

IN THE HIGH COURT OF LESOTHO

In the matter between:-

NEDBANK (LESOTHO) LIMITED

PLAINTIFF

and

**SOTHO DEVELOPMENT CORPORATION
(PTY) LTD**

RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 23rd day of May, 2000

The plaintiff in this matter is NEDBANK [LESOTHO] Limited. It is a banking institution, established in accordance with the Laws of Lesotho. Plaintiff has its main office at Kingsway, Maseru.

Defendant is SOTHO DEVELOPMENT CORPORATION (PTY) LTD. It is a company registered in terms of the Laws of Lesotho. It carries on its business at PLOT NO. 12293-013 at THETSANE INDUSTRIAL AREA, MASERU URBAN AREA, MASERU.

The plaintiff instituted this legal action against the defendant by issuing out of this court a combined Summons in which it claims:-

1. Payment of an amount of M1,493,412.27
2. Interest thereon at the rate of 23% per annum from the 1st November 1999 to the date of payment
3. An order declaring the property specifically mortgaged under the below mentioned Deeds of hypothecation No. 24281 registered on the 14th July 1994 and No.22697 registered on the 26th July, 1997 in respect of Plot No. 12293-013, situated at THETSANE INDUSTRIAL AREA, MASERU URBAN Area, here in MASERU, Executable.
4. Costs
5. Further and/or alternative relief.

The brief facts as gleaned from the plaintiff's declaration are as follows:- These two parties entered into an [oral or written] agreement in terms of which plaintiff granted to the defendant an overdraft facilities.

It is alleged that from time to time, at the special instance and request of the defendant, and in accordance with that overdraft agreement facilities, plaintiff advanced money to the defendant. [Presumably by honouring cheques drawn upon

the plaintiff bank by the defendant in whose account therein, there were insufficient funds to meet those cheques]. It is further alleged that the payment of this overdraft is secured by means of the two Deeds of hypothecation mentioned in paragraph 3 of the Declaration wherein they are annexed. Perhaps, the defendant's account is overdrawn beyond the agreed limit; or may be the defendant has unreasonably delayed in making an appropriate adjustment on that overdraft account, we do not know because not much is said in this regard. It is the express condition of the granting of the overdraft facilities that it shall always be in the entire discretion of the bank as to the extent, nature and duration of the advances, credits and other facilities so allowed. Plaintiff demanded payment of the overdraft as the parties had agreed that payment of the overdraft will be made by the defendant on demand by the plaintiff. Despite plaintiff's demand to the defendant to pay the said overdraft, defendant has failed to pay. The plaintiff, then issued out the Summons, claiming the relief as stated therein.

After an INTENTION OF APPEARANCE to defend was entered, an Application for Summary Judgment was, in terms of Rule 28 [High Court Rules Notice No.9 of 1980] filed. This Application for Summary judgment is opposed. The proper procedure to be followed by the parties, in this matter in order to succeed in these endeavours, is prescribed by Rule 28 of our Rules. The relevant portion thereof

reads as follows:-

“28. (1) Where the defendant has entered appearance to defend the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document
 - (b) for a liquidated amount in money
 - (c) for delivery of specified movable property, or
 - (d) for ejectment
- together with any claim for interest and costs.

(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 (a) must be accompanied by an affidavit made by the plaintiff or by any other person who can swear positively to the (b) 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 (c) the defendant has no bona fide defence to the action and
- (b) that entry of (d) appearance has been entered merely for the purpose of delay [My underlining]

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 days from the date of delivery of the notice.

(3) Upon the hearing of the application for summary judgment, the defendant may -

- (a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including such costs which may be given; or
- (b) satisfy the court by affidavit or, with leave of the court, by oral evidence of himself or of any other person who can swear positively to the fact, that he has a bona fide defence to the action.

Such affidavit shall be delivered before noon not less than two court days before the hearing of the application. Such affidavit or oral evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”

In our present case, the Notice of Application for Summary judgment, is accompanied by an affidavit as required, in terms of the rule. Both parties in this matter being artificial persons, the affidavits required in terms of the rule have been deposed to by other persons legally and duly authorised to act on behalf of the parties herein. **MALL CAPE (PTY) LTD V MERINO KO-OPERASIE BEPEK 1957 (2) SA 347.** In terms of the rule which governs the proceedings of this nature, there are specific issues which the deponents of the affidavits prescribed by the said Rule, ;must directly deal with. The contents of the affidavits, filed in support of the application for Summary judgment, or to resist the granting of that application, are prescribed by the said rule.

Those requirements which must be satisfied by the prescribed affidavit of the plaintiff/Applicant, are succinctly enumerated as follows by CORBETT JA [as he then was] in **MAHARAJ V BARCLAYS NATIONAL BANK LTD [1976 (1) SA] page 418 at 422-B.**

“(a) that the affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts

- (c) *that it must be an affidavit verifying the cause of action and the amount claimed*
- (c) *that it must contain a statement by the deponent, that in his opinion, there is no **bona fide** defence to the action and that the notice of Intention to defend had been delivered solely for the purpose of delays."*

These are the requirements listed in our Rule 28 (2) (a) and (b) [High Court Rules Legal Notice No.9 of 1980]. They are highlighted by my underlining of the same in the rule as cited. The affidavit filed in support of the application for Summary judgment, must be scrutinised together with other documents which are properly before this court, MOWSCHENSON AND MOWSCHENSON V MERCANTILE ACCEPTANCE CORPORATION OF SA LTD [1959 (3)] SA 362. Proper scrutiny must be carried out in order to ascertain that these requirements are satisfied. This is where the crux of the matter in our present case, lies. The defendant has not bothered to do anything required of it by the rule. In terms of Rule 28 (3) [High Court Rules (Supra)] The defence could have done (a) or (b) of the said rule. A deliberate election, to ignore compliance with the requirement of this rule on the part of the defendant, was made. The application for Summary judgment is resisted by the defendant, by mounting an attack on the manner of compliance with the rule governing the procedure adopted by the plaintiff/applicant. The

defendant has adopted a position that even if there is no compliance with the rule by the defendant, that failure to comply by the defendant does not by itself entitle the court to grant the application for Summary judgment.

The court must grant the application for Summary judgment when that application and the supporting documents have no defects. In short, the court must be satisfied with the total compliance with the requirements of the rule, by the applicant. There should be no apparent defects in the documents filed and relied upon, in support of the application for Summary judgment. TRANSVAAL SPICE WORKS BUTCHERY REQUISITES (PTY) LTD V CONPEN HOLDINGS (PTY) LTD 1949 (2) SA 198 at 200.

In resisting the granting of the application for Summary judgment, a number of points-**in-limine** have been raised on behalf of the defendant in this case:-

1. The first point-in- **limine** attacks the **locus standi** of the deponent of the affidavit which accompanies the application for Summary judgment.
2. The second point-in-**limine** seems to attack the ability of the said deponent to depose to the facts verifying the cause of action.

3. The third point-in-**limine** concerns the alleged failure by plaintiff to disclose the cause of action in the Summons and Declaration.
4. The last point deals with the description of the parties whose identity is put in issue.
 - 1- Parties to an overdraft facilities agreement.
 - 2- Parties to the Deeds of hypothecation.

These four points are what I managed to glean from the Answering affidavit and the Heads of Argument for Defendant. There could be more or less but the drafting of both documents is not simple and straightforward.

LOCUS STANDI

The deponent of the affidavit filed on behalf of the plaintiff bank, in terms of Rule 28 (2) [High Court Rules] supra, is one SAMUEL LIAHO RAHLAO. He has averred in his affidavit that he is duly authorised to make this affidavit on behalf of the plaintiff as more fully appears from the Resolution filed of record. RAHLAO, has claimed in the same affidavit, that he is the Executive Manager - credit of the plaintiff. These averments by themselves satisfactorily show the court that Mr. Rahlao has, that required **locus standi** to represent the plaintiff bank. **PHOOFOLO V CENTRAL BANK OF LESOTHO** C. OF A NO. 6 of 1987; **WING ON GARMENT (PTY) LTD V LNDC** C. of A. No. 6 of 1999.

In addition to the above, there is that Special Resolution [at page 9 of the record]. There in, are the names of persons who are authorised and empowered to represent the company (the plaintiff herein). Amongst those people who are authorised to sign all documents and represent this plaintiff, is one Rahlao. Another document the power of attorney, (at page 1) of the record) which appointed the plaintiff's present attorneys is signed by Mr. Rahlao and one other official whose name appear in that special resolution, On this point the defendant must fail. Rahlao is duly authorised to represent the plaintiff bank.

The second point in limine concerns the deponent's ability to "positively swear to the facts verifying the cause of action". The deponent of the Answering Affidavit, one LOUIS MEYER ICHIKOWITZ - [presumably the individual who represents the defendant corporation in all its dealings, denies that Rahlao "can positively swear to the facts verifying the cause of this action". The grounds of the denial appears to be his ignorance regarding the position held by and the date of the appointment of Rahlao to represent the plaintiff bank. He claims he does not know when Rahlao was engaged to work for the plaintiff bank and that he does not know Rahlao.

When the bank appoints its employees, it is not obliged to inform its customers about

the appointments, nor to give the names of, nor to present to its customers, the appointees personally. The documents which are properly before this court, show beyond any doubt, that Rahlao is an employee of the bank which has given him authority to act on its behalf in this matter.

In his affidavit Rahlao avers that he is the executive manager - credit of the plaintiff bank. The representative of the defendant may not know the executive manager - credit personally. The duties or responsibilities of the executive manager - credit, are not mentioned anywhere in the papers before me. This plaintiff being the banking institution may be it can be assumed that the executive manager - credit controls the credit the bank extends to its customers. He should therefor, be in charge of the recovery of the money which the bank has lent to its customers. As the manager - credit he should be in a position to acquire personal knowledge of the financial standing in that bank, particularly of those customers to whom the bank has extended some credit, as this defendant. As was pointed out in MAHARAJ v BARCLAYS NATIONAL BANK LTD [1976 (1) SA] 418 at 424 - C, the overdrawn account is operated in the same branch where the deponent of the affidavit verifying the facts is the executive manager - credit. As the manager, he may be too busy to deal personally with each and every customer. He cannot be expected at the same time to be the clerk who is making every entry of a withdrawal and deposit into the accounts

held in the plaintiff bank. In his affidavit, Rahlao has alleged that the facts which he has deposed to, are from his personal knowledge and records under his control. Being the manager - credit, it must be his responsibility to examine the state of indebtedness of the customers to the bank. He should be in the position at the end of the day to say who is indebted to the bank and to what extent and to decide whether or not the bank can manage to recover its money from those customers.

As regards the extent of the defendant's indebtedness to the plaintiff, the parties had a prior arrangement of the determination of the same. At paragraph (h), Annexure 'A' (page 16 of the record), it is provided:-

“(h) That the amount of the indebtedness to the bank at any time (including interest and the rates of interest) to be secured under the bond shall be determined and proved by a certificate signed by any manager or accountant of the Bank;

It shall not be necessary to prove the appointment of the person signing any such certificate and such certificate shall be conclusive proof of the amount of the said indebtedness and shall be valid as a liquid document in any competent court for the purpose of obtaining provisional sentence or summary judgment.”

The Certificate of Balance issued in terms of the above provision has been so issued under the hand of Rahlao. This is a further indication that Rahlao is a person who is definitely in a position to “positively swear to the facts verifying the cause of this action.” He appears to have dealt with this account held by defendant in that bank.

The objection, to the ability to swear positively to the facts by the deponent of the affidavit accompanying the application for Summary judgment, must fail.

The third objection raised is essentially an exception to the Summons. It is being alleged that the essential and necessary allegations, have been omitted. The omission has allegedly resulted in the failure of the summons to disclose the cause of action. The Summons are consequently exceptionable. It is necessary to examine the manner in which facts relied on as the basis of the claim, are set out. In the declaration, it is alleged that in terms of an agreement between the plaintiff and defendant at a special in stance and request of the defendant the plaintiff advanced money to the defendant on an overdraft facility. It is a terms of their agreement that an overdraft will be paid on demand upon the defendant by plaintiff. Such demand has been made by plaintiff to the defendant to pay that overdraft. The defendant does not deny that there was an agreement in terms of which plaintiff granted it a facility to overdraw its account at the plaintiff bank. It is not denied that defendant overdrew its account. It is admitted that the payment was demanded by a letter of demand addressed to the defendant.

The plaintiff's claim, as appears on the Summons and the declaration, particularly paragraph 3 thereof, is founded on the agreement and the breach of the terms of that agreement. In terms of that agreement, defendant was granted overdraft facilities by

agreement. In terms of that agreement, defendant was granted overdraft facilities by the plaintiff. In accordance with the terms of that overdraft facilities agreement, plaintiff advanced money to the defendant, whenever the defendant requested such money advances. This request for money advance was presumably made by presentation for payment of the cheques drawn by the defendant upon the plaintiff bank. It is alleged that it is the term of the agreement that the overdraft will be paid by the defendant on demand by the plaintiff. The agreement and the terms thereof, relied upon have been alleged by the plaintiff in paragraph 3 of the declaration. MC

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SA 1 [[A]. The summons are precise, intelligent and sufficiently disclose the plaintiff's claim. There is no ambiguity which can possibly deny the defendant an opportunity to appreciate and understand the plaintiff's claim.

The defendant is sufficiently informed that there was an agreement, in terms of which the defendant was granted overdraft facilities by the plaintiff. At the defendant's special instance and request, money advances were made by plaintiff to the defendant from time to time. It is further alleged that the payment of the overdraft was to be made by the defendant on demand by the plaintiff. There is a further allegation that such a demand was made by plaintiff upon the defendant. This issue of lack of necessary allegation must also be decided in favour of the plaintiff.

Another point-in-limine concerns the identity of the parties. The deponent of the answering affidavit avers that he has no knowledge whether the Standard Chartered Bank Africa PLC Limited changed its name to NEDBANK [Lesotho] Limited. Part of the issue has been dealt with when the question of **locus standi** was determined. It is not alleged that plaintiff is obliged in law to inform the defendant of its change of name. It is not alleged that it is a term of the parties' agreement relied on by this plaintiff, to inform the defendant of that change of name. That change of name from STANDARD Chartered Bank Africa PLC Limited to NEDBANK [Lesotho] Limited, is a matter of common knowledge in this country. As such this court is entitled to take a judicial notice thereof.

Ex-facie documents e.g. Deeds of hypothecation [(Annexures "A" and "B") at pages 12 and 19 of the record,] it appears that the defendant is indebted to the Standard Chartered Bank Africa PLC. There might be uncertainty as to the rights the plaintiff claims because plaintiff appears on the Summons and Declaration to be NEDBANK (Lesotho) Limited. Plaintiff would have to allege and prove how it acquired the rights of Standard Chartered Bank Africa PLC. **TRANSVAAL SPICE WORKS AND BUTCHERY REQUISITES (PTY) LTD V CONPEN HOLDINGS (PTY) LTD [1959(2)] SA 198.** The plaintiff in our present case, does not have to claim that it is a legal holder of said documents or that they were ceded to it, because it is still

the same person who has only changed the name. There has been no transference of those documents from one person to the other. The Standard Chartered Bank Africa PLC Limited is the same person as NEDBANK (Lesotho) Limited but has only changed its name from the one to the other. This change of name has been specifically alleged at paragraph 3.1 of the Declaration. Over and above this specific allegation of the change of name, the fact of that change of name is a well known one. The defendant must fail on the point too and the objection on this ground is accordingly dismissed.

Another objection raised on behalf of the defendant against the granting of the application for Summary judgment, and particularly, the declaration that the mortgaged property, be executable, is that, that property so mortgaged does not belong to the defendant. The first ground is that, the lease is registered in favour of ""SOTHO' DISTRIBUTORS (PTY) LTD in the first Deeds of hypothecation. Secondly, that very same lease, has been surrendered to the state. The facts which appear to be in the common cause, are that, the first Deed of hypothecation was passed and registered in favour of the plaintiff on the 18th June 1991. The second Deed of hypothecation was registered in favour of the plaintiff on the 28th April 1994. These deeds of hypothecation were made by the defendant herein in order to secure the payment of the overdraft which it operated at the plaintiff bank. The property so

mortgaged is lease No. 12293-013 [Maseru Urban Area] which is the principal office of the defendant.

The argument seems to suggest that the property mortgaged does not belong to the defendant, and could not possibly be available as security for the payment of the overdraft on the bank account operated or conducted by the defendant at the plaintiff bank. On the face of the power of Attorney (Annexure 'A and 'B at pages 12 and 20 of the record] the defendant is the mortgagor. In both instances, the Power of Attorney was issued out after the Board of Directors of the defendant corporation have duly authorised. This brings into question the defendant's bona fides. Is it suggested, that the defendant purported to mortgage somebody else's property? That cannot be so. It is likely that an error was committed when the description of the lease was entered at page 13 of the record. That error was in fact, subsequently rectified when the second mortgage was passed in respect of the very same lease. The Board of Directors of the defendant resolved to execute a second mortgage. This time the description of the mortgaged property is "SOTHODEVELOPMENT CORPORATION (PTY) LTD'. This indicates without a doubt that the Board of Directors of the defendant was aware that there is a first mortgage on lease No 12293-013 situated at Ha THETSANE, MASERU URBAN AREA. As far as the surrender of that lease is concerned, the Minister of Home Affairs, of the Government - representing the state to whom the said

lease has been allegedly surrendered, consented to the mortgage of the same. These technicalities are trivial and for the purposes of the application for Summary judgment, they could be ignored. The rectification of such minor technical errors can be made without prejudice to any of the parties. The letter and spirit of the documents, clearly indicates that the parties thereto, understood their rights and obligations as stated in those documents. The defendant was in the minds of all concerned, the person entitled to mortgage, as it did the property in question

Our rule 28 is identical to rule 32 of Uniform Rules of Supreme Court of South Africa. There are numerous cases where that rule has been discussed, interpreted and applied to a variety of facts. Paramount in every court's mind when considering an application for Summary judgment is to ensure that, first, that the defendant who might have a bona fide defence against the plaintiff's claim is not denied an opportunity to put that defence before the trial court. Secondly, where there is no defence, the court must exercise its discretion in such a way that justice is done to the parties. Justice delayed is justice denied. It must have been in consideration of this principle that the legislature saw it fit to enact rule 28 [High Court Rules (Supra)]. This rule must have been enacted for the purpose of affording the plaintiff with immediate relief, where the defendant is unable to satisfactorily explain the failure to meet as required its obligations.

One of the most important things which the defendant is required to do in terms of rule 28(3) [High Court Rules] is to set out in an affidavit, the facts which if proved at the trial, will constitute an answer to the plaintiff's claim. **BREITENBACH V FIAT SA [EDMS] BPK 1976 (2) SA 226 at 227-G**. The defendant in our present case has not set out any facts which could be considered as a possible answer to the plaintiff's claim. In the case of **Breitencbach v Fiat SA (EDMS) BPK**, (Supra). The defence was averred in a manner which appeared in all circumstances to be needlessly bald, vague or sketchy. At least it was there, averred in the Answering affidavit, for the court, considering the application for Summary judgment to consider and make a determination as to whether or not it can if proved at the trial, form an answer to the plaintiff's claim. There are no facts alleged by the defendant in this matter which this court can consider as a likely defence and therefore exercise its discretion in favour of the defendant. There is nothing this defendant can possibly put before the trial court to consider as the answer to the plaintiff's claim. In these circumstances, the plaintiff is entitled to succeed in this application for Summary judgment.

The application is allowed with costs as prayed.



K. J. GUNI
JUDGE

For Plaintiff : Mr. Matsau

For Defendant : Messrs Webber, Newdigate