

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

CCT/15/10

In the matter between:-

STANDARD LESOTHO BANK LIMITED

PLAINTIFF

and

SERETSE RACHABANE

1ST DEFENDANT

LEBOHANG RACHABANE

2ND DEFENDANT

Date of hearing: 6th of May 2010

RULING

Delivered by the Honourable Mr Acting Justice J.D. Lyons
on the 18th day of May, 2010

The following material was placed before me;

1. Summons filed 17th of March 2010.
2. Declaration filed 17th of March 2010.
3. Notice of appearance filed 31st of March 2010.
4. Notice of application for summary judgement filed 6th of April 2010.
5. Affidavit first defendant filed 15th of April 2010.
6. Affidavit of second defendant filed 15th of April 2010.

7. Affidavit of Deon Cronje filed sixth of April 2010.

The plaintiff bank loaned the defendants the sum of M 250,000 on 26 July 2005. The loan was secured by deed of hypothecation dated the same day. The deed mortgaged the defendants' communal property being plot 12292 -- 265 situated at Katlehong, Maseru. The defendants, being husband-and-wife, entered into the deed by way of the husband (the first defendant) as administrator of the joint estate of himself and his wife (the second defendant). By the time the additional costs such as stamp duty, registration costs and such were factored in, the total amount borrowed (and secured by the mortgage) was M 269,762.50.

The defendants defaulted. The plaintiff issued proceedings.

The plaintiff prays for; --

1. Payment in the sum of M 282,710.32.
2. Interest at the rate of 9.5% per annum from the date of the summons until payment in full.
3. A declaration that the property (plot number 12292 – 265) is specially executable without having to execute against movable property first.
4. Costs on the attorney and own client scale.

The defendants do not deny that they have defaulted on the mortgage. The remedies available to the plaintiff bank come into effect.

In a spirited defence, Counsel for the defendants put forward three arguments. Unfortunately none of these arguments will save his clients from this summary judgement application.

First counsel for the defendants argued that, so far as the second defendant is concerned the Legal Capacity of Married Persons Act (2006) comes to the aid of his client. It does not help his client. The act was assented to well after the mortgage is entered into and it is not retrospective. Even if it were, it does not affect the contractual relationship between the plaintiff as lender and the defendants as borrowers. What it does (inter alia) is create certain obligations and remedies as between a husband and wife relative to communal property.

Counsel also argued that the amount claimed by the plaintiff bank is not liquidated. He argued that as the initial amount borrowed was M 269,762.50 and the amount claimed is now M 282,710.32, it cannot be said to be a liquidated amount. Therefore, he argued, a trial needs to be held to establish the correct amount. There is no merit in this argument. In this case, a liquidated amount is that amount capable of being calculated by reference to the contractual document. That is the case here. The amount owing is able to be calculated by reference to the mortgage document and is thus a liquidated amount. (see the affidavit of Deon Cronje).

Finally Counsel argued that the plaintiff bank should not be granted a declaration in terms of prayer 3 (and thus summary judgement over the property) because it should first move against other movable property of the defendants. There is no merit in this argument. The defendants contracted with the plaintiff that if they defaulted in repayment of the money borrowed then the plaintiff had a right to take possession of (and eventually sell) the property that they had offered as security. Any attempt by the defendants to expect the plaintiffs to forego their contractual right to possession of the real property (security) and instead move to sell up some undefined movable property is without basis. Of course if the defendants are able to sell some of their other property and pay off the mortgage, the plaintiff bank would hardly be expected to object.

The application for summary judgement is granted.

The plaintiff bank is granted relief in respect of prayers 1 – 4 inclusive. As regards prayer 4 (costs on an attorney and own client scale), this is expressly agreed in the mortgage contract (see clause 1- deed of hypothecation).

[Footnote. As mentioned to counsel during the hearing, one of the classic UK decisions on mortgage defaults is ***Birmingham Citizens Permanent Building Society v Caunt*** [1962] 1 Ch 883 (Russell J.)

Whilst not necessarily applicable to the jurisdiction here, counsel may also find the article '**Residential Mortgage Repossessions and The Administration of Justice Acts, 1970 and 1973 - A case for Reform.**' (L.M. Clements, B.A, LL.M) to be of interest.

(It is available online at <http://webjcli.ncl.ac.uk/1999/issue3/clements3.html>).

J.D. LYONS
ACTING JUDGE

For the plaintiff : Mr. Mpaka
For the defendants : Mr. L. Molati