CCT 37 of 2007

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

In the matter between:

BOLIBA-MULTI PURPOSE COOPERATIVE SOCIETY PLAINTIFF

And

RAMATHIBELI JOSEPH MPOKO DEFENDANT

Hearing date : 15th and 16th of April and 27th of April.

JUDGMENT

Delivered by the Honourable Mr. Acting Justice J.D. Lyons

On the 4th day of May, 2010

(Defendant not present on 15/16 April but present on 27th of April).

Co-operative society – excessive interest rate charged - unconscionable – contrary to public policy – duty of court to be vigilant when dealing with default judgment or uncontested matter – erosion of public confidence if court were seen to be a 'rubber stamp' .

The plaintiff is a Co-operative Society established under the

provisions of the Co-operative Societies Act (number 6 of 2000).
In its by-laws its objects are listed as the following: --

To provide employment to members, as well as the general citizenry.

To provide loans at reasonable rates to members and the general public.

To attract international donor funds for the provision of loans to micro, small, and medium-size businesses in Lesotho.

To maximize shareholder's returns.

To be financially self-sustaining.

To ensure the survival and growth through good management and transparency.

To participate in affordable social responsibility programs.

The plaintiff's motto is *"Put your problems in our hands".*

I also note that section 5 of the Co-operative Societies Act ('the Act') states that,

"A Co-operative Society shall have as its object the promotion of economic and social interests of its members in accordance with co-operative principles and practices".

In pursuit of these objectives of the plaintiff, and between them April 2002 and August 2002 loaned money to the defendant. The defendant had successfully tendered for a contract with the Ministry of Defence to perform work at the military hospital. He required the money to finance that commercial venture.

Between 17 April 2002 and 26 August 2002, and thereby staggered draw-downs, the defendant borrowed M 41,988.85.

On 7 March 2003 the defendant paid back to the plaintiffs M 45,252. That was, as I understand it, the full amount of a cheque he had received from the Ministry of Defence. He has thus paid back M 3263.15 more than he borrowed. He had the use of the plaintiff's money for 324 days, or approximately 10 2/3 months.

The plaintiff claimed that the defendant had not pay off the full amount owing. It claimed that interest was still owing. As at 7 March 2003 the plaintiff claimed that an additional M 35,896.53 in interest was owing. By 31 July 2003 this outstanding amount had grown to M 50,124.69. The plaintiff then closed off the defendants account.

By writ of summons and declaration filed 23 of July 2007 the plaintiff sued the defendant for the sum of M 50,124.69.

In its declaration the plaintiff makes no mention of the interest rate it charged the defendant on the money borrowed.

The defendant obtained legal representation.

A request for particulars was delivered on 16 August 2007. One of the required particulars was: --

"How is the amount of M 50,124.69 claimed against the defendant made up of and calculated? Plaintiff is requested to furnish defendant with documentary proof in this regard".

On 6 September 2007 the plaintiff answered this particular.

It pleaded by way of annexing the loan statement of account number 18- 00117012 being the loan account herein.

The plaintiff also annexed 2 letters. The English translations are as follows: --

Letter dated 30 May 2007 from the plaintiff's attorney to the defendant;

"We are the legal representatives of Boliba Multi-Purpose Co-op. They inform us that you are indebted to them in the sum of M 50,124.69.

After receiving this letter we request that you should come and pay a set amount together with 18.5% interest at our offices before the expiry of seven days. Failing compliance herewith, we will take legal steps without further notice.

Your cooperation will be highly appreciated."

The defendant replied by letter dated 4 June 2007. His reply states,

"I agree that I have a debt with Boliba. I therefore request that I will start paying the debt from the 30th of June 2007 by at least five installments. However if things go as well as I am expecting it will be two installments."

On 25 October 2007 the defendant entered his plea through his then attorney. He denied being indebted to the plaintiff and put the plaintiff to strict proof of its claim.

On 16 January 2008 the attorney for the defendant gave notice of his withdrawal. Thereafter the defendant continued to represent himself.

On 27 February 2008 the plaintiff filed its witness statement. This statement was by Mr. J.S Motsoasele, a collection officer with the plaintiff. This statement gives a running history of the loan account. This statement, whilst referring to interest, fails to mention the rate of interest applied.

The plaintiff applied to set the matter for trial. The trial date was set for the 15th and 16th of April 2010.

On 15 April Mr. Matooane appeared for the plaintiff. A representative of his client accompanied him. He informed the court (and it was accepted) that the defendant had been informed of the trial date. The defendant was called but failed to appear. Mr. Matooane applied for judgment in default of appearance.

Mr. Matooane referred to court to the admission of debt from the defendant in the letter of 4 June 2007.

As there was no appearance from the defendant, I acceded to Mr. Matooane's request and allowed him to move to prove his client's damages.

I am mindful that when faced with what appears to be an uncontested matter (such as an application for judgment by default of appearance), the Court still has it obligation to see to it that the judgment is in order. The Court is not a rubber stamp. The Court must be satisfied that the plaintiff has pleaded a cause of action. It must be satisfied that there will be no miscarriage of justice by granting the judgment sought. The judgment must be equitable and must not offend against public policy. Indeed as a matter of public policy, the Court must remain watchful and vigilant even when granting default judgment. Were it to be otherwise, and the court act

as a ‘rubber stamp’, public confidence would be eroded with the consequential erosion of respect for the rule of law.

In my preparation for trial, I had noticed two matters that concerned me. These were put to the plaintiff’s attorney, Mr. Matooane.

Firstly, it was put to Mr. Matooane and his client that no actual rate of interest was pleaded nor put in evidence, making it impossible , on the available evidence, for the Court to quantify the plaintiff’s claim. On a quick calculation it appeared that the interest rate charged was in excess of 95% per annum. I bought to counsel’s attention that section 23 of the Act mandates that the by-laws must set out the maximum interest rate. (See; Third schedule, part 18 (a) (i). These by-laws were not before the court. Presumably the interest rate chargeable would be found there.

The discussion moved thereafter to my second concern - the apparent excessive rate of interest. It was pointed out to Mr. Matooane that whilst the Money Lending Order, (1989), does not apply to a Co-operative Society, section 6 of that Order deems that an interest rate in excess of 25% per annum is to be considered harsh and unconscionable. This, it was pointed out, could be said to represent an expression of intent by the Parliament that loans with interest rates in excess of 25% were to be considered inequitable and contrary to public policy.

Mr. Matooane took instructions from his client. His client instructed

that the members had agreed that the applicable interest rate on loans from the Society was at the rate of 8% per month. When pointed out that this resulted in an annual interest rate of 96% and that this was surely contrary to the intent of Parliament and public policy and unconscionable, Mr. Matooane's client appeared unperturbed.

At Mr. Matooane's request the matter was adjourned to the following day to allow him to present documentary evidence (the by-laws) supporting this astonishing interest rate.

On 16 April Mr. Matooane appeared in chambers and advised that he was unable to get the by-laws in time. He quite candidly told the Court that his instructions were that the members of the society had the objective of making some money from the funds they had deposited with the Society.

The matter was adjourned to 27 April to give Mr. Matooane time to provide a copy of the by-laws and to consider the concerns raised by the Court. As the plaintiff, by virtue of the defendant's non-appearance had moved to taking an interlocutory judgment and was now at the stage of proving its damage, I saw no problem with granting further time. The plaintiff was given a second bite at the cherry.

On that day Mr. Matooane appeared for the plaintiff. The defendant made an appearance.

Mr. Matooane presented the by-laws. They were marked as Exhibit 1.

The by-laws, however, do not enumerate the maximum interest rate to be charged. At best paragraph 7.6 reads: --

"(c) Maximum rate of interest shall be approved by the Board from time to time in line with Credit Policy and Credit Manual;"

No other evidence was provided regarding the rate of interest. Without this crucial evidence, the plaintiff was unable to prove its case.

I had already been informed that the rate of interest claimed as charged by the plaintiff in respect of this loan was a staggering 96% per annum.

Counsel, presumably addressing the public policy and equity concerns, repeated his submission that the intent (and the right) of the members was to make some profit from their investment. I have no quibble with that. The Act and the by-laws expressly provide for that objective. What I remained concerned with was the excessive rate of interest.

As I understood it, the plaintiff, having been given ample opportunity

to prove its claim and to address the concerns expressed by the Court, then closed its case.

I addressed the defendant. He apologized for not attending earlier. He gave a short run-down on why he took the loan and the circumstances of its re-payment. I explained my concerns as to the rate of interest. I explained that the plaintiff had judgment and was given until the 27th April to bring evidence to court to prove the interest charged. I explained my public policy concerns.

The defendant did not want to address the court further.

I then pointed out that the plaintiff, quite apart from satisfying me on the issue of public policy, had not put sufficient evidence before the court to prove the rate of interest charged was approved by its members and placed in the by-laws as he Act requires.

Mr. Matooane then sought to reply. I was prepared to allow that, but only on points of law. He had had ample opportunity to present evidence. He then wanted to call his client. I deemed too late and unnecessary. Even accepting the plaintiff's assertion through counsel that this was the interest rate charged by the plaintiff to the defendant, I had considerable 'public policy' concerns about such an interest rate, particularly when charged by a co-operative lending society whose objectives were to provide affordable loans.

I dismissed the plaintiff’s case. My reasons are as follows.

There is no evidence before the Court as to the rate of evidence actually agreed as between the plaintiff and defendant. On this point alone the plaintiff's case would normally fail.

Even accepting that the plaintiff charged 96% per annum interest, I cannot see how in clear conscience that the Court could allow it. Even assuming that the defendant, presumably out of sheer desperation, agreed to what can only be described as a 'loan shark' rate of interest (and there is no evidence or pleading to support this), the Court could not as a matter of public policy, enforce such an agreement. (To describe it as a ‘loan shark’ rate is to understate the case. This interest rate is in the ‘Jaws’ category.)

Whilst the Money Lending Order does not apply to a Co-operative Society the clear intent of the Parliament is to establish a ceiling on the rate of interest that lending institutions in Lesotho can charge. This amount is 25% per annum. In the view of the Parliament anything above that is harsh and unconscionable. Even if I were to allow some leeway (say, as much as a further 10% per annum), the amount of interest claimed by the plaintiff in this action is way above that generous allowance.

When first hearing this case on 15 April, I thought it possible that the plaintiff had simply made a mathematical error. That is apparently not the case. Even given time and a clear indication from the Bench that I

considered the rate of interest to be within the ‘harsh and unconscionable’ category and probably contrary to public policy, the plaintiff came back to Court and through its advocate continued to press for an annual interest rate of 96%.

I do not intend to grant it. It is plainly contrary to public policy. Were the Court to allow such astonishing rate of interest, commerce in this country would grind to a halt. Commerce relies on the lending and borrowing of money to undertake commercial ventures. More often than not the profit margin in a commercial venture, particularly smaller ones such as that undertaken by the defendant, is in single digit figures. Were the court to allow this astonishing rate of interest to apply, it would be a signal to other lending institutions that such rates were permissible and enforceable. It would be open season on commercial borrowers and borrowers in general. All profit made by commercial ventures that were financed by borrowing the venture capital (arguably the majority) would be swallowed up by the lender - and then some. This would act as a complete disincentive for any person to borrow money. The impact on commerce is obvious.

Such an extraordinary and punitive interest rates is contrary to the objectives of the plaintiff Co-operative Society. One could hardly say that an interest rate of 96% per annum is consistent with providing *"loans at reasonable rates to members and the general public".*

As the Money Lending Order does not apply, I am unable to reopen this transaction as provided for in section 13 of the Order.

I also note that the plaintiff was given clear notice that the Court required evidence of the defendant's specific agreement to both the interest rate of 96% per annum and that the amount owing was agreed as M 50,124.69. At best the letter of 4 June is a general acknowledgement of indebtedness without the benefit of legal advice and without any specifics. I suppose it could be said that as the letter of 4 June was in reply to the earlier letter of demand, it is reasonable to infer it is in agreement to the amount specified. But, when all is said and done matters of public policy preclude the Court from allowing the plaintiff to take advantage of the defendant. In addition it would be unconscionable to allow such 'gouging' by the lending authority.

Notwithstanding that the defendant made no appearance at trial, despite being aware of the date, and that he has made an admission of indebtedness, albeit in a general sense only, and notwithstanding that the plaintiff is in a position to take judgment by default, I cannot grant that judgment. As I have said, it would be unconscionable, inequitable and contrary to public policy.

As it stands, the plaintiff cannot complain at being disadvantaged by my dismissing its case. The plaintiff has been repaid the principal amount borrowed. It has also been paid an additional amount that works out at approximately 9% per annum. That seems equitable, within the bounds of the plaintiff's objects, within the spirit and objects of the Act and the members can make a profit – provided that the

officers of the plaintiff society get some business sense and stop wasting money trying to get the courts to approve the charging of unconscionable, inequitable interest rates that are plainly contrary to public policy and common business sense.

For the above reasons I think it best that I dismiss the plaintiff's claim. I make no order as to costs.

I order the Registrar to forward a copy of this judgment to the Commissioner of Co-operative Societies. It may be timely for the Commissioner to call upon the plaintiff. The charging of an annual interest rate of 96% is way beyond the spirit of both the plaintiff's objects as set out in its by-laws, and the objects of the Act. I might add that I suspect the interest rate as charged by the plaintiff is 8% **per annum** for the term of the loan even if the term is less than one year. That appears reasonable and in line with being a little less that other lending institutions that do not offer the member benefits that co-operative societies do. But I suspect that there has been a mis-application. For example, a loan given for a period of just one month (i.e. borrowed on the 1st of the month and repayable on the 1st of the next month) could reasonably attract an interest rate calculated as 8% per annum. (eg; Borrow M1,000 for I month – pay back M1,080). That does not mean that for loans longer than one month attract interest at 8% per annum, per month for the full term of the loan. The Commissioner may wish to look at this and offer some assistance. A co-operative society that lends longer term at 96% per annum may

profit from some extremely desperate borrowers for a very short while, but it cannot expect to attract sufficient borrowers in the long-term and will soon be out of business.

In conclusion I wish to compliment Mr. Matooane on his candor. At all times he was frank with the court. I can also say the same of his client. The plaintiff, through it's representative on the trial date, was candid. There was no attempt to be deceptive. The presentation of the case was straightforward. I do not think, however, that the full import of the calculating of a 96% per annum interest rate has been fully comprehended or examined. As I said, I think the prevailing interest rate charged has been wrongly applied to the defendant's loan.

J.D. LYONS
JUDGE (AGT)

Mr. Matooane for plaintiff.

Defendant (pro se).