CIV/T/163/82

IN THE HIGH COURT OF LESOTHO

In the matter of :

LESOTHO BUILDING FINANCE CORPORATION — Plaintiff

v

MICHAEL MESHACK MTHEMBU — Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on 3rd August, 1982

This is an application for summary judgment made by the plaintiff the Lesotho Building Finance Corporation in terms of Rule 28(2) of the High Court Rules against defendant M. Mthembu for the payment of the sum of M20,000 with interest and costs which sum plaintiff allegedly advanced by way of loan to the defendant at the latter's special instance and request during or about March to September 1980, which amount, despite demand, defendant has failed to pay.

A short history of the pleadings ought to be given.

The summons was filed in the High Court on 21st April 1982 by plaintiff's attorney Mr. Koornhof and served upon the defendant on the 26th April 1982 who personally endorsed it "I am defending the action". On the 8th June 1982 Mr. Koornhof set down the case for hearing to obtain a default Judgment. The matter came before my brother Mofokeng J on 14th June 1982 (a motion day) who entered judgment "as prayed in the summons". Mr. Koornhof tells me from the bar that there was nothing on file to show that the defendant entered an appearance to defend and I have since

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ascertained that there was nothing in the Judge's file on that day to indicate an appearance had been entered.

The defendant (in person) moved the Court on the 28th June 1982 to rescind the default judgment averring in an affidavit that he attempted to serve the notice to enter appearance through a female person working for him called Mamohau Masoka at the office of plaintiff's attorney on 4th May 1982. Mr. Koornhof, allegedly through a clerk, refused to accept it. The clerk endorsed the envelope "refer to Mr. Steyn". When this occurred defendant filed the notice with the Registrar on the following day 5th May. Miss Masoka filed an affidavit in support. The defendant averred further that for some reason or the other this notice was misfiled or misplaced and did not come or was not brought to the attention of the Judge on the 14th June or subsequently. In that application (which was before me) the defendant was represented by Mr. attorney Kolisang. Mr. Koornhof did not oppose the application and the default judgment was accordingly rescinded by consent with no order as to costs.

On the 30th June 1982 the defendant (in person) requested further particulars. On the 10th July 1982 plaintiff's attorney made this application for summary judgment. The managing director of the plaintiff had appended an affidavit in which he averred that the defendant is "indebted" to it in the sum of M20,000, the cause of action being "as set out in the summons" the gist of which appears in the first paragraph of this Judgment. The defendant (in person) opposed the granting of summary judgment and filed an affidavit denying that he was "indebted" to the plaintiff in the sum of M20,000 or any other amount whatsoever, and further averred that since he denies being indebted he has a bona fide defence to the action.

The matter was argued on the 19th July 1982 and on this occasion Mr. Maqutu represented the defendant. Mr. Koornhof argued first on the merits and then it was Mr.Maqutu's turn but his first objection was that the application for summary judgment should have been made within 14 days of the 4th May 1982 when plaintiff attorney refused to accept service. Mr. Maqutu adds that the reasons for this refusal

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remain unexplained and attorney had not applied for condonation. Mr. Koornhof contended in reply that he has not been called upon to explain, that his good faith is evident from the fact that he did not oppose rescission of the default judgment because there was a possibility of a mistake by his clerk, that he himself had been in lengthy correspondence on this issue with the defendant's regular attorney Mr. Steyn, that he does not recollect deliberately refusing or instructing his clerk to refuse service, that he would not have asked for a default judgment had he known the defendant intended to defend, that he did not see an entry of appearance notice in the Court file, and finally that it did not lie in Mr. Maqutu's mouth to speak about the Rules when he did not file a power of attorney in compliance with Rule 15 of the High Court Rules, which Mr. Maqutu admitted, nor had Mr. Kolisang who appeared before me on the 28th June which the Registrar confirmed. I shall, in due course, consider whether the Court ought to call upon attorneys to show cause why some of the costs should not be borne personally by them in terms of the new Rule 61 of the High Court Rules. Mr. Koornhof's explanation however does not seem unreasonable (see McLandy v. Slateum 24 Q B D 504 quoted in Odgers, infra). Furthermore Rule 19(1) of the High Court Rules provides that entry should be filed at the office of the Registrar within the time specified in the summons and defendant was already one day too late thus necessitating an application for condonation or extension of time. In my opinion equity demands that the 14 days should start to run from the date of rescission, and I shall now proceed to deal with merits of the arguments addressed to me.

Mr. Koornhof submitted that the claim was for a liquidated amount of money, that the cause of action was to recover a loan that has been advanced to the defendant(the amount thereof and approximate dates given) which loan has not been paid despite demand. This was supported by the affidavit of the managing director of the plaintiff that the defendant had no bona fide defence to the action and his entry of appearance was merely for the purpose of delay. He cited the judgments of the High Court in Barlows OFS Ltd v. Makhoza (CIV/T/122/81) dated 14th September 1981(unreported) since confirmed on appeal in C. of A (CIV) No. 4 of 1982

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dated 23rd April 1982 - unreported. Mr. Maqutu submitted that the cause of action as advanced in the summons was a mere "label", that the Court had been denied vital information and that the issues have not been ventilated. In the circumstances a denial of indebtedness can constitute a bona fide defence justifying the Court in dismissing the application in toto or at least granting the defendant leave to defend. He admitted that these arguments were unsuccessfully raised before the Court of Appeal in Barlow's case supra, but he adds, if I understand his argument correctly, that this case is distinguishable since the defendant's denial of indebtedness is of a specie that, standing on its own, is capable of affording a bona fide defence and he "need not give the plaintiff a preview" of what it is going to be. He cited the following authorities : P.I. (Pty) v Moolnam Bros 1982 1 SA 249 at 251 F-G; Edwards v Menezes 1973 1 SA 299 at 304; Maharaj v Barclays N. Bank 1976 1 SA 418 at 426; Jones and Buckle 7th Ed Vol.II p.116, Verrijdt v Honeydew Tractors and Imp (Pty)Ltd 1981 1 SA 787 at 789; D & D Ind. Ltd v Van der Werf and Others 1981 4 SA 417 at 419 C-E and 426 D-H.

Mr. Mthembu does not of course traverse the allegation that a loan was advanced. What he does is to traverse that he is "indebted" and I asked Mr. Maqutu whether what he was saying tantamounts to this: that whilst the plaintiff may have advanced the loan as alleged in the summons that the loan is not repayable as a matter of law and whether if this was his real defence the rule requires that he should disclose it to save time. Mr. Maqutu demurred and refused to be drawn contending that paragraphs 2 and 3 are clear.

I would have ordinarily granted the plaintiff summary judgment as prayed because a party is entitled to claim in this form for money lent with interest (see Precedent No.392 p. 676 Bullen and Leake and Jacobs, Precedents of Pleadings 12th Ed) and the defendant has failed to comply with the requirements of the Rule. The traverse is vague and the defence must be stated with sufficient particularity to appear genuine: "You don't get leave to defend by putting forward a case that is all surmise and Micawberism" (per Megarry VC in the Lady Ann Tennant v. Association Newspaper

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Group (1979) F S R 298 or a general statement that "I do not owe the money or a vague suggestion of fraud or other misconduct on the part of plaintiff" (examples given in Odgers, Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 22nd Ed pp 75 and 76).

However, it is the Court, in the final analysis, that has got to be satisfied beyond reasonable doubt that the plaintiff is entitled to summary judgment and not what the genius of lawyers may contrive by way of pleadings. The authorities are collected in Edwards v Menezes, supra, at p 304 D-E and I need not repeat them. I must confess that I was somewhat taken aback when a building society frames its cause of action in this manner and does not proceed on its security, for usually this is the basis upon which it lends money. However, a mortgagee is entitled to bring an action on the loan - See Snell's Principles of Equity 27th Ed. p. 396. Unfortunately for the plaintiff it is a statutory corporation and its objects powers and duties are published in the gazette as an Act of Parliament and thus forms part of the law of the land which the judges (s.61 of the Interpretation Act 1977) must take judicial notice of, unlike the memorandum and articles of a limited company that, though accessible to the public on payment of a small search fee at the office of the Registrar of companies, is not a matter of judicial notice. It is true that the plaintiff describes itself as "financiers" but they are financiers of a particular kind. Looking at the provisions of the Lesotho Building Finance Corporation Act 1976 and the provisions of the Building Finance Institutions Act 1976 to which the plaintiff Corporation is subject (Vol XXI Laws of Lesotho p. 24 et seq and 124 et seq) it seems to me that I ought not to grant summary judgment. The parties themselves may well be engaging in shadow boxing, but court officers should be more forthcoming. I can see a number of issues of

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fact and law to be resolved viz :-

1. Did the plaintiff advance a loan to defendant or did it not?
2. If the answer to 1 is in the affirmative, did the plaintiff have, or obtain from the defendant, security, of the type envisaged by Act 7 of 1976?
3. If the plaintiff did not have, or had not obtained from defendant, security, was the transaction otherwise intra vires plaintiff's objects and powers?
4. If not, i.e. if the transaction was ultra vires can the plaintiff nevertheless recover from the defendant the amount loaned or advanced?

On this last issue, if it comes to that, the authorities are by no means unanimous.

I think the plaintiff is entitled to an expeditious resolution if these eventually turn up to be the issues. In exercise of my discretion under Rule 28(8) I shall not require the defendant to give security but I make the following orders :

1. The defendant is given leave to defend.
2. The summons, plaintiff's managing director's affidavit on the application, and the opposing affidavit, shall constitute the pleadings in the action which pleadings are declared to be closed, save that the defendant will not be restricted in his defences (Odgers, supra, p. 79 and Langton v. Roberts (1894) 10 TLR 492).
3. The plaintiff is granted leave to apply forthwith to the Registrar for a date of set down during this session of the High Court unless it decides to opt for full pleadings in which event it may move the Court for variation of this order.
4. The costs of the summary judgment proceedings to stand over for determination at the trial. (See Estate Potgieter v Elliot 1948 1 SA 1084).
5. The Registrar will ensure that if defendant wishes to be represented his attorney must file a power of attorney before the hearing otherwise he will have to conduct his case in person.

CHIEF JUSTICE
3rd August 1982