

**IN THE HIGH COURT OF LESOTHO**

**(Commercial Division)**

**CCT 80/10**

**In the matter between:-**

**STANDARD LESOTHO BANK**

**PLAINTIFF**

**VS**

**MAPAKI ANNA MOLISE**

**DEFENDANT**

Date of Hearing : 29<sup>th</sup> March 2011

Date of Ruling : 30<sup>th</sup> March 2011

**CORAM : MR. ACTING JUSTICE L.A. MOLETE**

**Counsel :**

**Mr. Mpaka for Plaintiff**

**No appearance for Defendant (T. Fosa & Co. on record)**

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**RULING ON SPECIAL PLEA**

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On the 29<sup>th</sup> March 2011 I dismissed the defendant's special plea with costs and indicated that I would give my reasons later. I now set out my reasons hereunder.

## Background to the action

This is a claim for the following relief against the defendant;

1. Payment of the amount of R177 292.19
2. Interest at a rate of 11.75% from 11<sup>th</sup> October 2010
3. An order declaring property to be specially executable,  
and
4. Costs.

The Plaintiff's declaration sets out the facts. The defendant applied for a loan from plaintiff Bank on 20<sup>th</sup> March 2000 for an amount of M165,000,00. The loan was approved and a Deed of Hypothecation was drawn and registered in the Deeds Registry under No.26502 over defendant's property, namely Plot No.13293-638, situated at Qoaling, Maseru urban area. The property was initially registered in favour of one Thabo Makhoba, but was subsequently transferred to defendant herein and consent was obtained under the Land Act, enabling her to mortgage her lease.

## SPECIAL PLEA

The defendant entered appearance to defend the matter and raised the following special pleas:

1. Non joinder. It being alleged that the defendant was married in community of property and the husband ought to be have been joined in the proceedings.
2. Lack of jurisdiction – in that the parties had agreed in an acknowledgement of debt signed subsequently between them that they consent to the jurisdiction of the Magistrate’s Court in respect of any claim arising out of the debt owing.
3. Locus Standi: that the attorneys “have no authorization and hence locus standi to bring any action on behalf of plaintiff”.

The matter appeared on the roll on the 17<sup>th</sup> March 2011 and was on that date set down for 29<sup>th</sup> March 2011 for argument on the Special Plea. A notice of set down was duly served on defendant’s attorney and filed; but on the date of hearing nobody appeared on behalf of defendant. The matter proceeded.

Mr. Mpaka on behalf of the plaintiff argued that the mortgage bond was signed by the defendant on her own; and she described herself therein as a “Major Spinster” She declared herself as truly and lawfully indebted to the defendant and further renounced the benefits of all exceptions which might or could be taken in law or in equity to the payment of the debt or any part thereof.

It was contended; and it become clear to the Court that if the defendant was married; it could only have been after the transaction, and that fact was never disclosed to the plaintiff. The bond was executed in 2001; and the further acknowledgment of debt signed by defendant in 2006. None of these documents made any reference to her being married in community of property.

The defendant also failed to bring or attach any document to her pleadings to show her alleged marital status. The court was therefore in agreement with Mr. Mpaka that the special plea of non-joinder ought to fail.

The special plea of lack of jurisdiction also failed on the basis that there was a declaratory order sought; and furthermore, consent to the jurisdiction of the Magistrate’s Court would not oust the jurisdiction of the High Court. It would be untenable to expect the court already dealing with the matter to remit it

to the Magistrate's Court. This would be both unnecessary and costly.

The plea of locus standi also failed in as much as counsel or attorney would not necessarily have locus standi in the general sense pleaded; but merely has to show authorization to bring the action. The Court is of the view that this could be called upon and the plaintiff attorney be required to produce a Power of Attorney. This could be done at any stage. This ground no longer has the vigorous or forceful impact it had in proceedings in the old days. Unless there are reasonable and compelling grounds to dispute the authority of the attorney; the court has the discretion to simply require the production of the power of attorney at any stage before trial.

In the circumstances the defendant's special plea failed and the court dismissed the special pleas with costs and ordered that the parties proceed to pre-trial conference and continue with the trial hearing of the merits in the usual way in terms of the rules.

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**L. A. MOLETE**  
**ACTING JUDGE**