

IN THE HIGH COURT OF LESOTHO

In the matter of :

LESOTHO BUILDING FINANCE CORPORATION      Plaintiff

V

JAMES SEHLOHO BOFELO

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola  
on the 11th day of February, 1991.

The plaintiff is applying for provisional sentence on a reducible mortgage bond given as security for loan facilities for payment of an amount of M25,000.00 and an additional sum of M1,250.00 together with interest on both amounts. Clause 1 of the mortgage bond provides that the plaintiff may at its discretion from time to time make further advances to or payments to or on behalf of the defendant subject to the terms, conditions and provision of this bond.

Clause 12 of the mortgage bond provides that a certificate purporting to be signed by the Manager or Assistant Manager for the time being, or any person acting in any of such capacities, showing the amount owing the plaintiff in respect of the capital, additional

/sum

sum and interest and for all advances and payments made (in addition to the capital) to or for account of the defendant or otherwise authorised to be made under this bond and other loans granted, together with interest, shall be sufficient and satisfactory proof for the purposes of obtaining provisional sentence or summary judgment under this bond or for any other purpose and it shall rest with the defendant to prove that such amount is not owing to the plaintiff.

The plaintiff has attached to the summons served upon the defendant a certificate signed by the plaintiff's Managing Director certifying the amount owing as M75,106.33 as at the time of the summons was issued.

One of the objections raised by Mr. Mphalane on behalf of the defendant was that the mortgage bond supported by a certificate of the plaintiff's Managing Director is not a liquid document upon which the plaintiff can rely to obtain a provisional sentence despite the fact that the parties agreed in the mortgage bond that such certificate shall be valid as a liquid document against the defendant for purposes of obtaining provisional sentence. He referred the Court to Barclays Bank v. Lehlohonolo Khoboko CIV/T/586/85 (unreported). The facts of that case were the same with the facts of the present case except that in that case a second mortgage bond was involved. The court came to the conclusion that notwithstanding the certificate of the plaintiff's Manager, the mortgage bond lacked

/sufficient

sufficient liquidity for the purposes of provisional sentence and that action was dismissed.

A liquid document is defined as a document wherein the debtor acknowledges over his signature, or that of a duly authorized agent, or is in law regarded as having acknowledged, without his signature being actually affixed thereto, his indebtedness in a fixed and determinate sum of money. The amount of the debt must be ascertained and the document must be sufficient in itself and not require extrinsic evidence to prove that the debt is due (See Inter-Union Finance v. Franskraalstrand and Others, 1965(4) S.A. 180 (W.L.D.) at p. 181 and the cases referred to therein.)

It seems to me that in the present case the mortgage bond in question does not satisfy the requirements of liquidity because it required extrinsic evidence in order that the indebtedness of the defendant to the plaintiff could be established. That extrinsic evidence is the certificate of the plaintiff's Managing Director. The mortgage bond refers to only two amounts, viz., M25,000.00 and M1,250.00; the amount now claimed by the plaintiff is over M75,000.00 and in order to prove this amount the plaintiff has to rely on extrinsic evidence in the form of a certificate of the plaintiff's Managing Director.

Mr. Malebanye, on behalf of the plaintiff, submitted that the parties agreed in the mortgage bond that the certificate of the plaintiff's Manager or Assistant

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Manager, or any person acting in such capacities, shall be sufficient evidence upon which the plaintiff may seek provisional sentence or summary judgment. He submitted that the parties are bound by their agreement and that there is no prejudice to the defendant. I do not agree with this submission which implies that parties to an agreement can change the law and agree that a document, which according to our law is illiquid, shall be regarded a liquid by them for purposes of provisional sentence or summary judgment.

In Wollach v. Barclays Bank, 1983(2) S.A. 543 (A.D.) the headnote reads as follows:

"In a series of decisions since Bro-Trust (Pty) Ltd. v. Pieters 1973(3) S.A. 520 (T) it was held or accepted that provisional sentence could be granted if a debtor, in a written instrument such as a covering bond or deed of surety-ship, admitted indebtedness for an indeterminate amount subject to a fixed maximum, provided that the instrument stipulated that the extent of the debtor's liability at any given moment could be proved by a document such as a certificate, and provided that the plaintiff obtained and relied on such certificate. This approach, which was adopted in the seventies, is in conflict with the requirement of liquidity in provisional sentence proceedings as it evolved in practice over a long period, and this extension cannot be justified by practical or other considerations. An acknowledgment that an indeterminate amount is due, albeit coupled to a fixed maximum, evidently does not comply with the acknowledged requirement of liquidity, in terms of which the existence and extent of the debt must appear from the written instrument.

/Liquidity

Liquidity cannot, so to speak, be retrospectively conferred by the agreed issue of a certificate. Renunciation of the exceptio non numeratae pecuniae by the debtor will also not satisfy the requirement of liquidity: the exception, and consequently a renunciation thereof, is meaningful only where a genuine, unconditional acknowledgement or promise to pay appears from the written instrument."

In the result the action is dismissed with costs.

J.L. KHEOLA.

J U D G E.

11th February, 1991.

For Plaintiff : Mr. Malebanye

For Defendant : Mr. Mphalane.