant to harass the respondents despite being paid what is legally due in terms of the law. In broad terms the respondents contend that it is trite that interest stops accruing once it equals the capital sum in terms of the *in duplum* rule. After judgment, interest accrues once again on the new capital debt which new capital includes the pre-judgment interest awarded by the court in terms of the judgment debt. The amount of interest stops running when it reaches the capital debt.

FACTUAL BACKGROUND

On 28th January 2013, applicant issued out summons in this court under cover of case number HC 243/13 claiming payment of the sum of US$ 58 335.00 together with interest at the rate of 1.5 % per month calculated from the date of the acknowledgment of debt being 17th April 2012 to date of final payment. 3rd respondent entered appearance to defend. Applicant made an application for Summary Judgment under case number HC 499/13. It was ordered that judgment be entered summarily in favour of the applicant. Respondents were deemed to have no *bona fide* defence to the claims. 3rd respondent appealed against the High Court judgment to the Supreme Court under case number SC 533-13. The appeal was dismissed on the 28th July 2014. An attempt was made to attach 3rd respondent's assets. It was discovered that 3rd respondent no longer owned any assets. In October 2015 applicant applied to this court under case number HC 2615/15 for an order declaring that 1st and 2nd respondents be held personally liable for the debts in terms of section 318 of the Companies Act (Chapter 24:03). That matter was heard by MATHONSI J (as he then was) who held that 1st and 2nd respondents were personally liable for the debt in HB 53/16.

Applicant subsequently caused the attachment of 1st and 2nd respondents' immovable property being Subdivision D of Stands 5, 6, 7 and 8 of Matsheumhlope, Bulawayo. 1st, 2nd and 3rd respondents took issue with the sale of the immovable property, principally on the

grounds that the judgment debt had been settled in full by the respondents. The 4th respondent (The Sheriff) upheld the objection and cancelled the sale in execution in terms of a ruling dated 30th January 2020.

In bringing this application, the applicant is aggrieved by 4th respondent's decision to set aside the sale on the basis that respondents had liquidated their indebtedness to the applicant in full. In coming to this conclusion, the 4th respondent held that the *in duplum* rule was part of our law and that the applicant was not entitled to recover and claim from the debtor an amount for interest in excess of the unpaid capital amount claimed in the summons.

Applicant disputes the respondents' interpretation of the *in duplum* rule and avers that if this court were to find favour in the interpretation afforded to the *in duplum* rule by respondents, the court must find that this is an exceptional case to which the general rules would otherwise apply.

WHETHER THE APPLICANT IS STILL OWED BY THE RESPONDENTS

The applicant's contention is that respondents still owe it unpaid amounts in interest over and above what has been paid. Applicant argues that the common law *in duplum* rule which limits the levying of interest beyond the capital debt should not apply in this particular case. The applicant contends that the court has a discretion not to apply the *in duplum* rule premised upon the decisions of the Supreme Court of Appeal of South Africa in the decisions of *Standard Bank of South Africa v Oneanate Investments (Pty) Ltd* 1998 (1) ALL SA 413 and *Margo and Another v Gardner and Another, Gardner v Margo and Another* 2010 (6) SA 385 (SCA)

The above cases which were followed by a High Court decision of *Ehlers v Standard Chartered Bank of Zimbabwe Ltd* 2000 (1) 136 ZLR (H), which departed from GILLESPIE J's judgment and his interpretation of the *in duplum* rule, in *Commercial Bank of Zimbabwe Ltd v M M Builders and Supplies (Pvt) Ltd and Others* 1996 (2) ZLR 420 (H).

The applicant in the instant case has argued forcefully that this Honourable Court should follow suit and hold that the *in duplum* rule should not be applied *pendete lite* in

certain instances, as the Supreme Court is likely to adopt the reasoning by the South African Supreme Court of Appeal.

On the other hand, the respondents contend that the position adopted by the Supreme Court of Appeal in South Africa in the cases referred to no longer reflects the correct current legal position of South African jurisprudence on the issue of the *in duplum.* The Constitutional Court of South Africa has overruled those decisions and re-affirmed the *in duplum* rule. See: *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* (2015) ZACC 5 (2015) 3 SA 479 (CC). In this matter the majority decision of the Constitutional Court of South Africa dealt a fatal blow to the reasoning along the lines of *Oneanate* case (*supra).*

The respondents in this particular matter aver that they have fully discharged their indebtedness as follows:

Amount of the judgment debt $58 335 payments made:

Date	Amount
20/09/19	$34 000.00
27/09/19	$18 000.00
8/10/19	$3 000.00
15/11/19	$58 335.00
28/11/19	$23 294.15
5/12/19	$3 335.00
12/12/19	$31 499.05
TOTAL PAID	$171 463.20

The respondents argue that the total sum of $171 463.20 they paid includes the original capital or judgment debt of $ 58 335.00 plus the pre-judgment interest of $15 750.00 as at the date of the judgment which made a new capital debt of $74 085.00. The interest doubled that amount and led to a total judgment debt of $148 170.00. If the taxed costs of $23 294.15 are added the total amount is $171 463.20. This final figure was paid into the legal practitioner's trust account by the respondents. 4th respondent took into account these payments and came to the conclusion that the respondents could not be compelled to pay more than what they had paid. On that basis, and for that reason, the 4th respondent set aside the sale in execution as the sale of the attached property would violate the *in duplum* rule.

The applicant does not deny that respondents have effected the alleged payments. Applicant avers that this application is well founded and that the *in duplum* rule does not apply to the circumstances of this case. Applicant alleges that in the first instance, the court order clearly and expressly states that interest shall continue to run until payment is made in full. Secondly, and in any event, it is argued on behalf of the applicant that the prohibition against claiming interest in excess of the capital sum does not apply to the circumstances of this case. Thirdly, the applicant argues that it is entitled to the relief sought in the draft order and that 4th respondent should be directed to proceed with the sale in execution in order to recover additional interest accrued.

It seems to me that from the amounts set out in respondents' opposing affidavit, particularly paragraph 12 there is an indication that the capital debt and interest was liquidated in full in accordance with the *in duplum* rule. It should be observed that in response to the specific allegations on the payments made, the applicant simply made a bold denial of these averments in its answering affidavit. There is no specific denial that such payments were in fact made.

WHAT IS THE CORRECT INTERPRETATION TO BE AFFORDED TO THE IN DUPLUM RULE IN THE CIRCUMSTANCES?

The applicant argues that the general prohibition against claiming interest in excess of the capital amount does not apply in the circumstances of this case. It is not entirely clear to me why this case is considered an exceptional case by the applicant. The applicant makes an averment that the law regarding the *in duplum* rule has not been finally settled in our jurisdiction. In this regard, applicant contends that the High Court bench has applied the principle inconsistently, depending on the circumstances of each case. Further, applicant asserts that there is a divergence of views on the application of the *in dulpum* rule in this jurisdiction, and that its application will necessarily depend on a case by case basis, bearing in mind the established purposes of the rule.

This court in *Commercial Bank of Zimbabwe Ltd v M M Builders* (*supra*) formulated the *in duplum* rule as follows:

> "*interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing once the accrued interest equals the amount of the capital outstanding, whether the debt arises out of a financial loan or out of any contract whereby a capital sum is payable together with interest therein at a determined rate. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again ceases to accrue when it reaches the amount of the judgment debt, being the capital sum and interest thereon for which cause action was instituted."*

In the *Commercial Bank of Zimbabwe Ltd* case (*supra*), the court in justifying the *in dulpum* rule as one premised on public policy considerations held that such limitation is sensible in that while it permits the creditor to insist upon prompt payment and settlement of his debt, without affecting his right of recovery of interest, nevertheless should he tolerate fiscal indiscipline then he will not be permitted to allow the debt to remain outstanding and recover after a period of undue delay burdensome amounts of interest.

In *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 495 D GUBBAY CJ (as he then was) stated that the *in duplum* rule is based upon public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious interest. This reasoning was approved by this court in *Zimbabwe Development Bank v Naga Salons & Others* 2006 (1) ZLR 398 (H), which held that the rule enunciates a policy to protect a debtor who has not paid his full debt from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline upon a creditor.

The applicant urges the court to consider that the points which must fall to be examined in the circumstances of this case in construing the application of the rule relate to whether the accruing interest ought to have been suspended at any point of the litigation between the parties. If so, whether the interest which ultimately accrued upon the judgment debt being the amount of capital together with interest thereon ought itself to have been subject to the in *duplum* rule. The applicant goes on to argue that, the court in *Ehlers v Standard Chartered Bank Zimbabwe Ltd* (*supra*) dissented from GILLESPIE J's decision in the *Commercial Bank of Zimbabwe Ltd* case on the basis that his application of the *in duplum* rule did not give effect to the public interest sought to be protected by it, and secondly that making it, an immutable rule cast in stone tended to deprive judges of their discretion in the matter. In that regard, MALABA J (as he then was), in the *Ehlers* case preferred an approach which would give effect to the policy behind the *in duplum* rule, and one that would recognize the discretion enjoyed by the court in the matter.

After a reviewing the case authorities from this jurisdiction and South Africa, what is clear is that the *in duplum* rule is very much a part of our law. The *in duplum* rule is a long standing and well established principle in our law. It provides that unpaid interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital. The rule was carried through from Roman-Dutch law, reference to it being made by various old authorities, including most pertinently in this case *Huber and Van Keessel*. Our common law is based on the same Roman- Dutch law rule and the rule has been recognized in South Africa law as far back as 1830.

In *Paulsen & Another v Slip Kont Investments* (*supra*) the Apex Court in South Africa affirmed that at judgment stage, the interest would accrue again on the judgment debt from the date of judgment or appeal if the case was subject of an appeal. Interest ceases to accrue once it reaches the amount of the judgment debt. This is exactly what GILLESPIE J stated in *Commercial Bank of Zimbabwe* (*supra).*

The Supreme Court in this jurisdiction has not endorsed the decisions of the South African Supreme Court of Appeal along the *Oneanate* reasoning.

The Supreme Court of Zimbabwe has continued to consider the *in duplum* rule as part of our law.

See: *Makoni v Commercial Bank of Zimbabwe Ltd* SC 47-20. Although the issue in this decision related in the main to an application for rescission of judgment and the applicable principles, the court made no indication for the need to depart from the *in duplum* rule and its application.

It is in my view, not proper for this court to be enticed into transplanting and importing into our jurisdiction the noxious weed which has already been uprooted from South African jurisprudence in the form of the *Oneanate* principle which agitates for the suspension of the *in duplum* rule *pendete lite*. The arguments in the *Oneanete* decision, which have been discarded in South Africa should not find their way into our jurisdiction.

In any event, applicant has not shown that there are exceptional circumstances that warrant a departure from the principles of the *in duplum* rule. This is because, the respondents have proved that they have paid the capital debt, the interest accrued and taxed costs. Applicant desires to set out his own formula for calculation of interest that clearly shows a desire to continue levying interest beyond the recognized and lawful parameters. In other words, interest cannot continue to run indefinitely. The respondents' calculation of all the monies due and owing was informed by the correct legal position which is supported by decided cases. The last payment having been made in December 2019, applicant has no good reason to demand interest up to January 2020. Applicant has no sound legal basis to insist on the non-applicability of the *in duplum* rule or its variation. I am not persuaded by the assertion that public policy considerations in the circumstances of this particular case warrant a departure from the application of the *in duplum* rule. For these reasons, the application ought to be dismissed with costs.

DISPOSITION

The respondents raised certain preliminary objections challenging the validity of the application. Respondents conceded in their Heads of Argument that the application was timeously filed and was therefore properly before the court. The applicant had also raised the point that the respondents had been barred from instituting further proceedings against the applicant without the leave of the court. Applicant did not seem to persue this argument with vigour. In any event, the respondents have been brought to court by the applicant. They have a right to respond. They have responded. They ought to be heard. The doctrine of perpetual silence clearly has no application in this matter.

In concluding, my view is that the Sheriff's decision upholding the respondent's objection to the confirmation of the sale cannot be faulted. The respondents discharged their obligations in full and liquidated the judgment debt as well as interest and taxed costs. As the *in duplum* rule is still part of our law, it must apply pre-litigation, *pendete lite*, and after judgment to limit the accumulation of interest to the sum equal to the capital debt without exception to any debtor or creditor. The respondent's objection to the confirmation of the sale was well taken and well informed at law. The decision by the Sheriff in upholding the objection is beyond reproach and there is no basis for this court to set aside that decision.

In the circumstances, I would, accordingly dismiss the application with costs.

Messrs Webb, Low & Barry Inc. Ben Baron & Partners, applicant's legal practitioners
Mathonsi Ncube Law Chambers, 1st, 2nd and 3rd respondents' legal practitioners