

IN THE SUPREME COURT OF SEYCHELLES

SEYCHELLES SAVINGS BANK

PLAINTIFF

VERSUS

1. MICHEL ONEZIME
2. UNA BELLE

DEFENDANTSCivil Side No 342 of 2008

Mr F. Ally for the Plaintiff

JUDGMENT**B. Renaud J**

On 12th November, 2008 the Plaintiff entered this Plaint claiming from the Defendants the sum of **SR41,082.43** with continuing interest thereon and charges, and costs.

The claim arose by virtue of a loan agreement (**Exhibit P2**) dated 4th November, 2002 between the Plaintiff and the Defendants (*hereinafter "the agreement"*) the Plaintiff granted the 1st Defendant a loan in the sum of **SR25,000.00** with interest at the rate of **10% per annum**, which could be subject to other charges and costs, which loan the 2nd Defendant was the guarantor thereof.

In answer to a request for further and better particulars, the Plaintiff added that its claim as at 13th July, 2009, has reached **SR52,559.13** (*which sum continues to increase*) in that it also represent arrear interest in terms of Clause 2 (d) of the agreement. Arrear interest was at 22% as from 1st December, 2008, it had increased to 30% as shown on statement attached, showing all the interest charged from the 30th November, 2007, to date.

The 1st Defendant denied that she is indebted to the Plaintiff in the sum of **SR41,082.43** as at end of September 2008, representing the outstanding balance of the loan and interests and she also averred that she is not liable to make good to the Plaintiff the sum of **SR50,101.22** as claimed.

The 2nd Defendant did not put up any statement of defence and neither did she appear in Court.

The Representative of the Plaintiff who testified produced the agreement which was admitted and marked as **Exhibit P2**.

The agreement states that the 2nd Defendant agreed with the Plaintiff to be bound by the terms and conditions set out in Clause 5 and 6 of the agreement.

By virtue of **Clause 2** of that agreement the 1st Defendant agreed:

- (a) To repay the Plaintiff the loan of **SR25,000.00** with interest of **SR10,000.00** by **48 monthly installments of SR729.17** commencing on **24th November, 2002** and to pay the Plaintiff the total balance of loan and any other charges under the agreement **not later than 24th October, 2006** and to pay any unpaid balance of the loan on the date for payment of the next due installment or on demand under Clause 4 of the agreement.*

- (b) The 1st Defendant would pay each monthly installment by crediting Account No. 5150525006 on or before the 28th day of each month and the Plaintiff is authorized to debit the 1st Defendant's account to effect such payment.*

- (c)** *The 1st Defendant would pay interest on the loan at the fixed rate of 10% per annum, such interest to be paid from the installments payable under Clause 2(a), provided that any excess interest which accrues under the agreement due to non-payment of any installments on the due date for payment shall be due and payable on the day on which it would have been due but for its non-payment.*
- (d)** *The Plaintiff shall be entitled to charge interest at any increased rate from its current rate on any overdue installments or other payment until the same is discharged by the 1st Defendant to the satisfaction of the Plaintiff.*
- (e)** *That the 1st Defendant would pay the Plaintiff any costs of charges reasonably incurred or expended by the Plaintiff in exercising any right arising from any default of the 1st Defendant or otherwise under this agreement in the manner described in Clause 2(b) and the Plaintiff is authorized to debit the Borrower's account to effect such payment.*
- (f)** *That if at any time during the currency of this agreement or any of the terms herein the 1st Defendant is in default of any installment or payment or of discharging any liability he shall not make any withdrawal from Account No. 5150525006 provided that the withdrawal of sums may be made of any difference between the amount standing to his credit (not including the lien amount and the total balance of sums due to the Plaintiff under this agreement.*
- (g)** *The 1st Defendant shall not burden, sell, dispose of or in any manner alienate the property mortgaged/charged/pledged specified in this schedule without*

the express prior written permission of the Plaintiff which shall not be unreasonably withheld.

The terms of **Clause 3** of the agreement are to the effect that all moneys received by the Plaintiff shall be applied:

- (a) *First : in payment of any enforcement expenses;*
- (b) *Secondly : in payment of any deferral charges;*
- (c) *Thirdly : in payment of any accrued credit charges; and*
- (d) *Fourthly : in payment of any other moneys payable under the agreement*

In accordance with **Clause 4** of the agreement the Plaintiff is entitled to demand from the 1st Defendant the unpaid balance of the loan together with accrued interest thereon and any other moneys payable under this agreement and may enforce any guarantee under this agreement or the mortgaged/charged/pledged described in the schedule on the happening of any of the events set out in the agreement as follows:

- (a) *The 1st Defendant is in default of any payment under Clause 2;*
- (b) *If any security granted by the 1st Defendant or 2nd Defendant becomes enforceable under this agreement or otherwise or becomes diminished in value in any way;*
- (c) *The 1st Defendant breaches any obligations under this agreement;*
- (d) *The 1st Plaintiff dies;*

- (e) *The 1st Defendant leaves Seychelles in circumstances as to lead the Plaintiff to reasonably believe that he is leaving Seychelles for good. And the balance of all monies shall immediately become due and payable and any mortgaged/charged/pledged or guarantee enforceable and until the said balance due is paid the 1st Defendant shall pay additional interest thereon which shall accrue calculated at the daily percentage rate as prescribed in Clause 2(d).*
- (f) *If the 1st Defendant is employed by the Bank and the Borrower ceases to be an employee.*

It was a further term of the agreement under its **Clause 5** that the Defendants agree –

- (a) *that if there are more than one Borrower to this agreement their obligations shall be joint and several;*
- (b) *words imparting the singular shall include the plural and vice versa; and*
- (c) *the masculine gender shall include the feminine and vice versa.*

Under **Clause 6** of the agreement the 2nd Defendants guaranteed to the Plaintiff the payment of the loan herein and any other charges and liabilities legally due and claimable under the terms of this agreement and undertook to repay the same promptly and fully in case of any default of payment of the same by the 1st Defendant. The 2nd Defendant agreed to repay any amount legally due as aforesaid on a demand in writing by registered post requesting the same made by the Plaintiff to the 2nd Defendant's address stated therein.

In breach of the agreement the 1st Defendant has failed to repay the said loan and interest in the manner agreed upon in the agreements.

The Representative of the Plaintiff testified that the Plaintiff charged the Defendants annual penalty interest compounded monthly on a daily basis at the rate of 22% as from 1st December, 2008, which was increased to 30% from the 30th November, 2007, and thereafter reduced to 22% as from 1st December, 2009. Those penalty interests are unilaterally set by the Plaintiff. There is no documentary evidence that the Plaintiff informed the Defendants of such penalties.

At the time the Representative of the Plaintiff was testifying in Court on 15th July, 2010, the outstanding balance was **SR67,408.61**.

The Plaintiff sent notice dated 11th May, 2007 to the 1st and 2nd Defendants and these notices were admitted and marked as **Exhibits P3 and P4**. In those 2 letters the Plaintiff notified the Defendants to pay the Plaintiff the sum of **SR26,929.36** (*and such further interest accrued thereon*) within thirty (30) days of the letter, failing which it shall be compelled without further notice to them, to initiate legal action against them to recover the said sum, interests and cost of the action.

In response to the notice the 2nd Defendant made written arrangement dated 8th July, 2009 (**Exhibit P5**) to pay the amount of SR500.00 per month. By letter dated 22nd July, 2009 (**Exhibit P6**) from the Plaintiff to the 2nd Defendant, the Plaintiff signified that it had no objection with her paying SR500.00 every month towards the loan of the 1st Defendant but that the Plaintiff would appreciate if she could consider increasing that sum as the outstanding loan balance of the 1st is very high. The letter goes on to state that – *“meanwhile the case is still with our lawyer and we kindly request you to make your deposit promptly every month.”*

The 2nd Defendant however, did not keep the promise.

The Plaintiff produced an up to date statement of account (**Exhibit P7**) for the period of 24th October, 2006 when the amount outstanding stood at **SR26,929.36** to 14th July, 2010 when the amount, with accrued interest at the rate of 22% or 30% per annum, stood at **SR67,408.61**.

The witness testified that despite the Plaintiff's letter of demand to the Defendants to pay the balance of the loan more specifically by notice dated 11th May, 2007, the Defendants have failed to pay all of the said balance.

The witness added that as at 30th September 2008 the 1st Defendant, is indebted to the Plaintiff in the sum of **SR41,082.43** representing the outstanding balance of the loan and interests, which is increasing and which the Defendants are jointly and severally liable to make good to the Plaintiff.

Article 1134 of the Civil Code states as follows:

"Agreement lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorizes.

The shall be performed in good faith."

I find that the Loan Agreement, **Exhibit P2**, is an agreement that has been lawfully concluded between the Plaintiff and the Defendants and as such has the force of law of the parties who have entered into them.

It is not in dispute that the Plaintiff and the 1st Defendant as the borrower, entered into a written loan agreement dated 4th November, 2002, **Exhibit P2** whereby the Plaintiff granted to the 1st Defendant a loan in the sum of **SR25,000.00**. In that agreement the 2nd Defendant agreed with the Plaintiff to be bound by the terms and conditions set out in Clause 5 and 6 of the said agreement.

The Plaintiff's witness admitted that there was no documentary evidence that the Plaintiff ever informed the Defendants that the rate of interest had been raised from the original agreed **10%** to **22%** or later to **30%** and reduced again to **22% per annum**.

The thrust of the defence of the 1st Defendant is that she is not indebted to the Plaintiff in the sum of **SR41,082.43** as at end of September 2008, as representing the outstanding balance of the loan and interests and she is also denied being liable to make good to the Plaintiff the sum of **SR50,101.22** as claimed by the Plaintiff following her request for further and better particulars.

Although the Defendants, or Counsel on their behalf, did not put up appearance on the day of the hearing, the Court is yet required to assess the *ex-parte* evidence of the Plaintiff in the light of the defence entered by the 1st Defendant.

The failure of the Defendants to appear in Court at the hearing does not automatically lead to the Court accepting all the uncontroverted evidence of the witness of the Plaintiff. The

Plaintiff is suing the Defendants under a written agreement and this Court has also to address itself to the contents of the agreement, when evaluating the ex-parte evidence.

Article 1135 of the Civil Code of Seychelles states:

“Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.”

This claim arose out of a written agreement. On 11th May, **2007** when the Plaintiff issued a mise en demeure (**Exhibits P3 and P4**) on the Defendants calling upon them to pay within 30 days hence the total sum due at the time, the sum was stated as **SR26,929.36**. The Plaintiff did not follow up on its demand until 12th November, 2008 when it took recovery action by entering this Plaint in Court. By then, according to the Plaint, the debt of the 1st Defendant with interest and charges had risen to **SR41,082.49**. At the time of the hearing of the suit in July, 2010 that amount stood at **SR67,408.61**.

The Plaintiff did not take any legal action to recover the debt when it became due on **24th October, 2006** but instead allow the sum to attract more interest over a period of over 2 years before suing the Defendants. In the meantime the Plaintiff had **unilaterally** set the interest on the unpaid balance at 22% and further to 30% before reducing back to 22%. The Plaintiff did that without notifying the Defendants at all about it.

It is my judgment that the Plaintiff ought not to have charged the Defendants interest over and above the 10% originally agreed upon unless the Plaintiff had notified the Defendants of that variation and put the Plaintiff on notice. This fact is not even averred in the Plaint which was entered after the mise en demeure 2 years earlier notifying of a lesser sum.

It is my finding that the 1st Defendant failed to repay his loan when it became due and payable as per the loan agreement, by **24th October, 2006** and the 1st Defendant is liable to make good to the Plaintiff the sum legally owed with interest, charges and costs as per the agreement.

Applying the principle of law set out in **Article 1135 of C.C.Sey**, I believe that the sum claimed by the Plaintiff ought to be revisited by this Court. When that principle was applied in the case of **Banque Francaise Commerciale v Fayon 3 SCAR(Vol. 1) (83-87) p.66**, the Seychelles Court of Appeal held that – *“Applying Article 1135 of the Civil Code of Seychelles, the person guaranteed not only enjoys rights, including the right to demand payment by the guarantor in the event of default of the debtor; he also owes duties, among them the duty not to cause unnecessary or undue loss to the guarantor by his imprudence or negligence”*.

In the present case, I will likewise hold that the Plaintiff not only enjoys rights, including the right to demand payment by the Defendants in the event of their default; the Plaintiff also owes duties, among them the duty not to cause unnecessary or undue loss to the Defendants by its imprudence or negligence. The imprudence or negligence of the Plaintiff herein is that it delayed in taking recovery action; it failed to inform the Defendants about the penal interest from the agreed 10% to 30% then reduced to 22% resulting in the Defendant owing **SR67,408.61** at the time of the hearing.

In find that the 1st Defendant borrowed **SR25,000.00** from the Plaintiff and he had to repay that by in 48 monthly instalments of **SR729.17** which sum includes interest at 10% per annum, and the debt should be cleared by 24th October, 2006 when he would have repaid a

total of **SR35,000.00**. **Exhibit P7** shows the balance outstanding as at 24th October, 2006 was **SR26,939.36**. By its plaint the Plaintiff is not claiming any other charges.

Having found that the Plaintiff had not notified the Defendants of any increased in the rate of interest mutually agreed between the parties as per the agreement, I find that the applicable rate of interest on the unpaid balance of the loan under the agreement is 10% per annum.

I accordingly enter judgment in favour of the Plaintiff as against the Defendants jointly and severally in the sum of **SR26,939.36** with interest at the rate of **10% per annum** accruing on the balance with effect from **24th October, 2006**

I award taxed cost of this suit to the Plaintiff.

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B. RENAUD

JUDGE

Dated this 10th day of December 2010