

**IN THE HIGH COURT OF ESOTHO**  
**(Commercial Court Division)**

**HELD AT MASERU**

**CCT/0115/2020**

In the matter between:

**STANDARD LESOTHO BANK LIMITED**

**APPLICANT**

And

**MAMATELA AMOHETSE MATEKA t/a**

**MOTLEJOA GUEST HOUSE**

**RESPONDENT**

**Neutral Citation: - Standard Lesotho Bank v Motlejoa Guest House [2022]  
LSHC 178 COM (August 2022)**

**JUDGMENT**

**CORAM:           A.R. MATHABA J**

**HEARD ON:       19<sup>th</sup> May 2022**

**DELIVERED:     18<sup>th</sup> August 2022**

## **SUMMARY:**

*Application for Summary Judgment – Defendant moving the Court to ignore particulars of claim attached to the summons in considering the application – The propriety of Applicant’s reliance on evidential documents attached to the summons considered – Application for summary judgment granted.*

## **ANNOTATIONS:**

### **STATUTES**

**High Court Rules Legal Notice No.9 of 1980**

### **Cases**

#### **Lesotho**

**Dencor Lesotho (Pty) Ltd v Al Barakah Investment (Pty) [2013] LSHC 37**

**Leen v FNB Lesotho [2016] LSCA 27**

**Lesotho Nissan (Pty) Ltd v Katiso Makara (C of A (CIV) 72/14 [2016] 20**

**National University of Lesotho v Thabane (C of A (CIV) NO. 3/2008) [2008] LSCA 26**

**Standard Lesotho Bank Ltd v Mahomed [2010] LSHCCD 9**

#### **South- Africa**

**Absa Bank Ltd v Janse Van Rensburg and Another 2013 (5) SA 173 WCC**

**Absa Bank Ltd v Studdard and Another 2011/24206 [2012] ZAGP JHC 26**

**Bantry Head of Investments (Pty) Ltd and Another v Murray and Stewart CT 1 1974 (2) SA 386**

**Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others [2020] ZACC 13**

**Brisley v Drotsky 2002 (4) SA 1 SCA**

**Chambers v Jenker 1952 (4) SA 643**

**Maharaj v Barclays National Bank Ltd 1976 (1) SA 418**

**Moosa V Hassan 2010 (2) SA 410 KZP**

**Phofung Project Consulting (Pty) Ltd v Standard Bank of South Africa Ltd N0 A232/17 [2018] ZAFSHC 21**

**Unibank Savings and Loans v Absa Bank 2000 (4) SA 191**

### **Swaziland**

**June Mckenzie v Sera Ncongwane and Another (1751/2012) [2013] SZHC 14**

**Swaziland Civils (Pty) Ltd v Kukhanya Civil Engineering Ltd (1154/2018) [2019] SZHC 12**

### **INTRODUCTION:**

[1] This is an opposed application for summary judgment. The proceedings are essentially action proceedings. I shall therefore refer to the parties as in convention. Though the application was instituted on the 8<sup>th</sup> June 2020, it was only heard on the 19<sup>th</sup> May 2022. The operations of the Commercial Court were halted by the tragic demise of its two esteemed Judges in May and July 2020. The operations resumed in October 2021.

## **BACKGROUND:**

[2] The plaintiff and the defendant entered into a loan agreement on the 26<sup>th</sup> October 2015 wherein the plaintiff advanced M2,870,000.00 to the defendant. Consequently, the defendant registered a mortgage bond over three immovable properties in favour of the plaintiff as a security for repayment of the loan to the plaintiff.

[3] The loan was repayable by the defendant to the plaintiff in 84 monthly instalments of M66,349.04 per month inclusive of interest on or before the 30<sup>th</sup> day of each month. In terms of clause 13 of the agreement between the parties, in the event of default regarding payment of monthly instalments, the full amount outstanding would immediately become due and payable.

[4] The defendant breached the terms of the loan agreement when she failed to pay the monthly instalments and fell in arrears. The arrears amounted to M652,309.98 together with interest thereon to be calculated at the rate of 21.75% per annum. The total outstanding amount as at the 4<sup>th</sup> March 2020 was M2,734,583.62.

[5] Despite demand from the plaintiff the defendant refused or neglected to pay as a result of which the plaintiff instituted action proceedings before this

Court which eventually resulted into the instant application. The defendant is resisting the application on the grounds which can be summarised as follows:

- 5.1 The summons does not disclose a cause of action contrary to rule 18(5) of the High Court Rule of 1980 (*“the rules”*) and that the particulars of claim attached thereto must be set aside as irregular process;
- 5.2 the loan was advanced to be used exclusively to construct a hall at a guest house and the estimated income from the hall was considered in assessing the business ability to pay the monthly instalments. The funds ran out before the hall was completed as the contractor had underestimated the costs of the foundation. As a result, contrary to agreed instalments amount, the business has only been able to pay around M30,000.00 monthly;
- 5.3 Mr. *Sello*, the plaintiff’s representative, was notified that the construction of the hall was underestimated but he advised the defendant to endorse payments for the construction with the understanding that the plaintiff will provide additional funding should the loan not be enough to complete the project. The loan did not finish the project, but the plaintiff has not approved defendant’s application for additional funding;

- 5.4 the plaintiff cannot enforce clause 13 of the agreement in circumstances where it failed to ensure that the drawdowns were properly made against proper certificates;
- 5.6 it will be unfair, unreasonable or unduly harsh if the plaintiff were to be allowed to enforce clause 13 in circumstances where through its contribution the purpose for which the loan was sought and granted has not been fulfilled;
- 5.7 the effect of enforcing clause 13 in the circumstances of this case will be unjustified violation of defendant's constitutional right from arbitrary seizure of property as the plaintiff is sure to execute on the mortgaged property.

**LEGAL PRINCIPLES:**

**[6]** Rule 28 of the rules provides as follows: -

“(1) Where the defendant has entered appearance to defend the plaintiff may apply to court for summary judgment on each of such claims in the *summons* as is only-

- (a) on a liquid document
- (b) for a liquidated amount in money
- (c) for delivery of specified movable property, or

(d) for ejectment.

together with any claim for interest and costs.

(2) The plaintiff, who so applies, shall within fourteen days after the date of delivery of entry of appearance, deliver notice of such application, which notice must be accompanied by an affidavit made by the plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any claimed and such affidavit must state —

(a) that in the opinion of the deponent the defendant has no *bona fide* defence to the action and

(b) that entry of appearance has been entered merely for the purpose of delay.

If the claim is founded on a liquid document a copy of the Document must be annexed to the affidavit.

The notice of application shall state that the application will be set down for hearing on a specified date which shall be not less than seven days from the date of delivery of the notice.

(3) Upon the hearing of the application for summary judgment, the defendant may —

(a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including such costs which may be given; or

- (b) satisfy the court by affidavit or, with leave of the court, by oral evidence of himself or of any other person who can swear positively to the fact, that he has a *bona fide* defence to the action,

Such affidavit shall be delivered before noon not less than three court days before the hearing of the application. *Such affidavit or oral evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.* (Emphasis mine)

[7] Whether the plaintiff in *casu* has complied with the dictates of rule 28 is not in issue. I therefore deem it necessary to immediately consider what is required of a defendant to successfully resist an application for summary judgement. In **Maharaj v Barclays National Bank Ltd** 1976(1) SA 418 (A) at 426A-C the Court`s approach to summary judgement was set out as follows:

“Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and



good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be.”

[8] In **Leen v FNB Lesotho** C of A (CIV) 16A of 2016, [2016] LSCA 27 at para 22, the Court of Appeal citing the decisions in *Marsh and Anor v Standard Bank of SA Limited 2000(4) SA 947 (W) at 949* *C Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)* described a bona fide defence as a triable or arguable defence which must be such that when advanced at a trial and proved, the defendant would most likely succeed.

#### **ISSUES FOR DETERMINATION:**

[9] The foregoing having been said, there are two issues for determination in the instant matter: - whether I have to disregard the particulars of claim attached to the summons in considering summary judgment application and whether the affidavit filed by the defendant fully discloses “*the nature and grounds of the defence and the material facts relied upon therefor*” as demystified in **Maharaj v Barclays National Bank Ltd, supra.**

**ANALYSIS:**

[10] I first deal with the argument that I should disregard the particulars of claim attached to the summons and consequently find that the summons on their own do not contain material facts relied upon in support of the plaintiff's claim. The defendant relies on the following passage by **Lyons AJ** in **Standard Lesotho Bank Ltd v Mahomed** (CIV/T/182/2010) (NULL) [2010] LSHCCD 9 (07 June 2010) in relation to Rule 28:

“The rule is pellucidly clear. Summary judgement relates to such claims as are pleaded in the summons. That does not mean that reference is to be had to any declaration or other pleading that may have been filed. So when deciding a summary judgment application the court must have reference only to the summons and what is pleaded therein. I turn to that pleading.”

[11] The decision in **Standard Lesotho Bank Ltd v Mahomed**, *supra*, was subsequently followed by **Hlajoane J** in **Dencor Lesotho (Pty) Ltd v Al Barakah Investment (Pty) Ltd** (CIV/T/243/2013) [2013] LSHC 37, paras 7 and 10. The argument advanced by Mr. *Selimo* for defendant reminds me of profound words by **Smalberger JA** in **National University of Lesotho and Another v Thabane** LCA (2007- 2008) 26 para 4 where he said the following:

“Before proceeding I propose to make some comments concerning the rules. They are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals consequently the rules must be interpreted and applied in the spirit, which will facilitate the work of this Court. It is incumbent upon practitioners to know, understand and follow the rules, most if not all of which are cast in peremptory terms. A failure to abide by the rules could have serious consequences for parties and practitioners alike, and practitioners ignore them at their peril. At the same time formalism in the application of the rules should not be encouraged. Opposing parties should not seek to rely upon non-compliance with the rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent’s legitimate rights. Thus what amounts to purely technical objections should not be permitted in the absence of prejudice to impede the hearing of appeals on the merits. The rules are not cast in stone. This Court retains a discretion to condone a breach of its rules (see Rule 15) in order to achieve a just result. The attainment of justice is the Court’s ultimate aim. Thus it has been said that the rules exist for the court, not the court for the rules.”

[13] These words of wisdom were reiterated in **Lesotho Nissan (Pty) Ltd v Katiso Makara** C of A (CIV) 72 of 14 [2016] LSCA 20 (29 April 2016) at para 10. My invocation of these words does not mean that the plaintiff in *casu* has not complied with the rules as far as it relates to the attachment of the particulars of claim to the summons. I do so to demonstrate that Courts are not

tolerant of purely technical objections that are raised to derail the course of justice even in the absence of prejudice to the other side.

[14] Both decisions in **Standard Lesotho Bank Ltd v Mahomed**, *supra*, and **Dencor Lesotho (Pty) Ltd v Al Barakah Investment (Pty) Ltd**, *supra*, were considered by the Court of Appeal in **Leen v FNB Lesotho**, *supra*. It is important to clarify that the Court of Appeal was interrogating the contention that the simultaneous filing of a summons and particulars of claim is a bar to an application for summary judgment, not specifically the issue that I am dealing with in *casu*, whether the particulars of claim need to be ignored in considering a summary judgment application.

[15] The Court of Appeal in **Leen v FNB Lesotho**, *supra*, at para 13 appear to be endorsing **Lyons AJ**'s view that where a declaration has been served together with the summons, the Court should disregard the declaration and decide the case in reliance on the summons only. However, it made the following profound statement regarding particulars of claim that are filed with summons with reference to **Hlajoane J**'s judgment in **Dencor Lesotho (Pty) Ltd v Al Barakah Investment (Pty) Ltd**, *supra*:

“[12] HLAJOANE J's judgment is pleasantly short for reading. She basically followed LYONS AJ's judgment and does not seem to have appreciated that

in the earlier matter it was a declaration that had been filed together with the summons and in the case before her it was the particulars of claim that have been so filed. In her summary of the case she talks of “both summons and declaration” having been filed, in paragraph [11] she says that “the plaintiff had filed both the summons and declaration/particulars of claim.” Her paragraph [2] is clear that the plaintiff filed “his summons with the particulars of claim at the same time”. Whether what is filed is a declaration or particulars of claim is of no significance to this appeal. *The only point that must be highlighted is that particulars of claim are invariably filed together with the summons whereas a declaration is, in terms of the rules, to be delivered within the period provided in the rule but after the entry of an appearance to defend. Because particulars of claim are invariably, nay (sic) inevitably, filed with or attached to the summons the question arising in this appeal assumes greater significance.*” (Emphasis mine)

**[16]** In terms of rule 18(5) the “*summons shall contain a concise statement of material facts relied upon by plaintiff in support of his claim, in sufficient detail to disclose a cause of action.*”. I do not see how this rule can be complied with without the provision of particulars of claim. Whether the particulars appear in the body of the summons or are attached to the summons as in the instant case is inconsequential.

**[17]** In my view, what matters is that the particulars must be provided, and they must disclose a cause of action. I therefore agree with the statement

that particulars of claim are invariably or inevitably filed with or attached to the summons. Consequently, the contention that the particulars of claim are irregular and must be ignored is misplaced. I find that the summons, considered in light of the particulars attached thereto, disclose a cause of action as required by rule 18(5).

[18] It needs mentioning that, at the hearing on this matter, Mr. *Mpaka* for the plaintiff relied on the provisions of the deed of hypothecation annexed to the summons to show that the plaintiff does not have a bona fide defence as she renounced possible defences to the claim. I brought to Mr. *Mpaka*'s attention that in **Standard Lesotho Bank Ltd v Mahomed**, *supra*, Lyons AJ's emphatically denounced the practice of annexing documents of evidential value to summons where he expressly stated that "*Counsel also raised an objection to the annexures to the summons and the declaration. He is correct. They are evidential documents and not pleadings. As such they are excluded in a summary judgment application – see Rule 28 (4).*" Mr. *Selimo* filed supplementary heads of arguments trying to milk this issue which the Court had raised *mero motu*.

[19] In persuading me not to follow the decision in **Standard Lesotho Bank Ltd v Mahomed**, *supra*, in resolving this issue, Mr. *Mpaka* relied on the decision in **Leen v FNB Lesotho**, *supra*. He persisted with his reliance on the

latter decision even after I brought to his attention that the Court of Appeal did not deal with the specific issue at hand. Notwithstanding the decision in **Standard Bank Ltd v Mahomed**, *supra*, legal practitioners have persisted with the practice of annexing loan agreements to summons. I need to deal with this issue.

[20] A survey of South African judicial decisions reveals that a long-standing rule of practice in Western Cape High Court required a pleader relying on a written agreement to attach such agreement on the summons. *See: Bantry Head of Investments (Pty) Ltd & Another v Murray & Stewart (CT) 1974 (2) SA 386 (C) at 392 – 393.* This was even prior to the amendment of rule 18(6) of the Uniform Rules, compelling a party relying on a document to attach same. In **Absa Bank Limited v Studdard and Another** (2011/24206) [2012] ZAGP JHC 26 (13 March 2012), though dealing with application for default judgment, **Wepener J** said the following before concluding that the practice followed in the Western Cape was a salutary one:

“[6] It has been a rule of practice in this Division [South Gauteng High Court] that copies of both the written agreement of loan as well as the bond document must be attached to a summons, including a simple summons, and to produce the original documents at the time when judgment is requested, whether the matter is brought by way of summons or application. In most of the matters coming before the court for default judgment, practitioners adhere

partially to the practice by attaching copies of the documents, also where a simple summons is used, but the applicant argues that such attachment is not necessary despite it having attached a copy of the bond document to the simple summons. Since 1994 when Rule 31(5) was introduced, default judgments were largely dealt with by the Registrar and not by Judges in open court and it appears that the practice may not have been strictly adhered to, even to the extent, that it is now argued, that it is not necessary to attach the written agreement of loan at all. However, since the decision in *Jaftha v Schoeman and Others* [(8617/01) [2003] ZAWCHC 26]; *Van Rooyen v Stoltz and Others*, 2005 (2) SA 140 (CC), default judgments are often heard in court, together with a request to declare immovable property executable. There is no suggestion that the practice, to annex true copies of the documents and then to hand in the original documents when judgment is sought, has fallen into disuse, and it has not.”

[21] In dealing with the same issue in an application for summary judgment in **Phofung Project Consulting (Pty) Ltd v Standard Bank of South Africa Ltd** Case No: A232/2017 [2018] ZAFSHC 21, **Daffue J** (with **Rampai J** concurring) and referring to the decision of the full bench in **Absa Bank Ltd v Janse Van Rensburg and Another** 2013 (5) SA 173 (WCC) said the following:

“[13] ... It is accepted practice in the High Court that, although a simple summons is not a pleading and Uniform Rule of Court 18 does not



apply, a plaintiff issuing a simple summons relying on a written agreement must attach a copy of such agreement to the summons. If the document relied upon for the cause of action is not attached, the summons would not disclose a cause of action...”

[22] I agree with the view that where a written agreement is the foundation of the plaintiff’s case, it has to be attached to the summons. However, failure to do so in this jurisdiction is not fatal. What matters is whether the plaintiff has pleaded with sufficient particularity to disclose a cause of action. Again, I respectfully disagree with **Lyons AJ** in **Standard Lesotho Bank Ltd v Mahomed**, *supra*, where he cited rule 28(4) for the exclusion of evidential documents in considering a summary judgment application. What the rule does is to bar tendering of evidence by the plaintiff in addition to the affidavit filed in terms of rule 28(2) or cross examination of any person who gives evidence *viva voce* or by an affidavit.

[23] I entirely agree with the leaned Judge that there is a proper way in which documents of evidential value must be introduced in Court. For instance, rule 28 (2) requires plaintiff whose claim is founded on a liquid document to annex a copy of the document to the affidavit that is filed in support of application for summary judgment. However, in my view, it would be wrong and a retrograde step to simply adhere rigidly to what the learned Judge said and

exclude documents of evidential value in considering a summary judgment application. The decision to exclude the documents must be applied with a fair measure of common sense.

[24] It is beyond dispute in *casu* that the foundation of the plaintiff's claim is the loan agreement that has been attached to the summons. The agreement has not been annexed to the affidavit but was specifically referred to in the summons. In **Moosa v Hassam** 2010 (2) SA 410 (KZP), at paras 16 to 18, although considering rule 18 of the Uniform Rules, the court said that annexing a written agreement relied upon to the summons affords the defendant full particulars of the written agreement which plaintiff relies upon for its action. The defendant in *casu* is not disputing the loan agreement or challenging its authenticity. Conversely, she has gone further to introduce clause 11.2 of the agreement in her affidavit. Most tellingly, the defendant has not shown any prejudice she stands to suffer if the Court were to consider the terms of the loan agreement.

[25] In my view, rejecting or excluding the loan agreement simply because it was attached to the summons instead of being introduced by an affidavit in the circumstances of this case will encourage formalism in the application of the rules. It could be it was filed prematurely with the summons, but the agreement was eventually going to be filed. I conclude this subject by

referring to the following instructive words of **Schreiner JA** in *Trans – African Insurance Co. Ltd v Maluleka 1956 (2) SA 273 (A) at 278 F* quoted by the Court of Appeal in **Leen v FNB Lesotho**, *supra*, para 19:

“No doubt parties and their legal advisers should not be encouraged to become slack in their observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[26] The defendant does not dispute that in terms of the contract, the loan is to be repaid in eighty-four monthly instalments of M66,349.00. She asserts under oath that she has only been able to pay monthly installments of around M30,000.00. I therefore proceed to interrogate if the reasons provided by the defendant why she has failed to pay the agreed instalment constitute a defence which is bona fide and good in law.

[27] The defendant states that estimated income from the hall had been considered in assessing her ability to repay the loan and that failure to complete the hall made it impossible to pay the agreed amount in compliance with the agreement. However, the defendant does not cite any provision in the loan agreement in terms of which payment of monthly instalments is associated with

completion of the hall or in terms of which the parties had agreed that pending the completion of the hall, she will pay around M30,000.00 monthly instalments.

**[28]** In fact, in terms of clause 4.2 of the agreement, the defendant's first monthly instalment was due 30 days after she first utilised the loan facility and not upon completion of the hall. It is therefore clear that the defendant 's undertaking to make timeous instalments and in the agreed amounts was not dependent on the hall being complete and generating income.

**[29]** The argument that the plaintiff has, contrary to its representative's promise, refused to provide additional loan to finish up the project is of no moment and does not constitute a triable or bona fide defence looking at the nature of the claim in *casu*. I am prepared to accept that with the hall complete and operational, the financial position of the defendant is going to improve. However, it bears repeating that it is not the defendant's argument that in terms of the agreement, payment of monthly instalments was dependent on the hall being operational. That could not have been the case because utilisation of the loan facility triggered payment of monthly instalments 30 days thereafter.

**[30]** Again, the defendant is not referring this Court to any provision in the contract or anything, in terms of which payment of agreed monthly instalments was tied to the provision of additional loan to complete the hall.

Even if I were to accept that the plaintiff's representative had made the alleged representations regarding provision of additional loan in the event of the loan not finishing the project, this is of no avail to the defendant. The defendant is still left with no reasonable possibility of succeeding at a trial. The plaintiff is only bound by the written loan agreement as per one of the general terms and conditions in the loan agreement which reads as follows:

**“Whole Agreement, Variation or Terms, No Indulgence.**

The agreement created upon acceptance of the Facility Letter by the Borrower shall constitute the whole agreement between the Bank and the Borrower relating to the subject matter of the Facility Letter. No addition to, variation, or amendment, or consensual cancelation of any of the terms contained in the Facility Letter shall be of any force or effect unless it is recorded in writing and is signed on behalf of the Bank by one of its authorised officials and accepted by the Borrower. No indulgence shown or extension of time given by the Bank shall operate as an estoppel against the Bank or waiver of any of the Bank's rights unless recorded in writing and signed by the Bank. The Bank shall not be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the conclusion of any agreement and/or whether it was negligent or not.”

[31] Besides, the argument that the plaintiff cannot seek to enforce clause 13 of the loan agreement because it failed to ensure that the drawdowns

were properly made against proper certificates is misplaced. The defendant does not cite any provision in the loan agreement placing an obligation on the plaintiff to monitor the construction project and ensure that drawdowns were against proper certificates. I therefore cannot find that the defendant has fully disclosed the nature and grounds of her defence and the material facts relied upon. The defendant is required to substantiate the facts which if proved would give rise to a valid defence. *See: Chambers v Jenker* 1952 (4) SA 643 (C) at 637. All what clause 11.2 on which the defendant relies with respect to drawdowns says is that “*Draw downs to be made against provision of certificates from qualified architect*”.

[32] I now turn to the argument that it will unfair and against public policy to enforce clause 13 of the agreement in circumstances where through contribution of the plaintiff’s employee, the purpose for which the loan was sought and granted has not been fulfilled. This argument is without merit and cannot be sustained. I have already found that there is no provision in the agreement in terms of which the plaintiff was to monitor the drawdowns or the project to ensure that the drawdowns were made against proper certificates. Moreover, in terms of the agreement, the plaintiff is not bound by whatever representations its employee is alleged to have made regarding provision of additional loan unless those were reduced into writing.

[33] Determining fairness involves a two – staged enquiry. The first stage is whether the clause is unreasonable, on its face, as to be contrary to public policy. If so, the court has to strike down the clause. Should the clause be found to be reasonable, the second stage of the enquiry is whether in all the circumstances of the particular case, it would be contrary to public policy to enforce the contract. The party seeking to avoid enforcement of the clause must demonstrate why its enforcement would be unfair and unreasonable in the given circumstances. A particular consideration must be had to the reasons for non-compliance. *See: Beadica 231 CC and Others v Trustees For The Time Being Of The Oregon Trust and Others* [2020] ZACC 13, para 36 to 37.

[34] The defendant does not contend that clause 13 is necessarily unreasonable or unfair. Rather she challenges its enforcement in the particular circumstances of her case. I cannot find enforcement of clause 13 unreasonable or unfair in circumstances where payment of installments was not depended on the hall being complete and operational. The fact that the defendant cannot afford to pay monthly instalments, or its financial situation has changed is not a defence in law. Were this to be accepted as a valid defence, this would be counterincentive to economy as financial institutions will be reluctant to lend due to exposure to high risk of non-recovery.

[35] Regard must also be had to the legal principle that a change in financial strength and commercial circumstances which causes compliance with the contractual obligations to be difficult, expensive or unaffordable, does not constitute impossibility because deteriorations of that nature are foreseeable in the business world at the time the contract is concluded. See: **Unibank Savings & Loans Ltd v Absa Bank** 2000(4) SA 191(W) at 198B-E.

[36] The argument that enforcement of clause 13 in the circumstances of this case will be unjustified violation of the defendant's "*Constitutional right from arbitrary seizure of property*" is a non-starter. The plaintiff has followed due process of law in asserting its claim. As a result, the suggestion that consequent execution of the mortgaged property will be tantamount to arbitrary seizure of property is disingenuous.

[37] In **Brisley v Drotsky** 2002 (4) SA 1 (SCA) at para 13, the Court said the following with respect to the judicial power to invalidate written contracts on the strength of public policy:

"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's



individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12:

‘...the doctrine should only be invoked in a clear case in which the harm to be the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds’.

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom”.

**DISPOSITION:**

[38] To successfully resist summary judgment application, a defendant must disclose “*the nature and grounds of the defence and the material facts relied upon therefor*” in the affidavit or oral evidence resisting such an application. The defence must be triable or arguable such that when advanced at a trial and proved, the defendant would most likely succeed. I have given serious consideration to this matter, particularly looking at the amount involved. However, it is clear from the defendant’s affidavit resisting summary judgment that the defence which she has advanced carries no reasonable possibility of succeeding in the trial action. In short, the grounds advanced for resisting summary judgment do not hold water, consequently the defendant failed to show that she has a bona fide defence. Therefore, I cannot exercise my

discretion against the granting of summary judgment. The application must thus succeed.

**COSTS:**

[39] I was fleetingly addressed by the parties on the matter of costs. The costs were contractually agreed between the parties in the agreement according to the plaintiff. The parties had agreed on costs at attorney and client scale and collection costs. The awarding of costs is always at the discretion of the Court, but I find no reason to interfere with the parties contractual arrangement. However, I am not prepared to award costs at attorney and client scale and the collection commission. I remain persuaded by jurisprudence that collection costs cannot be claimed together with costs of suit and that where an agreement allows it, such an agreement is to that extent unconscionable. It results in excessive attorney's fees thereby rendering the agreement unenforceable. *See: Swaziland Civils (Pty) Ltd v Kukhanya Civil Engineering Ltd* (1154/2018) [2019] SZHC 12 (7<sup>th</sup> February, 2019) page 8 to 13 and *June Mckenzie v Sera Ncongwane and Another* (1751 of 2012) [2013] SZHC 14 (07 February 2013) at para 18.

**[40]** Further, if the parties had agreed on interest at the rate of 10.75% above the prime rate which as alleged by the plaintiff at the time the dispute arose was set at 10.75%, interest on the amount due has to be calculated at the rate of 21.5% and not 21.75% as alleged by the plaintiff.

**ORDER:**

**[41]** Consequently, summary judgment is granted and the order is issued in favour of plaintiff against the defendant in the following terms:

- 41.1 payment of M2,734,583.62;
- 41.2. interest on M2,734,583.62 at the rate of 21.5% per annum from the 4<sup>th</sup> March 2020 to date of full and final payment;
- 41.3 declaration that Plot No. 30082-481, Plot No. 30082-453 and Plot No.30082-455, all at Likileng Butha – Buthe, are specially executable; and
- 41.4 costs on the attorney and client scale.

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**A.R. MATHABA J**  
Judge of the High Court

**For the Plaintiff:        Mr. T. Mpaka**

**For the Defendant:      Mr. K. Selimo**