CIV/T/360/83

IN THE HIGH COURT OF LESOTHO

In the matter of .

LESOTHO TOURIST CORPORATION (PTY LTD Plaintiff

v

TANKISO MOLEKO Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 21st day of November, 1983

Lesotho Tourist Corporation (Pty) Ltd., issued a summons in this Court against one Tankiso Moleko wherein the former (referred to herein as (Applicant) claims against the latter (referred to herein as (Respondent)

"1. Payment of the sum of M2,327.98 being an amount lent and advanced by the plaintiff to the defendant.

2. Interest at 17½% per annum a tempore morae from 1st September 1981 to date of issue of summons.

3. Interest at 10% per annum from date of issue of summons to date of payment.

4. 10% collection charges on M2,327.98.

5. Alternative relief.

6. Costs of suit.

In its Declaration the plaintiff claimed in paragraph 3 that 'on or about the 10th August 1981, plaintiff lent and advanced to defendant at the latter's special instant and request the sum of M2,327.98". It was further alleged (paragraph 4) that

/defendant

defendant undertook to repay the said loan in six equal monthly instalments of M388.00 per month." There are other conditions mentioned which are not important in view of the conclusion the Court has arrived at. However it is important to note that it was resolved by the plaintiff that one Mr. Pulumo Kakhetha would sign all the necessary papers.

The action is defended. A notice of an intention to defend was filed of record and attached to it was a document styled Request for Further Particulars. The latter remain unanswered up till now.

The plaintiff has now filed a document styled "Notice of Application for summary judgment."

In his submission in this Court in reply to Respondent's paragraph 6(a) of the opposing affidavit which had alleged that applicant had, in fact, never lent and advanced the amount claimed in the summons or any portion thereof, Mr. Mlonzi conceded that in fact there never was an actual loan. The whole transaction was a face-saving devise in honour of the Respondent. This seems to be counsel's reply to Respondent's paragraph 1 to Request for Further Particulars. However, he submits further that there was no undue advantage taken of the Respondent. The Court was referred to R.H. Christie's. The LAW OF CONTRACT IN S.A. (1981 Ed.) at p. 305. The principle which one gathers from the authorities collected therein is that it is neither duress nor compounding to induce a person of no more than is one's due by agreeing to withhold a justified prosecution (306). Paragraph 6 of the opposing affidavit alleged that the amount claimed was the amount which was deficient in the books of the Respondent.

/Mr. Mlonzi

Mr. Mlonzi submitted further that the letter, Annexure "A", which constitutes an acknowledgement of debt, was not signed in fear as the Respondent had alleged in his opposing affidavit. He referred specifically to Annexure E. But this annexure is appended to applicant's own affidavit and it is one of the many letters which Respondent wrote to the applicant explaining why he has not paid as promised. In this particular one he goes further to say that now that he has managed to open a small business and runs a taxi business as well, he would be able to pay

Mr. Mlonzi says that the time leg between the letters which are alleged to be threatening is too great to have had any immediate bearing on the matter. It was asking too much of the Court if it were asked to infer duress from these letters. The court was referred to the case of Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd., 1975(1) S.A. 265(W) where the test was laid down in deciding whether a contract which had been entered under duress or whether if it amounts to a compounding was contra bonos mores viz. did the creditor thereby extract or extract something to which he was not otherwise entitled. (See also Ilanga Wholesalers v Ebrahim, 1974 (2) S.A. 292 (D); R.H. Christie's Law of Contract (supra) p. 306).

He submitted that Annexure "A" was a liquid document in that the amount mentioned therein is a definite amount which Respondent owed the applicant.

In answer to paragraph 6(c) & (d) of the Respondent's Opposing affidavit that there had been no cause or reason for the obligation in as much as the acknowledgement did not indicate why Respondent had to be advanced in the sum

/mentioned

mentioned since the applicant is not a borrowing and /or lending house or institution and also that there had been no renounciation of the legal exceptions available to the Respondent, Mr. Mlonzi submitted by citing the case of W.M. Mentz & Seuns (EDMS) BPK v Katzake, 1969 (3) S.A. 306. However, in that case it was held (after finding many differences between the original papers and those served on the Respondent) that as the document was not a liquid document there was no need to annex it to the notice. That problem, with respect, hardly arises in the present case.

Finally Mr. Mlonzi stated that Respondent's opposing affidavit shows what appears to be an appearance of a bona fide defence. The Respondent knew all along that the transaction which is the basis of the present action, was not a loan, but a face-saving device.

Mr. Pheko in reply submitted that it was no answer to the opposing affidavit to say that the money mentioned in the Summons or Declaration concerned was not advanced or handed over to him when that is exactly what the allegation in those two documents alleged. The Court was confined to the papers before it.

He submitted that all the authorities referred to by Mr. Mlonzi were irrelevant. There is no allegation whatsoever in the Summons or Declaration concerning stolen money or embezzlement of funds Such allegations do not appear in the Applicant's founding affidavit before Court. It is the application before Court which the Court has to look at.

He submitted that it could not be said that the deponent to Applicant's founding affidavit had grounds

/of

of appreciating what she had said on the face of that document, for an example see paragraph 3 of her founding affidavit. What she did was to repeat what had been alleged in the Summons and the Declaration. Since the deponent was not the Applicant itself nor its authorised agent the circumstances had to be set out from which the Court would be justified in coming to the conclusion that the facts averred were within their knowledge. This has not been done. (C/P Nathan, Barnett & Brink : Uniform Rules of Court, 1965 Edition p. 154). Further, it was submitted, the amount was a shortage which occured in Respondent's department. He is therefore, entitled to say that he signed Annexure "A" by mistake. He might not have personally stolen the money.

It was further submitted that the Respondent, and this was denied by the Applicant's Counsel, could avail himself of one or more of the exceptions he had not renounced such "non numerate pecuniae," (In Standard Bank v Perl, 1904 T.S. 769 it was held that a bond has to be read as a whole and provisional sentence was refused notwithstanding the renounciation of the exception of non numerate pecuniae where it was clear on the construction of the bond as a whole that the amount claimed was not due and never had been due) or Exceptio non causa debiti. Causa is essential for the validity of a contract (Conradie v Russouw, 1919 A.D. 279).

It was submitted that the money alleged to be due and payable was in fact not so due and payable. The Request for Further Particulars were not replied to simply because the Applicant was unable to do so without revealing the truth about the purported nature of the said acknowledgement.

/of debt.

of debt.

He finally submitted that on the documents before Court, as they stood, there was no indication that Annexure 'A" was a face-saving device.

The Applicant has already conceded that the basis of the whole action is not based on the premise it had alleged in its Declaration. That, in itself, is an admission that the Respondent has a bona fide defence because a series of questions may now arise as to why the Applicant decided to call an action by a legal phrase which is used in entirely difierent circumstances. The applicant, moreover, has not complied with the provisions of Rule 28 (2) (a) which require the deponent to the affidavit to state that "in his opinion" the defendant /Respondent has no bona fide defence to the action. The failure to make that averrement alone warrants the application to be dismissed It is not sufficient for the deponent to say that he "verily believed" (Group Areas Development Board v Hassim and Others, 1964 (2) S.A. 327 at 328). The applicant should bring himself within the ambit of the Rule. (C/P Uniform Rules of Court (supra) p. 154.

There is no dispute that the document, Annexure "A" is a liquid document (see Ladybrand Kooperatieve Landboumaatskappy Beperk v E.M. Thulo, 1980(1) L.L.R. 99 at 102; Rule 28(1) of the High Court.

In terms of Rule 28(3) where an application for summary judgment has been made the Respondent may :

(a) Give security to the Plaintiff/Applicant to the satisfaction of the Registrar for any judgment including such costs which may be given, or

/(b)

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

The Respondent chose to file an opposing affidavit and not to give any viva voce evidence.

The essence of the application is actually to eliminate bogus or frivolous defences. It is also important to remember that an application for summary judgment is not intended to afford an opportunity for a miniature trial of the issues involved. (Van Winsen, & Herbstein The Civil Practice of the Superior Courts in South Africa, 1954 Ed. p. 232). It is not in the nature of the Courts to refuse an action to be defended merely because a complicated transaction is involved. Counsel for the Applicant in his argument referred to pursuasive authorities in answer to the defences raised by the Respondent. He was fair enough to inform the Court that even in that country where those authorities are obtainable, there is still a division of opinion. The weighty defences raised by the Respondent are not yet settled in the sense that in order to be accepted or rejected it would depend in which Province the litigation took place. Certainly, in this Court the defences that the Respondent has raised have not been dealt with hence the death of case-law. This application not being a miniature trial, this Court is not called upon to go into the niceties of these defences. These will be gone into at the appropriate time. But it must always be remembered that the remedy for summary judgment is an extraordinary one which permits a judgment to be given without a trial. It totally closes the doors of the Courts to the Respondent. However, this will only be permitted if there is no doubt that the applicant has

/an

an unanswerable case. (C/P Uniform Rules of Court (supra) p. 154).

In my view the Respondent's defences are clearly disclosed in paragraph 6 of his Opposing affidavit. (Chambers v Jonker, 1964(2) S.A. 327(T). Those defences cannot be said to be bogus or frivolous nor can they be described as being bad in law. In fact it is through the relevation contained in those defences, which the applicant concedes, that the Court was taken, for the first time, into confidence in this matter. Until then, the matter was regarded as the run of the mill case of summary judgment based on a liquid document. It took the Respondent to show that the application before Court was not in fact that type of a case at all. The onus, according to the Rule appears to be on the Respondent in that it requires him to satisfy the Court that he has a bona fide defence to the action. However, that is not a heavy one. (Chambers v Jonker (supra) at 637 H. I am therefore satisfied that the defences disclosed by the Respondent in his Opposing affidavit are bona fide. In my view the Court ought to grant leave to defend.

In conclusion I wish only to reiterate that it would appear that the aim of section 28 (9) of the Rule is two-pronged to discourage unjustified applications of the nature with which the Court is presently concerned and also to discourage defendants from setting up bogus defences. In the process of this sort of application the Respondent will, inevitably, be forced to disclose his defences in his opposing affidavit, however, the applicant is not entitled to such information unless his grounds of making the application are

/unassailable.

unassailable. (C/P Uniform Rules of Court (supra) p. 156).

The Court has a descretion as to the condition(s) it may impose together with the order granting leave to defend. It is therefore hereby ordered that leave is granted to the Respondent to defend the action.

The normal rule is that costs follow the event. In my view of this application it is the Respondent who took the Court into his confidence. The defences which it disclosed in its opposing affidavit ought to have been realised as such. But instead of conceding before the matter comes to Court, the applicant persisted in bringing it to Court for a decision. However, it turned out to be a strange type of application where the first word uttered by the applicant is a concession with Respondent's assertion that the action is based on different facts than those originally alleged. In the premises, it is ordered that the applicant/plaintiff pay the costs of this application.

It is further ordered that the Respondent will file his plea within the usual period after the present costs have been taxed and paid.

(J U D G E)

21st November, 1983.

For the Applicant/Plaintiff : Adv. Mlonzi

For the Respondent/Defendant : Mr. Pheko