

IN THE COURT OF APPEAL OF LESOTHO

C. OF A. (CIV) NO. 4\98

CIV\T\599\97

In the matter between :

LEHLOHONOLO PHORI

Appellant

and

ELENA DUROW t/a J & e ENTERPRISES

Respondent

Coram :

**Steyn P
Browde JA
Leon JA**

J U D G M E N T

Browde JA:

This appeal arises from an application for summary judgment in the High

Court which can best be described as a comedy of errors. The summons in the matter was issued by the respondent in October 1997 against Lehlohonolo Khori t\ a Thembaletu Butchery. In the summons the respondent claimed payment of the amount of M61 860.95 with interest thereon at the rate of 22% from August 1997 to date of payment. There followed a declaration by the respondent dated the 8th November 1997 in which the respondent prayed for judgment against the appellant in the sum of M14 118.28 plus interest at the rate of 22% calculated from August 1997. In the declaration there is set out in paragraph 4 the following :

“Plaintiff supplied the Defendant with the said goods from the date of agreement in the total amount of M70 641.27 and there were some payment (*sic*) which were made in the total amount of M15 000.00. The total amount due and payable is M61 860.95.”

The agreement referred to is alleged to have been entered into on or about the 1st of March 1997.

It is clear that if the total amount was as set out in paragraph 4 and the payments were M15 000.00 then the total amount due and payable was M55 641.27 and not the sum alleged to be the amount payable in paragraph 4. Nor, of course, is there any explanation whatsoever as to why judgment is prayed for in the sum of M14 118.28 only. Attached to the declaration was a special power of attorney given by one Letsema Emmanuel Letsoela to attorney Mphalane, the said Letsoela

saying that he does so "*duly authorised by virtue of resolution dated 6 November 1997*". The resolution is not attached and it is not clear whose resolution it is alleged to have been.

The next document in the record is a notice of intention to defend apparently signed on behalf of the Defendant (wrongly called Khori) on the 18th of November with an indication on it that it was served on the Plaintiff on the 19th November 1997. Attached to that document is a special power of attorney in which Lehlohonolo Khori apparently nominates attorney Monyako to defend the action in which, so it is stated, Plaintiff claims payment of the sum of M14 118.28 for goods sold and delivered with interest at the rate of 22% calculated from August 1997. On a date which is not clear but which appears to be the 20th day of November 1997 a notice of application for summary judgment was filed by attorney Mphalane in which it is stated that application would be made on behalf of the applicant (the present respondent) on the 4th day of November 1997 for summary judgment. The affidavit of Elena Durow in support of the application and dated 20th day of November 1997 is attached. In paragraph 3 thereof the deponent states that she attaches documents pertaining to the claim "*and which shows the Defendant's indebtedness to the Plaintiff*". The documents referred to date back to the 1st of

March 1994 which is rather surprising having regard to the allegation that the agreement between the parties was entered into on the 1st of March 1997. It appears from those documents that the last purchase made by the Appellant was in September 1995 when the balance outstanding was something over M200 000.00. The only other debit entries since that time refer to interest charged by the respondent.

In August 1997 the balance is shown as M61 860.95 but it is not clear at all what amount is for goods sold and delivered and what for interest. The documents attached to the affidavit leave this question unexplained.

On the 22nd of November 1997 attorney Monyako on behalf of the appellant drafted a request for further particulars which appears to have been served on the respondent on 24 November 1997. In that document the respondent is asked to provide particulars as to how the amount of M61 860.95 as appears on the summons is arrived at and how the amount of M14 118.29 as appears on the declaration is arrived at. No reply was given to those questions but on the same day as the respondent received the request a notice of set down in respect of the application for summary judgment was prepared and served. This gave notice that the hearing would take place on 8 December 1997. On that day i.e. the day of the hearing a

supplementary affidavit was filed by the respondent and dated the 26th November 1997. To this affidavit there was attached "*a bundle of documents in support of application for summary judgment*". This "*bundle of documents*" is alleged in the affidavit to show the indebtedness of the Defendant as stipulated in the summons. These documents are certainly not self-explanatory and are merely a series of what appear to be invoices in respect of meat, many of which contain an overprint of a rubber stamp reading :

*"PROPERBOER-DIENSBURO BK Voortrekker Straat 24 Posbus 271
Ladybrand 9745 Tel 05191-2074"*.

No explanation is given for this rubber stamp or what it means on the invoices.

The special power of attorney given to attorney Mphalane authorises him to sue for the sum of M61 860.95 plus interest at the rate of 22% per annum from March 1997 to date of payment. The documents attached to the affidavit for summary judgment show interest already charged for March to September 1997 and therefore a claim in October or November with interest from March would be asking for interest on interest.

At the hearing on 8 December 1997 Monapathi J granted judgment by default

against the appellant *"it having been found that the Defendant had been served on the 12th November 1997. The Defendant had not responded that is why the Plaintiff applied for a default judgment"*. It need hardly be pointed out that the Defendant by the 9th of December 1997 had not only responded but had entered an appearance to defend and had filed and served a request for further particulars. The following day when it was discovered that what was intended to be asked for was summary judgment and not default judgment the learned judge decided that it was *"just and proper in the total circumstances of the matter"* to correct the order he had made. In doing so he outlined the various documents in the file and decided that since the Appellant had not complied with Rule 28(3) of the Rules of Court that he should grant summary judgment in the amount claimed in the summons. In doing so he overlooked the discrepancies between the summons and the declaration and stated as follows :

"I was aware that Mr Monyako (on behalf of the Appellant) had felt very strongly about the matter of the discrepancies in the sums contained in the summons and the declaration. This as I have said is shown by that paragraph in his request for further particulars in which the Plaintiff is taken to task in the manner shown. The Plaintiff ignored this and proceeded on to claim for the order".

He then went on to say that -

"One could be of the view that he (i.e. the Respondent) should have applied for striking of the request for particulars as an improper step."

I however felt that if there were other reasons and of course it had to be serious reasons why the Defendant felt the judgment was irregular or was a mistake and an error of some kind he should apply for rescission of judgment."

The fact that the Appellant might have a reason for applying for rescission of a judgment is in my opinion no good reason for granting the judgment in the first place.

The learned judge then went on to state that another issue which was raised was that the Plaintiff should have applied for an amendment having regard to the contradiction which existed between the summons and the declaration. The learned judge dealt with this by stating -

"This he had not done but it was clear how the sum of M61 860.95 was arrived at in the summons as in that paragraph 4 of the declaration. It was that sum this M61 860.95 was a balance from the original sum of M70 000.00. That is the sum the Plaintiff claimed. I therefore condoned that irregularity as not being a serious one."
(sic).

I can hardly agree with that approach of the learned judge to the problem which confronted him when he had to decide whether or not to grant summary judgment. An application for summary judgment is an extraordinary remedy since it enables a Plaintiff to obtain judgment against a Defendant without a trial despite the Defendant having entered an appearance to defend. It is for this reason that

Courts will be reluctant to refuse leave to defend where the transactions between the parties are complicated and the quantum of the Plaintiff's claim is not so clear as to be readily ascertainable. Accordingly Courts have widely and consistently held that the affidavit of the Plaintiff may only contain those matters which are expressly provided for in the Rule of Court which deals with Summary Judgment. See, for example, *M.A.N Truck & Bus(S.A.)(Pty)Ltd v. Singh and Another(1)* 1976(4) SA 264. (Lesotho Rule 28 is identical to South African Rule 32) and reads :

“(2) The plaintiff, who so applies, shall within fourteen days after the date of delivery of entry of appearance, deliver notice of such application, which notice must be accompanied by an affidavit made by the plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any claimed and such affidavit must state -

- (a) that in the opinion of the deponent the defendant has no **bona fide** defence to the action and
- (b) that entry of appearance has been entered merely for the purpose of delay.

If the claim is founded on a liquid document a copy of the document must be annexed to the affidavit.

The notice of application shall state that the application will be set down for hearing on a specified date which shall be not less than seven day from the date of delivery of the notice.”

In the instant case there is a great deal of confusion in the Respondent's claim arising *inter alia* from the documents which were filed by the Respondent and

admitted as evidence by the learned judge which, if they show anything, show that there is considerable doubt regarding the amount which the Respondent was entitled to claim from the Appellant on the 8th of December 1997. In this regard it is surprising that the learned judge *a quo* was able to say what he did in the passage from his judgment quoted above.

As I have already pointed out, paragraph 4 of the declaration is impossible to reconcile with the claim in the summons or the prayer in the declaration. It is also impossible to reconcile the statement in paragraph 4 that Plaintiff supplied the Defendant with the said goods from the date of agreement i.e. 1 March 1997, with the details furnished as part of the affidavit in support of summary judgment. There are no goods shown as having been sold from March 1997 as the only debits in the account are for interest.

I am of the view that summary judgment should not have been granted by the learned judge. Although it could be contended that the amount was not formally in dispute because no affidavits were filed by the Appellant, nevertheless the confusion which exists between the summons and the declaration, the documents which show that no goods were sold from March 1997 and the claim for interest at the rate of 22% which is totally unsubstantiated should have led the learned judge to the

conclusion that the debt could not be ascertained promptly and summarily as is required for the relief sought

The Appellant noted his appeal to this Court on two grounds namely :

- (I) That the claim in the summons differed materially from that in the declaration; and
- (ii) That the learned judge erred and misdirected himself in granting judgment by default and thereafter, without any formal application by the Plaintiff to amend the summons and declaration, altered the judgment to one for summary judgment for the amount claimed in the summons without reference to the declaration.

After Monpathi J granted summary judgment an application was launched by the Appellant in which he sought a stay of execution pending the determination of the appeal. It appears from the supporting affidavit to that application that three or four days after the grant of summary judgment the Deputy Sheriff arrived at the business of the Appellant and demanded the sum of M3 395.00 if the Appellant wished to suspend execution. This amount was paid but the Deputy Sheriff, so the allegations went, again came to demand more money to stave off the sale of the Respondent's property.

In answer to the allegations of the appellant the respondent stated, *inter alia*, that the supplementary affidavit in the summary judgment proceedings "*was only filed to show the invoices pertaining to the business transactions between the parties. This is to prove that parties had some business dealings.*" I consider this an unacceptable explanation for the filing of the supplementary affidavit since it specifically states therein that the documents "*show the indebtedness of the Defendant to the Plaintiff as stipulated in the summons*". The respondent also attached to her affidavit a document purporting to be an acknowledgment of debt signed by the Appellant. In reply the appellant admitted to signing the document but stated that he signed it in blank and pointed to certain features of the document which cast some doubt on its authenticity. The respondent's attitude was that the appeal was being pursued merely to delay payment and consequently asked that the stay of execution be denied.

The application for stay of execution ended with an order made by Monapathi

J in the following terms :

- (1) *Applicant to pay M10 970.00 which he acknowledged he owed.*
- (2) *Applicant pays with effect from February 1998 a sum of M2 000.00 to be placed in trust with creditor's lawyer until heard in June.*
- (3) *All property attached to be returned to the debtor (Appellant)*

at the place they were taken.

- (4) *Deputy Sheriff to present before the Registrar a bill of costs within 30 days.*
- (5) *Record of proceedings for the Court of Appeal to be prepared before the end of March 1998 failing which execution will proceed.*
- (6) *Costs of this application are awarded to the Respondent (the Respondent in this appeal) ”.*

Apart from the fact that paragraph 2 of the above order is incomprehensible it also escapes me how the learned judge, in an application for a stay of execution, came to make an order which had nothing whatever to do with the relief sought by the Appellant in his application for a stay nor with the prayer of the respondent which simply asked that the application be dismissed with costs. The order issued by Monpathi J is, therefore, completely irregular and falls to be set aside.

In the result the appeal should be upheld with costs and the order of the Court *a quo* altered to read,

“The application for summary judgment is dismissed with costs”.

The order made by Monpathi J pursuant to the application for a stay of

execution is set aside.

J. BROWDE
Judge of Appeal

I agree and it is so ordered:

J.H. STEYN
President

I agree :

R.N. LEON
Judge of Appeal

Delivered this 3rd day of July, 1997 at Maseru