

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0228/2024

In the matter between:

FIRST NATIONAL BANK OF LESOTHO LIMITED

PLAINTIFF

AND

KHAFO PITSI

RESPONDENT

Neutral Citation: FNB of Lesotho Ltd v Khafo Pitsi [2024] LSHC 250 Comm. (11 NOVEMBER 2024)

CORAM: MOKHESI J

HEARD: 12 SEPTEMBER 2024

DELIVERED: 11 DECEMBER 2024

SUMMARY

CIVIL PRACTICE: *Application for a summary judgment- The plaintiff applying for a summary judgment on account of the defendant's failure to pay monthly instalments as agreed- The defendant having raised a bona fide defence, application dismissed.*

ANNOTATIONS

LEGISLATION

Financial Consumer Protection Act, 2022

The legal capacity of Married Persons Act, 2006

CASES

LESOTHO

*Tseliso James Thamae and Another v Nedbank Lesotho C of A (CIV) 47/2024
(unreported and delivered on 01November 2024)*

SOUTH AFRICA

Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD

Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375

*Veriawa and Others v President, SA Medical and Dental Council and Others 1985
(2) SA 293*

JUDGMENT

[1] **Introduction**

This is an application for a summary judgment lodged in terms of the now-repealed High Court Rules 1980. The reliefs sought are the following:

1. *Payment of an amount of M1,067,771.02 (One Million and Sixty-Seven Thousand, Seven Hundred and Seventy-One Maloti Two Lisente being a full outstanding amount.*
2. *Interest on the amount stated herein above at the rate of 7.67% per annum calculated on the daily balance of the amount of the loan, plus any interest thereon outstanding from time to time from the date 28th July 2023 to the date of final payment.*
3. *A developed residential plot registered as plot No. 12293-599 situated at Thetsane in the district of Maseru is declared specially executable.*
4. *Costs of suit on Attorney and Client scale as per agreement between the parties.*

[2] **Background Facts**

The plaintiff is a financial institution. It issued out simple summons against the defendant who is its client and a former employee. On 04 August 2017 the parties entered into a contract whereby the plaintiff advanced the defendant a home loan serviceable in 235 monthly instalments. The amount advanced was M1,199,143.00 (One Million One Hundred and Ninety-Nine Thousand One Hundred and Forty-Three Maloti) secured by mortgage bond over plot No. 12293-599. In terms of clause 7.1 failure by the defendant to effect punctual payment of the instalments constitute a breach of the agreement. Clause 11 of the agreement provides that the certificate of

indebtedness signed by any manager of the plaintiff as to the plaintiff's indebtedness shall be *prima facie* evidence of his indebtedness.

- [3] It would appear that the defendant was involved in disciplinary issues which resulted in him being dismissed by the plaintiff. Consequent to his dismissal he sought intervention of the Directorate on Dispute Prevention and Resolution (DDPR) as he was complaining about being unfairly dismissed. In terms of the loan agreement the defendant was obliged to pay back the loan in equal monthly instalments of M9,868.68 (Nine Thousand Eight Hundred and Sixty- Eight Maloti Sixty-Eight Lisente. On 19 April 2024 the plaintiff's Head of Credit issued a certificate of indebtedness in which she/he states that the defendant:

“Failed to make punctual payment or at all and is therefore indebted to:

First National Bank Lesotho Limited

An amount of M1,067,771.02 (One Million and Sixty Seven Thousand, Seven Hundred and Seventy Thousand, Seven Hundred and One Maloti Two Lisente) which amount is inclusive of the capital amount of the loan plus 7.67% interest calculated annually from the date the loan was issued on the 28th July 2023.

The amount being in respect of money loaned and advanced, and compounded interest thereon which Khafo Pitsi has failed to pay despite demand from First National Bank.”

- [4] The plaintiff relies on this certificate of indebtedness to claim the accelerated debt and on clause 1 of the Deed of Hypothecation which is to the effect that in the event of the defendant's default in the performance of the condition of the bond or his failure to discharge his obligations to the plaintiff on the

scheduled date or failure to pay such unpaid amount on demand, the plaintiff will be entitled to claim the accelerated debt.

[5] The defendant on the one hand disputes that he owes the plaintiff any amount in arrears. He annexed a schedule of payments which he says he made during the period he is alleged to have defaulted to repay the loan instalments. The instalments vary between M8,000,000.00 and M9,500.00. From the said attachments the last payment was made on 02 January 2023, otherwise if there was anything paid beyond that he could have attached it. He further averred that on 08 September 2023 he made a payment of M91,000.00 thereby accelerating his instalments, and for this reason he contends that his account is not in arrears. The defendant further avers that he has a *bona fide* defence in the form of the two points of law he raised in the summons, namely, (i) non-joinder of his wife as they are married in community of property, and (ii) that the litigation is premature as the plaintiff does not allege and prove that a demand was made for repayment, and it was never met.

[6] **Issues for determination**

(i) Whether the application should succeed

[7] (i) Non-joinder of the defendant's wife.

It is common cause that the defendant and his wife are married in community of property. It is for this reason that he contends that she ought to have been joined in these proceedings. He relies this contention on Section 5(b) and 7(b) of the legal capacity of Married Persons Act ("The Act"). The two sections relied upon by the defendant do not relate to the issue he is trying to hammer home. Section 5 is located under part which provides that couples married in community of property have equal powers, and under sub-section (b) to

contract debts for which the joint estate is liable. Under Section 7 (b) the Act provides that a spouse may not enter into a contract for the alienation, mortgaging, burdening with servitude or conferring of any real right in immovable property forming part of the joint estate, without the consent of the other spouse. In my view the defendant is relying on wrong section. These sections are not implicated in this case.

- [8] The answer to the defendant’s case is to be found under Section 10(7) of the Act deals with matters related to litigation by or against spouses. Section 10(7) provides that:

“where a debt is recoverable from a joint estate –

(a) a spouse who incurred the debt or both spouses may be sued jointly for the debt; and

(b) the debt has been incurred for necessities for the joint household, the spouses maybe sued jointly or severally for the debt.”

- [9] The present matter is about recovery of a home loan debt from the joint estate. In terms of Section 7(a) of the Act the spouses may be sued jointly for the debt. Section 10 (7) (a) employs a disjunctive ‘or’ to say that where a debt has been incurred for the benefit of the joint estate a spouse who incurred the debt, or both may be sued jointly. The word “may” as used in the subsection is not always decisive (**Veriawa and Others v President, SA Medical and Dental Council and Others 1985 (2) SA 293 (T) 310G-J**). However, the way the word is used in this subsection connotes that a person who sues a spouse who incurred a debt for a joint estate has a choice to either sue such a spouse

severally or to sue them both to recover the debt. I therefore find that the point of non-joinder was not properly taken.

[10] (ii) **Pre-mature Litigation**

The defendant contends that the litigation is premature because he was not issued with a letter of demand that his account was in arrears. On the one hand the plaintiff contends that in terms of clause 1 of the Deed of Hypothecation it was empowered, in case of default, to proceed against the defendant without notice. The plaintiff contends that the point was badly taken because there is no provision in the agreement which stipulates that a demand must be issued before the court can be approached for enforcement. I think the plaintiff's counsel misses a very critical point here. The requirement of a notice of default may not appear in the agreement but it is part of our law as provided by Section 21 of the **Financial Consumer Protection Act, 2022** ('the Act') which provides that:

“Pre-enforcement notice

(1) Enforcement proceedings over a credit liability shall commence after a consumer has been –

(a) notified of a default; and

(b) informed of his rights.

(2) A financial service provider shall be required to issue a written notice explaining an amount overdue and how a default can be remedied by a consumer.

(3) A financial service provider shall observe a minimum notice period between a pre-enforcement notice and a commencement of action,

commensurate with a type, length and amount of credit, as outlined by the Regulator.”

[11] It is apparent that the plaintiff did not provide the defendant with pre-enforcement notice as required by the above-quoted section. This is the jurisdictional fact which must be satisfied before a credit provider can issue out summons to recover its debt. To put it differently, there is no cause of action unless the plaintiff serves the defendants with pre-litigation notice in terms of section 21 of the Act. Despite the plaintiff stating in the certificate of indebtedness that the plaintiff failed to pay despite demand, there is no evidence that such a demand was ever made. In the light of section 21 of the Act and the decision in **Tseliso James Thamae and Another v Nedbank Lesotho C of A (CIV) 47/2024** (unreported and delivered on 01 November 2024) the defendant has a *bona fide* defence.

[12] **Certificate of indebtedness**

The plaintiff relies only on the certificate of indebtedness to claim it's the accelerated debt. Reliance on this certificate stems from clause 11 of the loan agreement which provides that it shall be a “*prima facie* evidence” of the defendant's indebtedness. The purpose of the certificate of indebtedness was stated in **Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A) at 382A:**

“The main purpose of the certificate clause was clearly to facilitate proof of the amount of the principal debtor's indebtedness to the bank at any given time. A similar purpose underlies provisions frequently found in reducible mortgage bonds to core future advances, that a prescribed certificate shall be sufficient or prima facie proof of the amount due thereunder.”

[13] As to what is meant that the certificate “shall be *prima facie* evidence”, the court in ***Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 at 478***, said:

“Prima facie evidence, in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. If the prima facie evidence or proof remains unrebutted at the close of the case, it becomes ‘sufficient proof’ of the fact or facts (on the issue with which it is concerned) necessarily to be established by the party bearing the onus of proof. (Salmons v Jacoby 1939 AD 588 at 593).”

[14] The plaintiff, in terms of the certificate of indebtedness claims the accelerated debt from the defendant, but the defendant on the one hand provides a schedule of payments he made and another more substantial on 08 September 2023 – M91,000.00, which he claims accelerated the future payments. He then contends that his account is not in arrears for this reason. All these payments are not disputed by the plaintiff, and once the plaintiff cannot seriously dispute these payments, compel me to find that the defendant has disclosed fully the nature and grounds of his defence and the material facts on which he relies upon.

[15] **Costs**

The defendant’s counsel did not file his heads of arguments and for this conduct, the court forewarned him that, should the defendant succeed, he will be deprived of his costs.

[16] In the result following order is made:

(a) The application for a summary judgment is dismissed with no order as to costs.

MOKHESI J

For the Plaintiff: Adv. Kelepa

For the Defendant: Adv. L. A Molati