

CIV\T\101\95

IN THE HIGH COURT OF LESOTHO

In the matter of :

THOLOANA MOTSOENE	1st Plaintiff
THEEPE MAKHAKHE	2nd Plaintiff
LUCY MABATHOANA	3rd Plaintiff

and

LAWRENCE NDABA NDABA	Defendant
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RULING

Delivered by the Honourable Mr. Justice T. Monapathi
on the 18th day of April 1995

The Plaintiffs have applied for summary judgment in terms of rule 28. The Plaintiffs' summons was not accompanied by a declaration. This is not improper in terms of our rules of Court. The Defendant had filed his notice of intention to defend. That is why Plaintiffs were in the circumstances entitled to apply for summary judgment. This is besides whether the application itself ought to succeed or not. The Plaintiffs' claim is for:

- (a) "Payment of an amount of M18,775.95 being monies lent and advanced by the Plaintiffs

to the Defendant at his special instance and request." (My underlining)

I would say from the outset that in reference to Rule 28(1)(b) that Mr. Monyako was correctly urged to concede that the Plaintiffs' claim constituted a liquidated amount in money which is defined as "an amount which is either agreed upon or which is capable of speedy and prompt ascertainment." (See BOTHA vs W. SWANSOW & CO. (PTY) LTD 1968 (2) P.H. F85 (CPD) and COMMERCIAL BANK OF NAMIBIA LTD vs TRANS CONTINENTAL TRADING (NAMIBIA) 1992 (2) SA 66 at 72-3).

The Plaintiff is merely required to apply "supported by an affidavit which must comply with rule 28(2). The Plaintiff must not go into the merits of the matter, he must confine himself with what the rule allows, nor may file replying affidavits or cross examine the defendant if the latter gives oral evidence. These restrictions upon the Plaintiff make it clear that an application for summary judgment is in no sense a preliminary trial of the issues involved. The procedure is intended neither to give the Plaintiff a tactical advantage in the trial nor to provide a preview of the Defendant's evidence or to limit the defence to those disclosed in the answering affidavit". (See Superior Court Practice HJ Erasmus, Juta & Co. 1994 at B1-207) (My underlining) I do not see why the learned author does not at the same time allude to the mischief of a Defendant who will

cheerfully and actively take steps calculated towards a situation that can only result in delaying the Plaintiff's application for summary judgment in particular and the Plaintiff's claim in general.

It should perhaps have been clear now that in the absence of the Plaintiffs declaration there are no other particulars or circumstances of the Plaintiff's claim except as shown in the beginning of this judgment. This was one of the queries raised by Mr. Monyako against the application. As a result he justified the content of the paragraphs 2 and 3 of the Defendant's opposing affidavit. These paragraphs read as follows:

"2

I was served with the summons in the above matter and entered appearance to defend. There was no declaration attached to the summons and I was wanting them to enable me to know what case I have to meet. I have been advised by my lawyer and verily believe that the application for summons (summary) judgment is ill-timed and misconceived.

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I humbly submit I have a bona fide defence in the action, much as I paid the amount I am alleged I owed." (my underlining)

Mr. Mahlakens submitted that the paragraph 2 contradicted the paragraph 4 in that the first mentioned paragraph suggested no knowledge of the amount claimed and yet the second paragraph suggested the amount claimed to have been paid. That may be so. But is not the matter much more complicated than that? It is this paragraph which Mr. Mahlakens submits do not comply with the rule 28 (3) (b) which reads: "Such affidavit or oral evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor." In the case of VENTER vs CASSIMJEE 1956(2) SA 242(N), in the somewhat similar circumstance and in speaking of the attitude of the defendant, in a plaintiff's claim based on a cheque endorsed in favour of a third person (not plaintiff), Broome J said at page 245 F-H:

"He was also entitled to assume that he only had to bring this circumstance to the notice of the Court and summary judgment would certainly be refused. AFRICAN CREDIT INVESTMENT CORPORATION LTD vs KNIGHT 1930 WPD 293; CAPE AND TRANSVAAL LAND AND FINANCE CO. LTD vs DE VILLIERS 1926 CPD 59. That being so was he justified

in disclosing no further defence, if he had one? Mr. Niehaus, for the Plaintiff, submitted that Rule 21 (3) (iii) required him to disclose the whole of his defence, but I do not read the sub-rule in that way. It is sufficient if he discloses "fully the nature and grounds" of a *bona fide* defence to the action."

The learned judge went on to decide on page 246

" The magistrate was in my opinion wrong in deciding the case solely on the original cheques and is ignoring the potential prejudice to the Defendant arising out of the incorrect copy of one of them. He ignored the Plaintiff's non-compliance with the rules when he should have realized that summary judgment is an extraordinary remedy calling for a strict compliance with the Rules on the part of the Plaintiff. VAN ZYL vs THENNISSEN MUNICIPALITY 1944(1) PH L3"

While I am inclined to agree with Mr. Mahlakeng that the rule 28 (3) calls for much more than what has been sought to be provided in the paragraph 4 of the Defendant's opposing affidavit I would also at once find a clear basis for Mr. Monyako's complaint against the Plaintiff's claim. In that regard I would refer to

rules 17(5) and 20(b). Rule 17(5) reads:

The summons shall contain a concise statement of the material facts relied upon by Plaintiff in support of his claim in sufficient detail to disclose a cause of action." (My underlining). Rule 20(b) reads:


"When a party in his pleading, relies upon a contract he shall state whether the contract was verbal or in writing and where and when and by whom it was concluded." (My underlining)

I may be having my own doubts about the Defendant's attitude to things but that should be the task of the trial judge to resolve. The remedy that the Plaintiffs ask for is a draconian one where virtually the Defendant is in the result denied an opportunity to have his defence fully ventilated. I must be left with no doubt that Plaintiff himself has provided such sufficient information to his claim that leave no room for what on the surface appears to be a technical defence on the part of the Defendant. The test is not whether it is a technical defence but whether it is valid.

The presence of the Plaintiff's declaration would have gone long way to expose some of these alleged oddities in the Defendants defence. Perhaps I should have asked the Defendant to file supplementary affidavit. But the problem would be that the Plaintiff would not be entitled to reply to the affidavit.

Perhaps I would be entitled to allow the Plaintiffs so to reply. Perhaps I should have called for viva voce evidence. The matter would in any event be further embroiled while the matter would still not be fully ventilated.

In the circumstances of the doubts that I have I feel I cannot exercise my discretion to allow the application for summary judgment. "One must remember that summary judgment is a drastic and extraordinary remedy involving the negation of the fundamental principle *audi alteram partem* and resulting in a final judgment which is normally only granted in clear cases, and where there is a doubt, in which latter event leave to defend ought to be given." Per Harcourt A.J. in FASHION CENTRE AND ANOTHER vs JASAT 1960(3) SA 221 (W) at 222. (My underlining). Costs shall be in the cause of the action. I allow Defendant to defend.



T. MONAPATHI
JUDGE

For the Plaintiffs : Mr. L. Pheko noted judgment for
Mr. Mahlakeng

For the Defendant : Mr. Monyako