



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 1359/2018

In the matter between:

SWAZILAND BUILDING SOCIETY

PLAINTIFF

And

**THE TRUSTEES FOR THE TIME BEING OF
BHUBHUDLA FAMILY TRUST**

1ST

DEFENDANT

NTOMBIFUTHI DLAMINI

2ND DEFENDANT

BUSISIWE SIPHIWE NGCAMPHALALA

3RD DEFENDANT

**ESWATINI ROYAL INSURANCE
CORPORATION**

4TH DEFENDANT

Neutral Citation: *Swaziland Building Society vs The Trustees For The Time Being of Bhubhudla Family Trust and 3 Others (1359/2018) [2022] (196) 5th September 2022*

Coram:

MLANGENI J.

Last Heard:

28th April 2022

Delivered:

2nd September 2022

Summary: A financial institution issued a simple summons for debt based on breach of contract - debt substantial and disputed - simple summons inappropriate - Rule 18 (6) of High Court rules referred to.

Two successive loans granted to a trust - free insurance cover provided on the loan amounts up to a maximum limit - amount in excess of the free cover limit to be covered on condition that medical tests were undertaken by the main trustee - tests were not undertaken and the main trustee died.

Insurer paid up to the maximum of free cover and the financial institution sued for the difference.

The trust raised a number of defences as well as a counterclaim.

Held: Defences dismissed.

Held, further: Counterclaim dismissed.

Held, further: Plaintiff's claim proved on a balance of probabilities.

Held, further: The contra proferentem rule applies to the rate of interest to be paid by the Judgment Debtor.

JUDGMENT

- [1] The plaintiff is SWAZILAND BUILDING SOCIETY. It has described itself as a body corporate incorporated in accordance with Act No.1 of 1962, trading as a Building Society at Corner Mdada and Dzeliwe Streets, Mbabane, and elsewhere within the Kingdom of Eswatini. In the course of this judgment I will alternatively refer to it as SBS or the Society.
- [2] The first defendant is THE TRUSTEES FOR THE TIME BEING OF BHUBHUDLA FAMILY TRUST, being Ntombifuthi Dlamini and Busisiwe Sphiwe Ngcamphalala, sued in their capacities as Trustees of Bhubhudla Family Trust. I will alternatively refer to it as the Trust or the Trustees.
- [3] The second defendant is NTOMBIFUTHI DLAMINI, an adult female who it is alleged is also sued as surety and co-principal debtor of Bhubhudla Family Trust.
- [4] The third defendant is BUSISIWE SIPHIWE NGCAMPHALALA, an adult female sued as surety and co-principal debtor of Bhubhudla Family Trust.

[5] At the start of the hearing Mr. K. Motsa for the plaintiff informed the court that Ms. Ntombifuthi Dlamini was no longer being pursued as surety but remains pursued as a trustee.

THE PLAINTIFF'S CLAIM

[6] The plaintiff's claim was instituted by way of simple summons¹ claiming payment of the sum of E3,219,441-85 being outstanding balance in respect of money lent and advanced by the plaintiff in 2014 and 2015 respectively, to the first defendant, at the latter's instance and request, which as at the 30th June 2018 was due and payable. There is also an ancillary claim for interest at the rates of 11 per cent and 12.25 per cent respectively per annum calculated from 1st July 2018 to date of final payment, and costs of suit at attorney-client scale including collection commission.

[7] It is the plaintiff's case that the third defendant is liable as surety and co-principal debtor with the first defendant.

[8] The different interest rates as claimed by the plaintiff in respect of the consolidated account, being 11 per cent and 12.25 per cent respectively, from 1st July 2018, pose a serious problem of computation. In the event that the

¹ Book "A", p1-4.

plaintiff succeeds in its claim I will need to find a scientific formula that would successfully compute the two different interest rates on E3, 219, 441.85. In due course I may have to pay closer attention to this aspect and determine its effect upon the plaintiff's claim in respect of interest.

[9] Unavoidably, the defendants noted an intention to defend the matter, this necessitating the filing of a declaration by the plaintiff. I have repeatedly stated before, and I repeat now, that claims based on breach of contract, especially ones involving a substantial and contentious claim such as this one, should not be instituted through simple summons. According to first principles of pleading in civil litigation, in breach of contract cases the contract must be pleaded as well as the facts and specific instances that constitute breach. Rule 18(6) of the High Court Rules has precisely that effect. It's wording is as follows: -

“A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof... shall be annexed to the pleading.”

This is not possible through a simple summons. There is nothing as inelegant as attaching bulky annexures to a simple summons.

For my part, I am not prepared to blink an eye over procedure that threatens the core of our civil procedure.

[10] The plaintiff's claim is based on two separate loan transactions where SBS advanced amounts to the Trust as appears below: -

<u>DATE</u>	<u>AMOUNT</u>
1 ST April 2014	E2, 550,000.00 ²
6 th May 2015	E2, 000,000.00 ³

The above dates are in respect of loan offers by SBS which, it is common cause, were accepted on behalf of the first defendant.

[11] Apart from the respective applicable rates of interest, the terms and conditions of these loans are substantially the same.

THE PLAINTIFF'S EVIDENCE

[12] The plaintiff led the evidence of three witnesses, the first of whom was one Zwelakhe Motsa. This witness started working for SBS as a teller in 2002 and was later promoted

² Loan offer at p21 of Book "A".

³ Loan offer at p25 of Book "A".

to the mortgage department. His duties under this department were to receive and assist clients who sought loans for the acquisition or development of immovable property. He testified that he knows the defendants, not personally but on paper. Later on in his evidence he made it clear that at no point in time did he personally interact with the defendants; what he knows of the matter in court is largely based on information in the files pertaining to the relevant transactions.

[13] According to the witness the first defendant approached SBS through its trustee, one Nqaba Dlamini, who oversaw all the processes that needed to be in place in order for the loans to be granted.

[14] The first stage in making an application for a loan is completion of an application form. I understand, and I do accept, that there would be prior engagement with the prospective customer in order to apprise them of relevant matters around the process, including requirements to be complied with in order for the loan application to be considered. The application form in *casu* has space for a **“second applicant or spouse,”** and therein is the name Futhi Phindile Dlamini, the second defendant.

[15] The application form in respect of the first loan is dated 19th December 2013.⁴ The applicant therein is stated as **“The Trustees For The Time Being of Bhubhudla Family Trust.”** The various pages which form the application form are initialed **“NMD”** which, it is common cause, stands for Nqaba Mhlakayifani Dlamini, who held himself out as the main trustee. The loan amount sought was E2, 550,000.00.

[16] The witness testified that the normal procedure is that the applicant is assessed for credit worthiness, and if they meet the requirements relating to security, a recommendation is made for approval by the relevant committee. In the present matter the loan was approved, security was put in place in the form of a bond over immovable property. There was additional security in the form of suretyships by Nqaba Dlamini and Busisiwe Ngcamphalala. It is on that basis that Busisiwe Ngcamphalala is being sued as third defendant. The loan amount was subsequently disbursed in tranches of E500, 000.00 upon written request by Nqaba Dlamini on behalf of the Trust.

[17] Over and above the security, the applicant was required to secure a Home Owner’s Insurance Policy which provides

⁴ Book “B”, p1-8.

protection in the event of damage or destruction of the property through natural causes. For purposes of this policy SBS doubled up as an agent and beneficiary. Agent in that it is the one that facilitated the process of putting the policy in place; beneficiary in that upon occurrence of an insured event resulting in damage or loss of the property the insurer would pay to SBS what is outstanding at that particular time. The premium for the policy would be paid by SBS to the insurer annually in lump and debited to the customer's loan account in monthly instalments. In this particular case this was put in place in terms of Policy No. MB FCA 3072176, the annual premium being E9, 135-00.⁵ This type of insurance is of no relevance in the matter before court.

[18] According to the witness, in such transactions there was a second type of insurance policy known as Mortgage Protection Policy (MPP) which provides protection in the event of death of the borrower where there is an outstanding balance at the time of death. On the face of it this would be applicable to natural persons because artificial persons do not die. The witness testified that this second type of insurance was not compulsory at that point in time, hence a loan could be disbursed even if there was none in place. This is what happened in this particular place.

⁵ Book "B", p55.3.

[19] It is abundantly clear from the evidence of this witness, and others after him, that the Trust was assumed to be a legal entity with the right to enter into binding contracts in its own name. It is settled in our law that this is not in fact the case. See: SIKHUMBUZO R. MABILA N.O. AND ANOTHER v SYZO INVESTMENTS (PTY) LTD AND THREE OTHERS.⁶; NTOMBIFUTHI PHINDILE DLAMINI AND BUSISIWE NGCAMPHALALA.⁷ This misapprehension is a common thread in all the dealings between SBS and the Trust and, to an extent, it determined the manner in which employees of SBS interacted with the Trust. But because the legal nature of a trust is not in my view a determinant factor in this *lis*, there is no need to say more on this aspect.

[20] The witness further testified that the loan was granted and disbursed under account No. 136332. Interest was payable at the rate of 9.25 per cent per annum, and the repayment period was fifteen years at E26,245.00 per month. The loan amount and interest rate as stated by the witness are consistent with the letter of offer dated 1st April 2014.⁸ It is settled that the lending rate of interest is linked to prime lending rate as determined by the Central Bank from time to

⁶ (304/13) [2013] SZHC 143.

⁷ H/C case No. 577/2017, para 77.

⁸ Book "B", p19.

time, and as prime lending rate changes the interest rate payable by the borrower is bound to change upward or downward. It is on that basis that the letter of offer dated 1st April 2014 states the following: **Initial annual rate of Interest: 9, 2500%.** (my underlining).

[21] In respect of the Mortgage Protection Policy (MPP) the Society had in place a standing contractual arrangement with an insurer (Swaziland Royal Insurance Corporation, now ERIC) which provided automatic cover, referred to as **“free cover,”** up to E1, 500,000.00. By letter dated 27th May 2015⁹ the Society requested the insurer to increase the automatic cover to E2, 000,000.00. Witness stated that this did occur in 2017. However, the totality of evidence suggests that this may have occurred earlier. In terms of the automatic cover, there was no extra obligation or requirement imposed upon the borrower. In the event of death of the life assured, the insurer would pay to the Society whatever the outstanding balance was at death, up to and not exceeding E2,000,000.00.

[22] If the loan amount was in excess of E1, 500,000.00 (later E2, 000,000.00) the loan receiver was required to undergo a prescribed medical examination the results of which would

⁹ Book “B”, p213.

be forwarded to the insurer. This would inform the insurer's decision whether to accept the obligation or not, the amount of premia, etc. This is where the perceived ambivalence of the borrower, the Trust, comes to the fore. The trust is not a natural person, hence it does not have a **"life"** to be insured. One Nqaba Mhlakayifani Dlamini, who was the founder of the Trust, trustees, was described as the front runner in the business affairs of the Trust and it is clear that the Society dealt with him on all the business transactions with the Trust. He was, as a matter of fact, authorized by a resolution of the trustees dated 19th December 2013 **"...to sign all documents to give effect to this resolution and to represent and sign on behalf of the trust any and all documents relating to the said application and subsequent agreements."**¹⁰ He was, for all intents and purposes, the face of the Trust. It is for that reason that the Society looked up to him to undergo a medical examination as required for purposes of cover in excess of the E2, 000,000.00 limit. This aspect was a major issue at the trial, and I will come back to it in due course.

[23] By letter dated 18th November 2014 the Trust was informed that repayments on the initial loan were to start on or before

¹⁰ Book "B", p201.

30th November 2014 at the rate of E26, 796.00 per month¹¹.
The breakdown of the amount was as follows:-

Mortgage repayments	E24, 188.00
Mortgage Protection Policy	E1, 807.00
House Owner's Insurance	<u>E801.00</u>
	<u>E26, 796.00</u>

[24] It is clear that at this stage the Society was acting on the assumption that a Mortgage Protection Policy (MPP) was in place to cover the amount in excess of E1, 500.000.00 which, at that time, was about E1, 050,000.00, exclusive of interest and charges.

[25] The business relationship between the Society and the Trust took-off like a whirlwind. I say so because five days after the letter from the society requiring repayments to begin in respect of the first loan, the Society was already considering a second loan application by the Trust, this time for E2,000,000.00, which was expected to increase the monthly instalment to E53,029.00.¹² In respect of the second loan application PW1, Zwakele Motsa, is the one who personally dealt with Mr. Nqaba Dlamini who was acting on behalf of the Trust.

¹¹ Book "B", p53.

¹² Book "B", p54.

[26] The loan application form has space to enter the date of the application. This space is blank. The applicant is stated as Nqaba Dlamini (in brackets), then it states **“The Trustees For The Time Being of Bhubhudla Family Trust.”** Item V of the application form requires the policy number, name of insurer, sum insured and maturity date in respect of the applicant’s life assurance or endowment policies. The applicant entered **“N/A”**. I contrast this with the corresponding entry on the first loan application form¹³ where the applicant entered **“Old Mutual”**, period. No policy number, no amount insured, no maturity date, no nothing (as they say somewhere across the oceans). Item Q of the application form requires gross salary/income of the applicant per annum. The applicant entered **“Rent”**. The amount is not stated.

[27] This apparent laxity by the Society in dealing with the trust was the subject of intense cross-examination of the Society’s witnesses, the obvious purpose being to demonstrate that SBS was negligent in its dealings with the Trust. One possible explanation for this apparent laxity is that, according to PW1 during cross-examination, SBS had prior dealings with Nqaba Dlamini in his life as an employee of

¹³ Book “B”, P56.

Autostan. Autostan is a motor vehicle dealership within Mbabane CBD. It is apparent that the employees of SBS came to trust Nqaba Dlamini to the extent of taking some things for granted.

[28] By letter dated 6th May 2015 the Trust was offered a second loan of E2,000,000.00 payable over 14 years at a monthly rate of E21,508.00. The initial interest rate applicable was 9.5 per cent. This loan account was opened as a sub-account of the first loan, named 136332-02.

[29] PW1 testified that in respect of the second loan the Home Owner's Insurance Policy was maintained and that the Mortgage Protection Policy was at the upgraded level of E2, 000,000.00 since 2017.

[30] The second loan of E2, 000,000.00, which was granted within a period of one year from the first one, took the society's exposure to about E4, 550,000.00 (excluding interest and charges). With the free cover of E2, 000,000.00, the uninsured excess in the event of death was then about E2, 550,000.00. The need for Mr. Nqaba Dlamini to undergo the medical examination for purposes of the uninsured excess became more glaring and urgent. According to PW1, Mr.

Dlamini was being reminded verbally from time to time, at some point in time by him personally, to undergo the medical examination. He did not do so. On the 20th January 2017 the Society wrote a letter to the Trust¹⁴, among other things demanding a medical examination, which was to include an HIV test. The contents of the letter are diverse and include the exact nature of the medical enquiries to be done. It also gave the trust the alternative option to provide an insurance policy. I quote the relevant portion of the letter below.

“Should you not wish to undertake the required medical checkup, you may provide the society with a life insurance policy proportionate to the amount in excess of the limit...”.

[31] It is common cause that Mr. Nqaba Dlamini did not undergo the medical examination that was required. It is also common cause that the trustees did not provide the Society with an insurance policy which would have been ceded in favour of the Society up to the amount owing at any point in time. On the 17th February 2017 Mr. Nqaba Dlamini died. It is the plaintiff’s case that after the death of Nqaba Dlamini the monthly repayment stopped, this in respect of the main account and the sub-account.

¹⁴ Book “B”, p92.

[32] On the 14th March 2017 the Society lodged a claim against the insurer for payment in terms of the free cover. The claim form is at page 94 of Book “**B**”. On the claim form there is space for “**Balance owing as at date of death**” and the figure entered therein is E2, 754,720.66. The witness testified that the Society expected the insurer to pay only E2, 000,000.00, this in terms of the free cover limit. The Society filed another claim against the insurer in respect of a separate loan account that was also in the name of the Trust, for an amount of E1, 229,060.94. Because this one is not part of the dispute that is before me I need not delve into it. I mention it only because it is part of the amount that was eventually paid by the insurer to SBS, pursuant to the death of Nqaba Dlamini.

[33] Subsequent to the filing of the two claims by the Society, there was a debate between the Society and the insurer, ERIC, on the applicability of the E2, 000,000.00 cover limit. The Society was of the view that the free cover limit was payable in respect of each loan account, which would mean that the society would be paid up to E4, 000,000.00 in respect of the main account and the sub-account. The insurer’s position was different – it was that in respect of the insured event only E2, 000,000.00 was payable, irrespective

of the number of accounts. In this context a letter from the insurer to the Society, dated May 29th 2017,¹⁵ is of relevance.

[34] Below I quote some portions of the letter:-

- “3. In terms of the definitions sections of the policy, ‘Benefit means the lump sum claim payable on the death of the life assured, as specified in the schedule payable to the beneficiary.’**
- “4. In terms of Article 2.4.1 of the policy, ‘a life assured’s benefits are limited to the Free Cover Limit...Insurance in excess of the Free Cover Limit will only be granted if evidence of health and insurability is submitted... and SRIC has agreed in writing to provide an amount... that is in excess of the Free Cover Limit.’**
- “5. The correct interpretation of the Free Cover Limit therefore is that it is applied on the risk exposure of an individual/life assured, as opposed to the loan exposure of the creditor.**

¹⁵ Book “B”, p123-4.

“7it follows that the corporation’s liability is limited to E2,000,000.00... as the life assured never submitted any health report for cover in excess of the prescribed limit.”

[35] I have quoted copiously from the letter because it put finis to the debate regarding the application and/or interpretation of free cover limit. The insurer did, nonetheless, make an undertaking to make a gratuitous payment of **“the current claims in full, taking into account the long standing relationship between Swaziland Royal Insurance Corporation and the Swaziland Building Society.”**¹⁶

The witness testified that the **“current claims”** meant E2, 000,000.00 plus an amount of E1, 229,060.94 in respect of loan account No. 136381. The balance on this account is at page 141 of Book **“B”** and was actually paid by the insurer to the Society on the 28th June 2017. Similarly, an amount of E2, 000,000.00 was paid to the Society on the same date. This made the total paid by ERIC to SBS an amount of E3, 229,060.94, and it signified closure of the matter as between the Society and ERIC.

[36] PW1 was cross-examined extensively. There is not much that came up in the form of evidence that was substantially different from the witness’ evidence in chief. The witness

¹⁶ Para 8 of Letter at p123-4, Book “B”.

persisted that the loans were advanced to the Trust as opposed to Nqaba Dlamini personally; that the loans were approved upon satisfactory proof of ability to repay; that there was nothing untoward – and indeed it was normal practice of the Society – to verbally brief clients on the Mortgage Protection Policy; that the sub-account was created for administrative convenience because the two loans attracted separate interest rates; that the MPP is done once irrespective of the number of properties that are bonded; that the MPP agreement is between the Society and the insurer but it was not part of the initial loan agreement; that if the Trustees did not want the MPP they would have said so. More importantly, the witness was led to zero in on the meaning of **“Life Assured.”** He answered this in reference to the definition section of the standard MPP agreement. The relevant portion is as follows: -

“Where the credit agreement is issued in the name of more than one debtor, reference to the ‘life assured’ shall apply to the first claimant of the lives assured named in the credit agreement¹⁷.”

[37] The witness proceeded, apparently for good measure, to say that if the other two trustees also had an MPP in place, in

¹⁷ Book “A”, p133.

respect of the same loans, the insurer would not have paid out in the event they also died.

[38] It was further put to the witness that the general terms and conditions of the loan agreements did not deal with MPP and he agreed. In light of the importance of MPP and the free cover limit, the witness was asked whether there was a documented process or not on how this information would be conveyed to clients of SBS. His response was that the advice given to borrowers was standard – they were advised about repayment amounts, the Home Owner’s Policy, MPP and other related matters; that regarding the Free Cover Limit there was no need to explain anything because the cover was automatic. The witness stated that it did not matter whether one property or more were used as security, that MPP was done only once, the purpose being to cover the excess amount.

[39] Upon re-examination by Mr. Motsa, the witness stated that SBS dealt exclusively with Nqaba Dlamini because of the resolution that authorized him to act on behalf of the Trust.

[40] PW2 was one Zola Linda Tsabedze. At the material time she was employed as an insurance officer by SBS. Her role was

to ensure that property financed by the Society has adequate insurance cover for the eventuality of damage or loss. The insurance was to be in place before the money was released to the borrower. She testified that the insurer was Swaziland Royal Insurance Corporation (the principal) and the Society was the beneficiary. It was the duty of SBS to explain about the insurance to the borrower **“in simpler language and to advise the customer that the insurance premiums would be debited on their loan account. This was done by letter.”**

[41] She further testified that there were two types of insurance available – short term and long term. The short-term insurance is Home Owner’s Insurance, which has no relevance to the present matter. The second one is the Mortgage Protection Policy (MPP), which is at the core of this litigation. This policy, she said, was applicable only to natural persons. In respect of trusts, the main trustee was allowed to take out MPP **“but it was not compulsory.”** There were no forms to sign – once the loan transaction was complete the client would be included in a schedule that was sent to ERIC and cover was then provided. At the beginning of each month ERIC would produce a list of all clients with mortgage protection plan. If the loan amount exceeded the limit e.g. E1, 500,000.00, this would be brought to the attention of the client.

[42] In respect of amounts in excess of the free cover limit the client was informed telephonically to come and pick up the forms for medical examination to be done **“at our nominated doctor who would report direct to ERIC.”** In respect of the first loan the witness made reference to page 21 of Book **“A”**, which is the loan offer by the Society. The loan offer is dated 1st April 2014 and the acceptance is dated 31st March 2014, which is one day earlier. Regarding the anomaly of the acceptance date preceding the offer, the witness said that this is **“beyond my comprehension.”** This is but one instance in which the Society’s paperwork betrays indifference. I highlighted other instances in the loan application forms, above.

[43] The witness made reference to pages 55.1 to 55.9 of Book **“B”** which is the Home Owner’s Insurance Policy in the name of the Trust. She further testified that in respect of the MPP she personally informed Mr. Nqaba Dlamini of the need to undergo medical examination since the loan amount was in excess of E2,000,000.00. She explained to him the nature of the examination and the benefits of same and his response was that he was not keen on it. He said that he did not like medical tests. He did not come to collect the medical forms. The loan disbursement was made anyway, because

the MPP was at that time applicable to natural persons only and not to corporate entities. In respect of trusts, the main trustee was allowed to take the policy **“but it was not compulsory.”** Artificial entities were allowed to cede life policies of members to the Society.

[44] On the first loan (2014) the monthly premiums for insurance was E1, 700.00, which was based on the assumption that the medical examination would be done. On the 1st September 2014 the monthly premium was reduced to E1, 020.00 in line with the lesser limit which, at that time, was E1, 500,000.00.

[45] In respect of the amount of E2, 745,720.00 which was claimed by the Society from ERIC following the death of Nqaba Dlamini, the witness testified that this balance excluded the additional loan that was made in 2015. She continued: -

“We didn’t include the balance of the sub-account because that was an addition to this loan which we were discussing with Mr. Dlamini at the initial stage of the loan transaction¹⁸.”

[46] Explaining why the figure that was entered in the claim form was in excess of the revised free cover of E2,000,000.00, the

¹⁸ Transcript, p157.

witness said that the claim form had space for **“balance owing as at date of death. It doesn’t talk about the free cover limit. So we put the balance that was on the main account.”**¹⁹ She further stated that no claim was filed in respect of the sub-account. According to her understanding the undertaking by ERIC to settle the current claims in full, per letter dated May 29th, 2017,²⁰ was in reference to E2, 000,000.00 in respect of account No. 136332 and E1.229, 060.94 in respect of account No. 136381. Both claims were indeed paid, on the same date – the 28th June 2017.

[47] The witness was also cross examined at length, especially by attorney Mr. B. Magagula who has since been appointed a Justice of this court. She stated that she has an advanced insurance qualification from the Insurance Institute of South Africa, of which she is a member.

[48] She reiterated that in respect of MPP there was no document that was signed between SBS and the Trust, the reason being that the beneficiary of the policy was the Society, not the client, in the event of death of the assured. The beneficiary, she said, was the Society **“on behalf of the**

¹⁹ Transcript, p158.

²⁰ Book “B”, p123-4.

client”.²¹ According to her, the MPP became compulsory in 2017 or thereabout. Below I capture a few questions and answers that transpired.

Q: Deceased’s family would think that the insured has protection, on the basis of the verbal arrangement?

A: Yes.

Q: The only record the family would have would be the debits of the premium?

A: No. There are letters and statements in respect of the repayments, which have the information.

Q: In being an agent for SRIC and being a beneficiary the Society was conflicted?

A: I don’t think so. If that was the case the regulator would have raised it.

[49] The witness’ duty was to debit the client’s account and remit the premiums to SRIC, irrespective of whether there was money in the account or not. It was the responsibility of a different department to monitor the accounts. Her attention was drawn to page 2 of Book “**B**”, which is a copy of the Trust’s first loan application. At part V thereof the applicant

²¹ Transcript, p184.

entered **“Old Mutual”** and no further information, e.g. policy number, amount, maturity date, etc.

Q: Wasn't it prudent for SBS to probe further into this?

A: It was prudent, but because there was the option of MPP that was not necessary because there was already cover, **“and remember my Lord this was not part of the loan condition in any case.”**²² She further stated that although the second loan was different from the first, it did not entitle the client to second free cover **“in that the property bonded was the same.”**²³

COURT: In other words the loans were not merged into one, they remained separate?

A: Yes my Lord. Same loan account but with separate interest rates.

[50] The witness proceeded to state that upon the death of the assured what was due to the Society was the outstanding balance from a combination of E2,550,000.00 and E2,000,000.00 plus interest and charges. It was put to her that she should have claimed from SRIC **“the total amount**

²² Transcript, p205.

²³ Transcript, p209.

that was outstanding under the account” and she disagreed.²⁴

Q: When you act for the applicant your job was to claim everything that was outstanding and leave it to SRIC to adjudicate on the claim and make a decision?

A: I maintain that I claimed in respect of what client had paid premia for.

Q: SRIC took a compromise position and did not apply its rules strictly?

A: Yes, because they paid on an *ex gratia* basis.

Q: If you had included the entire amount owing, SRIC would have considered it favourably?

A: I don't agree.

[51] In respect of charging monthly premiums posthumously, she stated that this was an error, but it was corrected and a refund made to the account.

[52] It was put to her that the letter to the Trustees dated 20th January 2017 (demanding medical examination) which was

²⁴ Transcript, p217.

sent through ordinary mail, was not received by the deceased and she disagreed. She added that **“it was posted in Mbabane to an address in Mbabane. In three days or so it would have been received. Three days would have been too long. We had been communicating with the client in this manner since 2014.”** Making reference to an insurance proposal form at page 55.9 of Book **“B”**, which was in respect of the Home Owner’s Insurance, she testified that she is the one who signed it on behalf of Mr. Dlamini and that this is demonstration of how reluctant he was on such matters. Apparently for good measure, the witness posited that if the Trustees did not receive the letter, it would have been sent back to the Society’s box number notwithstanding that it was not registered.

[53] She corroborated PW1 that the amount entered on the claim form to SRIC²⁵ was the balance as at the date of death, not what was due to the Society. She was referred to Book **“C”**, at page 14, which is a letter to The Trustees dated 15th June 2015, specifically directed to **“Mr. Dlamini”**. This letter was requiring Mr. Dlamini to undergo medical examination to ensure MPP cover for the amount in excess of E1, 500,000.00. Of significance is that this letter was addressed to **“P.O. Box 1558 Mbabane”** whereas the Trust’s

²⁵ Book “B”, p94.

documented box number is **“390 Mbabane”**. Defence Counsel Mr. Magagula’s position was that this **“demonstrates the disorganized manner of communicating with its client.”**

[54] What follows is an overview of cross-examination of this witness (PW2) by Mr. Z. Hlophe for the 4th Defendant, SRIC. She stated that SRIC covers only one life under MPP, that in this case it was the life of Nqaba Dlamini. Asked why she submitted a claim for E1, 229,060.94 when she was aware that the maximum free cover was E2, 000,000.00, which was in respect of account number 136332, her answer was that the amount of E1, 229,060.94 was claimed in respect of a separate account, which we now know to be account No. 136381. I noted earlier on that this account has no relevance to the issues to be determined in this *lis*. She further stated that the amount of E1, 229.060.94 was paid *ex gratia*, without obligation, in recognition of the good working relationship between SRIC and the Society. According to her if the medical examination had been done SRIC would have settled the entire balance.

[55] The third and last witness for the plaintiff was Thulani Vilakati. He has been employed at the Society Since 1st December 2017, as manager for collections and recoveries.

Part of his work involves dealing with loans that are not performing well. He is involved in monthly meetings to discuss non-performing loans whose balances are in excess of E1, 000,000.00. The Bhubhudla Trust account came to his attention in December 2017, the same month he was employed.

[56] Much of this witness' evidence overlaps with, and repeats that, of the preceding two witnesses. My focus will therefore be largely on new matter that he contributed.

[57] He noted that in respect of the two loans there were defaults in monthly payments, that between 2015 and 2016 the arrears were in excess of E300, 000.00. He also became aware that one of the trustees had passed on and a claim had been lodged with the insurer in May 2017. He also became aware in dealing with the file that the deceased was mandated by resolution of the trustees dated December 2016 to do all that was necessary in furtherance of the Trust's business transactions with the Society. The resolution is at page 201 of Book "**B**". As it happens, it is dated 19th December 2013, not 2016 as stated by the witness. It is in this context that Mr. K. Motsa for the Society enquired whether there was another resolution dated 2016 and the

witness' response was that there was only one resolution. Clearly, the mention of 2016 was in error.

[58] By letter dated 18th November 2014 the Society required the Trust to make the first monthly repayment of E26, 796.00 whose breakdown was as follows: -

Mortgage repayment	E24, 188.00
Mortgage Protection Policy	E1, 807.00
House Owner's Insurance	<u>E801.00</u>
	<u>E26, 796.00</u>

The first repayment was due on or before 30th November 2014 but it was delayed and finally paid on the 11th December 2014, being an amount of E28, 866.00²⁶.

[59] The witness also made reference to bond registration costs, an amount of E26, 650.73, which is at page 125 of Book "**B**". Other items include insurance premiums, loan disbursement in tranches of E500, 000.00, etc. These were debited on the loan account which was 136332.

²⁶ Book "B", p126.

[60] In respect of the second loan of E2, 000,000.00 another bond was registered over the same property as the first one, and suretyships were executed by two trustees, including the deceased. By letter dated 24th November 2014 the Trustees were informed that the monthly repayments would increase to E53, 029.00. The witness corroborated the evidence of the previous witnesses that it was necessary to open a sub-account if applicable interest rates were different and needed to be captured accurately. The sub-account was harvesting payments from the main account. The witness further testified that the accounts then fell into arrears, and on the 17th November 2015 the Society wrote to the Trustees confirming that arrears as at that date were E133, 152.83.²⁷ The arrears were not paid, and on the 30th December 2015 a follow-up letter was written.²⁸ In November 2016 the arrears had swelled to E182, 530.87.²⁹ On the 10th November 2016 the Trustees settled an amended debit order which increased the monthly repayments to E61, 225.00,³⁰ in a quest to address the arrears.

[61] The Society continued to charge interest on the accounts even after the death of Nqaba Dlamini, and the witness' explanation for this is that the loan receiver was a trust,

²⁷ Book "B", p88.

²⁸ Book "B", p89.

²⁹ Book "B", p90.

³⁰ Book "B", p91.

“which continued to exist regardless of the death of one of the trustees.”

[62] According to the witness, the documented source of funding for the Trust was rental collected from the funded property developments, and in confirmation of this the trust furnished lease agreement from prospective tenants. After the death of Mr. Dlamini the trust stopped repayments, the last payment being on the 10th February 2017.

We now know that Mr. Dlamini died on the 17th February 2017, seven days after the last payment was made.

[63] The insurer paid out on the claim on the 28th June 2017 and on the 3rd July 2017 the Society wrote to the Trust advising it of the outstanding balance which, at that time, was E2, 912, 715.09, in respect of both accounts as consolidated. According to this letter the redemption figure was valid until the 31st July 2017, **“After which date interest... will accrue³¹”** at the respective rates. Thereafter the Society wrote to the Trustees requesting The Master’s reference in order to claim from Nqaba Dlamini’s estate, this based on the personal suretyship that he signed. On the 18th May 2018 the Society issued a final demand to the Trustees, for payment of arrears which at that stage were E200, 428.53 or

³¹ Letter at p142 of Book “B”.

the entire balance which, at that stage, was E3, 153, 158.36.³² In response to the demand the Society received a letter from attorney Mr. Sabela Dlamini. This letter heralded a major rift between the Society and its client, and in an e-mail dated 24th July 2018 Mr. Dlamini raised some issues on behalf of the Trustees regarding the amount demanded by the Society. Thereafter, summons were issued against the Trustees.

[64] In its summons the plaintiff claims payment of E3, 219, 441.85, together with ancillary relief. This balance is as at 30th June 2018, per the certificate of balance which is at page 44 of Book **“A”**. The witness stated that of that amount there was compound interest which was factored in from April 2014 to 2018, being E1, 763,093.50.

[65] The witness was also cross-examined extensively. He was referred to page 21 of Book **“A”**, which is the letter offering the first loan to the Trust. It was put to him that it does not state that for the defendants to qualify for Credit Life Cover (MPP) in excess of E1.5 million they had to undergo medical examination. His response was that the loan offer was to Bhubhudla Family Trust which is not a person but was represented by Mr. Dlamini. **“There is no such condition,**

³² Letter at p147 of Book **“B”**.

but I also do not expect it to be there, because the offeree is a trust.” To this Mr. Magagula for the defendants made the comment that I capture below: -

“This goes to the core of the matter because the way in which the entire matter was handled under that wrong assumption and that is why we are here...”³³

[66] Some specific questions and answers follow: -

Q: Why did you insure the life of one trustee them?

A: It was not a pre-requisite to have Credit Life Cover (MPP)

Q: A life was insured, and the expectation was that when the risk happened then the debt will be paid?

A: Yes.

Q: If that was important, why was it not traversed in the conditions under which the loan was issued?

A: I will repeat, my understanding is that the loan was given to the Trust.

Court: So in other words as far as you are concerned the Trust is alive and well?

³³ Transcript at p390.

A: Yes my Lord.

[67] He stated that the Society does not keep a policy document in respect of the Mortgage Protection Policy, it only keeps one in respect of the House Owner's Policy. In his review of the file he did not find and any notes by Lungile Ndwandwa, the consultant who was attending to Nqaba Dlamini. It was put to him that he does not know for a fact that everything was explained to Nqaba Dlamini regarding excess MPP cover and he agreed.

[68] Asked why only one of the trustees' lives was insured, the witness said that was a choice made by the trustees based on who was key to its business operations. He agreed that it is apparent from the financial statements that were presented by the Trust in seeking the loans, that its financial position was satisfactory. It was put to him that since the amount that was paid out to SRIC to the Society was based on compromise, if the Society had included in the claim all that was outstanding, the insurer would have paid. His response was that he is not sure, **“but they did not pay the whole E2, 754,720.00 that was entered in the claim form.”**

[69] The Society continued to run the loan account posthumously as if no one had died, the reason being that the loans were granted to a trust, not a natural person, the result of that being that instalments, interest and charges continued to be levied on the account. When taken to task on bank charges of E100.00 dated 13th April 2017 the witness explained that this was in respect of processing an unpaid item dated 13th April 2017. Asked to explain what admin fees are, he said that this pays for the different functions in the banking business, and that the charges are based on the loan agreements and bond documents.

[70] In cross-examination by Mr. Hlophe of SRIC the witness stated that the Trustees were aware of sub-account 1363332-02 and he referred to page 224 of Book “**B**”, which is a letter to the Trustees dated 25th May 2015, the last item thereof.

SUMMARY OF THE PLAINTIFF’S CASE

[71] The plaintiff lent and advanced amounts of money to the Trust, in two different loans, one in April 2014 for E2,550,000.00 and the other one in May 2015 for E2,000,000.00, the total capital advanced being E4,550,000.00. The interest rate applicable on the first loan was 9.25 per cent per annum

and on the second loan it was 9.5 per cent per annum. In respect of the first loan the monthly repayments were E26, 796.00, inclusive of insurance, bond costs and other incidental charges. The second loan took the monthly repayment up to E53, 029.00.

[72] Representing the Trust in arranging the finance in respect of both loans was one of the Trustees, being Nqaba Dlamini, who was duly authorized by resolution of the Trustees. Bonds were registered in respect of each loan and there was additional security in the form of suretyships by the said Nqaba Dlamini and one Busisiwe Ngcamphalala.

[73] In respect of both loans the Society did due diligens to determine the Credit-worthiness of the Trust and found it to be satisfactory, the source of income being rental to be collected from prospective tenants in the residential flats that were being constructed.

[74] There were two types of insurance available to safeguard the interests of the Society and the Trust. One type, which was a requirement for all loans for the acquisition and/or development of immovable property, was the Home Owner's Policy. This covers possible damage to the property through

natural causes like fire, floods, etc. This one is of no relevance to the present litigation. The second type of insurance policy is the Mortgage Protection Policy (MPP), which kicks in in the event of death of the borrower. How it works is that in the event of death of the borrower, who leaves behind an unpaid balance on the loan, and all conditions being met, the insurer settles the outstanding balance, so that there is no need to foreclose on the property. Ordinarily, the life assured would be the borrower. In this particular case a great deal of the debate is around the fact that the borrower is not a natural person, and has no life to be assured.

[75] At the inception of the two loans the MPP was not a requirement. It is on that basis that both loans were disbursed sans such policy. A borrower was allowed as an option to furnish a life policy which could be ceded in favour of the lender. In the present case this did not happen.

[76] An MPP automatically came into effect when the loan was put in place, and the premium thereon became part of the repayment process. In 2014 and 2015, when the two loans were made, the automatic cover, otherwise known as Free Cover Limit, was E1, 500,000.00. This means that when the life assured died, the insurer, in this case Swaziland Royal

Insurance Corporation, would be obliged to pay that amount to SBS.

[77] In 2015, or thereafter, the Free Cover Limit was increased to E2, 000.00.00. If the loan was in excess of the free cover limit, it was a requirement that the borrower undergoes medical examination at the instance of the Society but for use by the insurer in determining terms upon which to provide cover. It is axiomatic that a trust is not a natural person, hence it does not have a life that can be assured. Because the Society was dealing with Nqaba Dlamini on all business transactions with the Trust, the Society expected, and required of him, to undergo medical tests so that MPP would be put in place to cover the excess that was above E2, 000,000.00. According to the plaintiff Nqaba Dlamini was verbally informed of this requirement numerous times but he gave excuses and did not co-operate. Eventually, the Society made a written demand to the Trustees to ensure that the medical examination was undertaken. There is no doubt that this was expected to be acted upon by Nqaba Dlamini, but it is equally clear that there was nothing to stop any other trustee from doing it.

[78] Nqaba Dlamini died on the 17th February 2017. The last repayment by the Trust was made on the 10th February 2017

and no other payment was made. At the time of his death the loan accounts (136 332 and 136 332-02) were already in arrears and continued to attract interest posthumous Nqaba Dlamini, because the borrower, not being a natural person, was regarded by the Society as being in continuous existence.

[79] Subsequent to the death of Nqaba Dlamini the Society lodged a claim with SRIC which paid E2, 000,000.00 to the Society in respect of the two accounts stated above, that being the maximum free cover. In this action the Society now claims the balance outstanding, which comprises a portion of the principal debt, interest and charges, in total amounting to E3, 219,441.85.

THE DEFENDANTS' DEFENCE

[80] The three initial defendants were later joined by Eswatini Royal Insurance Corporation through the Rule 13 procedure. The 1st - 3rd defendants have one attorney and the 4th Defendant retained a different attorney.

[81] In their plea the 1st – 3rd defendants canvassed a multiplicity of issues in defence, and I itemize the substantive ones below:

81.1 The interest rates applied by the Society are wrong, and therefore the interest charged is incorrect.

81.2 The sum claimed is not in accordance with the agreement between the parties, nor with the Money Lending and Credit Financing Act No.3/1991 nor with The Financial Services Regulatory Act nor with Inspection Circular No.8 issued under The Central Bank Order.

81.3 The Society was to look to SRIC to settle the entire outstanding balance in terms of the MPP that was in place.

81.4 It is the Society's negligence that denied it the opportunity to be paid by SRIC the entire outstanding balance, hence it has no recourse against the said defendants.

[82] These defendants paraded only one witness, Ntfombifuthi Phindile Dlamini who is one of the trustees. She is the wife of the deceased, whom she described as the Founder of the trust. She testified that she is a teacher by profession, and that her role in the Trust was administrative work and that

she was involved in most of the business transaction of the Trust. In her own words: -

“We usually discussed matters pertaining to the Trust.”

[83] It is worth-noting, however, that contrary to her assertion, she turned out to be oblivious of a lot of important things that were going on in the business affairs of the Trust. In her evidence in chief she said that she did not know that medical tests were required for MPP in excess of E1.5 million, subsequently E2 million. Under cross-examination she said that there were no formal meetings of trustees **“because we lived together.”** A question that arises is this: What about the third trustee, Busisiwe Ngcamphalala? The court was not told that she also resided with the couple. Asked on what processes followed after the loan application form was submitted, she said that she does not know - **“He did not brief us.”** In respect of a resolution dated 1st April 2014³⁴ authorizing the late Nqaba Dlamini to settle all the conditions relating to deeds of suretyship she said that she does not recall this meeting, she **“was not present.”** This has an element of irony, given that she was the wife of the deceased and they lived together. Asked how much was the second loan, she said that she is not sure. She did not even

³⁴ Book “B”, p51.

estimate. The foregoing evidence left me with the clear impression that the deceased was running the business affairs of the trust single-handedly, and that this witness was in the position of a passenger on a long journey. A fortiori, this applies to the 3rd defendant who was hardly mentioned in the evidence of the defendants.

[84] In her evidence in chief she testified that the deceased reported to the other trustees that his life was insured for purposes of securing payment of the loan, but he never showed them any document; that the deceased did not mention the need for medical examination; that she never received any call from the Society. She made reference to a letter dated 15th June 2015 addressed to the Trustees³⁵ and captioned **“Dear Mr. Dlamini.”** This letter was addressed to Box 1558, Mbabane. The important of this letter is that it stated, among other things, the importance requirement of medical tests for purposes of MPP. At this stage the second loan was in the process of being finalized. In her testimony she observed that the correct address of the Trust was Box 390, not 1558, clearly making the point that the letter could not possibly be received by the Trustees, and therefore this condition was not conveyed to the Trustees. She does not believe that the deceased was reluctant to do medical tests because he did it in respect of an Old Mutual Policy which did

³⁵ Book “C”, p14.

pay out upon his death. Because of the foregoing, she expected SRIC to settle the entire outstanding balance on the loans.

[85] I have already mentioned some testimony that came up in cross-examination by Mr. Motsa on behalf of SBS. Below I highlight more that came up during the long and probing examination. It was put to her that insurance premium in respect of the first loan was finally settled at E1,020.00 per month and maintained this rate even after the second loan was added, and she agreed. It was also put to her that in view of the consistency of the insurance premium, correspondence to the Trustees as well as information in bank statements, the Trustees cannot apportion negligence to the Society. To this her response was **“No comment.”** She also had no comment when it was put to her that the Society cannot be blamed for the fact that medical tests were not conducted. In reference to many letters that transpired between the Trustees and the Society, with special reference to pages 142-149 of Book “B”, she said that the letters were received by the Trustees.

Q: Isn't it strange that the one dated 20th January 2017 (requiring medical tests) was not received by the Trustees?

To this question there was no answer.

Q: It is convenient for the Trustees to now deny the letter?

A: No comment.

[86] It was put to her that in making the loan applications the Trustees presented to the Society a variety of information including financial statements, lease agreements by prospective tenants, etc, and that the Trust was largely able to make repayments. She agreed that this was the case. She also admitted that interest was linked to the prime lending rate and that customers were routinely informed of changes in the lending rate.

[87] She was also cross-examined in respect of Claim **“C”** of the counterclaim, which is on **“Unlawful Charges On The Mortgage Account.”** After several poignant questions were put to her on the legitimacy of the charges, including reference to the terms of the mortgage bond, the fact of defaults in timeous payment, various forms of communication with the Trustees, the witness said in response **“I now understand the charges.”**

Q: So there is no basis for the claim?

A: I now understand that.

[88] Mr. Hlophe for SRIC asked two relevant questions;

Q: Were you aware of the Trust's requirements for MPP?

A: No

Q: If some requirements were not met then SRIC was entitled not to pay?

A: Yes

[89] Upon re-examination by her attorney Mr. Magagula, the witness said that SBS makes profit through bank charges.

[90] In completing the evidence for the defence I finally make reference to the evidence of Queen Sibanyoni who testified on behalf of SRIC, the 4th defendant. Much of SRIC's case was effectively canvassed by the Society's witnesses who needed to demonstrate that the buck ends with the Trust, that the Society was entitled to claim from no other. Unavoidably, Sibanyoni's evidence was brief. She is the Life Manager at SRIC. I understood that to mean that she is in charge of the department of Life Insurance at SRIC. She has worked for the institution since 1990. She testified that in respect of the contractual relationship between SBS and SRIC, the latter is informed by the former who the assured is in any particular

loan transaction, that SBS provides the name of the person who represents the Trust for purposes of the contract. She stated that SRIC had no obligation to pay anything beyond the Free Cover Limit **“because the proper underwriting had not taken place.”** In this relationship the policy holder is SBS, and that it never happens that the beneficiary would be the life assured. Further, that the policy document is always issued to SBS, not to the life assured. She also stated that no medical report was received in respect of the deceased.

[91] The above captures the evidence that is, in my view relevant for the determination of the case.

DETERMINATION OF THE PLAINTIFF’S CLAIM

[92] The full extent of the plaintiff’s claim is against the 1st, and 3rd Defendants. It is the difference between the total debt in respect of the account and sub-account on the one hand, and the E2, 000,000.00 that was paid out by SRIC on the basis of MPP. According to the Plaintiff the amount is E3, 219,441.85 plus interest.

[93] Other than the defendants' half-hearted arguments about improper interest and unlawful bank charges, there is no evidence to gainsay the plaintiff's case that it is owed money. As appears from the analysis of evidence above, the three defendant's position is that whatever it is that is due to the plaintiff, it ought to be paid by ERIC.

[94] As part of this determination, I make findings as appear below:

94.1 I take judicial notice of that fact that financial institutions, in their day-to-day operations, routinely communicate with their clients in writing or verbally or telephonically.

94.2 Nqaba Dlamini was the link between the Trust and SBS. The other trustees were very much like **“sleeping partners.”**

94.3 Nqaba was repeatedly informed orally, at least once in writing, to undergo medical tests.

94.4 He was reluctant to do so and did not do so.

94.5 Hence there was no MPP cover for the amount in excess of the free cover limit of E2, 000,000.00

94.6 SRIC paid out in accordance with its legal obligations in terms of the MPP, and more.

94.7 SRIC is not liable to pay anything more to either the Trust or SBS.

[95] In respect of the defendants' defences I make the following findings: -

95.1 Improper interest rate: the interest rates applied were agreed upon by the parties as provided in the loan agreements. It is settled that interest is tied to the prime lending rate which changes from time to time. The defendants have not shown that there was any error on the application of the interest rates.

95.2 Unlawful bank charges: under cross-examination DW1 accepted that the bank's charges were legal. As a matter of fact they are provided for in the bond and suretyship documents.

95.3 SBS claimed from SRIC, and was paid by SRIC, what was legally due, and more, hence there was no negligence on the part of SBS in claiming what it did and what was eventually paid by ERIC.

95.4 The reference by the defendants to various legal instruments in the finance sector i.e. The Money Lending And Credit Financing Act, etc, were not substantiated by evidence. DW1 said absolutely nothing on those pieces of legislation, perhaps

understandably so, because she does not have a working knowledge of the legislation. It is trite that if the defendant alleges a defence, the onus is upon it to establish the defence on a balance of probabilities.

[96] On the basis of the above I find that the plaintiff has succeeded in establishing its claim against the trust. In their submissions the 1st, 2nd and 3rd defendants raise the question whether or not the 3rd defendant is bound by the suretyship agreement that she executed in favour of SBS. In the absence of factual basis for raising such a question, it is in my view nothing more than rhetoric. She did not participate in the trial, hence there is no evidence by her to show why she should not be bound by what she signed for. I accordingly hold that a case against the 3rd defendant is also proved on a balance of probabilities.

THE COUNTER-CLAIM

[97] In an approach that is reminiscent of the Stalingrad Defence, the 1st to 3rd defendants filed a counterclaim. There is overlap between the counterclaim and what was pleaded in the claim in convention, but for the sake of completeness I

will deal with the essence of the entire pleading, one aspect after the other.

[98] It is alleged that the Trust was indemnified by SRIC in respect of the entire indebtedness, on the basis of the MPP contract,

ALTERNATIVELY

The Society having been negligent in one way or the other, it is liable to the Trust in damages equivalent to the amount being claimed in convention.

ALTERNATIVELY

The Society committed an act of recklessness in lending money to the Trust, and therefore should have no recourse.

98.1 The indemnity would apply only if there was full compliance with the requirements for the MPP cover in excess of E2, 000,000.00. I have already found in the main claim that it is Nqaba Dlamini who let down the Trust by refusing to undergo medical tests, hence the indemnity cannot apply.

98.2 Similarly, I have found in the claim in convention that there was no negligence on the part of the Society, hence a claim for damages is not sustainable. The onus

to prove negligence is upon the defendants. To successfully do so they needed to demonstrate that the manner in which the society dealt with the business affairs of the Trust fell below the standard required of bankers; that the Society failed to exercise the degree of care and skill required of members of the banking profession. (see: POWELL AND ANOTHER v ABSA BANK LIMITED, 1974 (4) SA 231). The defendants did not at all lead any evidence in this regard and clearly their case based on negligence must fail. Similarly, the allegation of recklessness against the Society is not substantiated by evidence. The Society did, on the other hand, show that due diligens was undertaken to determine the creditworthiness of the Trust and the result was satisfactory, and that as a matter of fact payments were being made regularly while Nqaba Dlamini was alive.

[99] It is also alleged that the society unlawfully charged interest on the loan accounts in excess of the rates agreed upon, this resulting in loss to the Trust amounting to E1,600,000.00, and that the Society is liable to the Trust in that amount.

99.1 In her evidence in chief the only witness for the Trust, Ntombifuthi Dlamini, made no attempt to traverse this aspect of the matter. In cross examination it was put to

her that the agreed interest rates were linked to the prime lending rate and she agreed. She also admitted that interest in respect of the second loan was at prime plus 2 per cent. She also admitted that as the Central Bank revised the prime lending rate the interest rate payable by the Trust did change, and that the Trust was indeed consistently advised of these charges. This was in specific reference to a letter to the Trustees dated 25th May 2016 which was headed: **“CHANGE TO INTEREST RATE,”** in respect of account NO. 136332.

99.2 Clearly, it is SBS that went beyond the call of duty and proved that the interest charged was in accordance with the loan agreements.

99.3 In the circumstances the Trust’s submission is unsustainable.

[100] Unlawful charges on the mortgage account: this is in reference to admin fees, service charges, arrears penalty, arrear reminders and recovery telephone calls.

I mentioned earlier that during cross-examination by Mr. Motsa the Trust’s witness admitted that these charges were legitimate, that she now **“understands”** what they are for.

[101] In the totality of the evidence, the counterclaim has not been established on a balance of probabilities and stands to be dismissed.

[102] The quantum of the plaintiff's claim is certified by DW3 through a certificate of balance dated 25th July 2018.³⁶ Such a certificate is a familiar document within the banking sector. In this particular case it is provided for in Clause 7.5 of the mortgage bond document.³⁷ The effect of this clause is that the outstanding balance, as certified **“by any Manager for the time being of the Society,”** is *prima facie* proof of the client's indebtedness. It places the onus upon the debtor to prove that such amount is not in fact owing to the Society. This, however, does not relieve the plaintiff of the burden to prove its claim in the normal way and the plaintiff in this case has done so.

[103] Over and above the principal amount, as consolidated, the plaintiff claims interest **“at the rate of 11 per cent and 12.25 per cent respectively per annum from 1st July 2018 to date of final payment.”** Earlier on in this judgment I alluded to the insuperable difficulty I have with this prayer. I do not see how two different interest rates can

³⁶ Book “A”, p44.

³⁷ Book “B”, p28.

be factored simultaneously in one amount. Of course it would have been easy if the two accounts had not been consolidated into one, because each interest rate would apply to the corresponding debt.

[104] In the circumstances I will grant interest in the lower rate of 11 per cent per annum. This, in my view, is basic fairness and could well be supported by the *contra proferentem* rule. In contractual relationships it is often the case that the contracting parties are not on an equal footing in terms of bargaining power. The loan seeker is always likely to be in a weaker bargaining position. The *contra proferentem* rule protects the weaker party against the proferens.

[105] The plaintiff also prays for legal costs at attorney-client scale and collection commission. These are specifically provided for in the bond document, and therefore arise *ex contractu*. It is my understanding, however, that in this jurisdiction the practice is not in support of granting costs and collection commission together. If I am not correct in this I still feel that punitive costs are enough to indemnify the plaintiff for all reasonable out-of-pocket expenses in pursuit of the debtor. These are provided for in the parties' agreements.

[106] On the conspectus of the foregoing I make the orders that follow below:-

106.1 The counterclaim of the 1st, 2nd and 3rd defendants is hereby dismissed in its entirety.

106.2 The 1st and 3rd defendants are ordered, jointly and severally, the one paying the other one to be absolved, to pay the plaintiff: -

- i) An amount of E3, 219, 441.85;
- ii) Interest thereon at the rate of 11 per cent per annum calculated from date of issue of summons (27/08/2018) to date of final payment.
- iii) Costs of suit at attorney-client scale in favour of the plaintiff;
- iv) Costs of suit at the ordinary scale in favour of Eswatini Royal Insurance Corporation.

106.3 Portion 42 (a portion of Portion 18 of Farm No. 706 situate in Hhohho District, Swaziland, measuring 2030 square metres, held by the Mortgagor under Deeds of Transfer No. 772/2013 dated the 17th day of October 2013, is hereby declared executable.

MLANGENI J.

For The Plaintiff: Mr. K.J. Motsa

For 1st, 2nd and 3rd Defendants: Mr. B. Magagula

For 4th Defendant: Mr. Z. Hlophe