CIV/T/432/97

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO BANK **Plaintiff**

and

JOHANNES MAISA MATŠABA t/a FATHER & SON BUTCHERY **Defendant**

JUDGMENT

Delivered by the Hon. Mr Justice M.L. Lehohla on the 12th day of February, 2001

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This is an application moved for summary Judgment by the plaintiff which had issued summons against the defendant wherein it preferred three Claims set out below:

Claim 1 :

1.1 payment of the sum of M135 265-93
1.2 payment of interest on the above sum at the rate of 20.5% per annum as from 12th November, 1996
1.3 costs of suit
1.4 further and/or alternative relief.

Claim 2

1.1 payment of the sum of M3 526 072-53
1.2 payment of interest on above amount at the rate of 20,5% per annum as from 25th April 1996
1.3 costs of suit
1.4 further and/or alternative relief

Claim 3

1.1 payment of the sum of M1 374 839-67
1.2 payment of interest on the above sum at the rate of 20.5% per annum as from 22nd April, 1996
1.3 costs of suit
1.4 further and/or alternative relief

Claim 1 arose, according to particulars of claim, out of an oral agreement entered into at Leribe between the parties, and at the special instance and request of the defendant whereby the plaintiff advanced monies to the defendant from time to time on overdraft account No 0240307505.

Claim 2 arose from a written agreement entered into between the parties in terms of a copy annexed to the proceedings marked Annexure "A".

Claim 3 arose from a written agreement marked Annexure "B".

It seems convenient at this stage of the Judgment to indicate that the Rule under consideration is Rule 28(2) reading :

"The plaintiff, who so applies, [for summary Judgment as set out in sub-Rule 1] shall ..... deliver notice ..... accompanied by an affidavit ..... 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 purpose of delay".

At the start of oral submissions *Mr Mpobole* for the plaintiff intimated that the plaintiff was no longer pursuing Claim 1 for purposes of the summary Judgment.

I must hasten to express the Court's regrets that because of its busy schedule the Court was unable to find time within which to dispose timeously of this application in respect of which it heard concluding arguments towards the end of 1999.

In his well set out written submissions *Mr Mpobole* highlighted the fact that in order to raise a successful opposition in a summary Judgment the defendant must show (1) *bona fide* defence; (2) prospects of success in the trial.

Learned Counsel indicated that in order to fulfil the two requirements set out

in (1) and (2) above, the defendant must make full disclosure of its defence.

To show the defendant's failure in this respect the plaintiff draws the Court's attention to Preamble 2 at page 2 of Annexure "A" reading as follows :

> 2. Preamble -
> whereas :
>
> 2.1 the Borrower has requested the Bank to convert his overdraft under account numbers 0240302238, 0240303046, 0240701619, 0240305099 and 0261003163 into a loan
>
> 2.2 The Bank has agreed to convert the overdraft into a loan.
>
> 2.3 The parties have recorded their agreement in respect of the aforesaid, the terms of which are set out hereunder.

Mr Mpobole laid stress on the fact that the defendant doesn't deny having signed the agreement.

He demurred at the fact that on the contrary the defendant, through its deponent Maisa Matšaba says he entered into agreement with the plaintiff but says he has not been given the money.

Learned Counsel urged that because of this contradiction the plaintiff's case

for summary Judgment has been strengthened that the defendant has failed thereby to disclose a defence.

Reacting to the onslaught *Mr Phafane* for the defendant, having regretted his failure to submit heads of arguments pleaded with the Court to be charry of granting a summary Judgment merely for the asking.

His main reason for this submission is that a summary Judgment is a very drastic remedy. What is even more drastic is the fact that a summary Judgment entails in essence that the defendant be condemned (hanged) before being heard. To this extent it is a negation of the *audi alterem partem* rule.

Learned Counsel pleaded that because the *audi alterem Partem* rule is so entrenched in our law the Court should be very reluctant to grant this application. The learned Counsel in a fervent attempt to persuade the Court against granting the application referred it to the fact that the rule giving the Court a discretion to act in this type of application has been interpreted in such a way that it is in very rare cases that applications of this nature have been granted.

Mr Phafane demurred at the fact that plaintiff's counsel relied entirely on Annexures "A" and "B". He raised scruples at the insinuation by the plaintiff in turn enjoying its counsel's full support that in order to have answered adequately the defendant should have delved into every detail and only then would he have made a full disclosure.

Learned counsel submitted that this is not the correct interpretation of the relevant rule on summary judgment.

I agree with *Mr Phafane's* submission that in an application for summary Judgment there is no need for the defendant to be as detailed and specific as he would otherwise be required to be when filing a plea.

It is important to note that even in filing a plea the defendant is not required to go into fine details because a plea is not evidence which otherwise is constituted by an affidavit in motion proceedings.

To this extent it follows that in summary Judgements the defendant need not give a reply that strictly would be required when filing a plea.

The Court in this connection is required therefore to be quite liberal when dealing with applications of this nature : the reason being that this is a very drastic and extraordinary remedy that is at variance with the fundamental principle of *audi alterem partem.* See ***Fashion Centre & Anor vs Jasat*** 1960(3) SA p 221 at 222.

It is stimulating to observe that this authority is referred to in the invaluable works of I.Isaacs styled **Becks' Theory and Principles of Pleading in Civil Actions** p 329 at 330 where the following phrase is quoted i.e.

> " It seems that there is no need in opposing affidavits to be as specific as one is in a plea. It is sufficient if they disclose a *bona fide* defence ....."

It seems that learned Counsel for the defendant was astute enough to know that doubts would most likely arise whether the defendant is not acting *bona fide* and that entertainment of such doubts short of clear evidence that he doesn't have a good defence should redound to the defendant's benefit at this stage of the proceedings.

I subscribe to the view that it is often tempting to regard full disclosure required in motion proceedings as meaning the same thing as the disclosure required in the summary trials where no such full disclosure in the literal sense of the word

"full" is required. Indeed the distinction at times appears to be very subtle and as such reproved in law. But it remains a distinction which should not be confused in the two sets of circumstances set out above.

It would be fruitful to have regard to ***Breitenbach vs Fiat SA(Pty)*** 1976(2) SA p 226 at 228 A-E where the court dealt with the true meaning of the word "fully" as it appears in the Rule relating to summary Judgment. It is urged that the word "fully" be not given literal interpretation.

In ***Shepstone vs Shepstone*** 1974(2) SA 462 at 463 it appears the authorities are in harmonious step with one another for in the words of Colman J in ***Breitenbach*** above it is stated in paragraph A to E that

> "It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.
>
> Another provision of the sub-rule which causes difficulty is the requirement that in the defendant's affidavit the nature and the grounds of his defence, and the material facts relied upon therefor, are to be disclosed 'fully'. A literal reading of that requirement would impose upon a defendant a duty of setting out in his affidavit the full details of

> all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree..... with the suggestion by Miller J in ***Shepstone vs Shepstone*** 1974(2) SA 462 at pp 466-467, that the word 'fully' should not be given its literal meaning in Rule 32(3), and that more is called for than this : that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of *bona fides*".

I am in respectful agreement with the above outline of the position in law regarding the matter on the tapis.

I am of the view that the defendant has raised a *bona fide* defence which is on all fours with the line of authority that the defendant has to raise a *bona fide* defence which if proved would be good enough. That in my view is the test; and not that the defendant is already guaranteed victory at trial. In fact in ***Jasat*** above Harcourt J.A. at p 222 E cites with approval De Villiers J.P.'s dictum in ***Lombard vs van der Westhuizen*** 1953(4) SA 84 (C) that a Judicial officer is neither obliged, "nor indeed entitled, to investigate or to decide upon the probabilities of success" (Emphasis supplied by me).

While I do endorse the view that the discretion conferred on the Court should not be exercised capriciously the Appellate Division's dictum in ***Gruhn vs M. Pupkewitz & Sons (Pty)Ltd*** 1973(3) SA 49 AD is very instructive. It indicates that the word "may" in sub-rule (5) "confers a discretion on the Court," so that even if the defendant's affidavit does not measure fully up to the requirements of sub-rule 3(b) of Rule 32, the Court may nevertheless refuse to grant summary Judgment if it thinks fit.

I am unable to resist reiterating Harcourt J.A.'s words with respectful agreement at p 222 that :

> ".....To keep it in perspective, however, one must remember that summary judgment is a drastic and extraordinary remedy involving the negation of the fundamental principle *audi alterem partem*, and resulting in final judgment which is normally only granted in clear cases, and not where there is any doubt, in which latter event leave to defend ought to be given".

Miller J above has formulated an approach which bears imitation. This appears at p 467 E-H of the learned Judge's Judgment as follows :

> "The Court will not be disposed to grant summary Judgment where, giving due consideration to the information before it, it is not persuaded

that the plaintiff has an unanswerable case".

The learned Judge further says :

> ".....a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial".

For the above reasons summary Judgment is refused. The defendant is granted an opportunity to defend his case. The papers on file shall stand as pleadings. Costs are awarded to the defendant.

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JUDGE
12TH February, 2001

For Plaintiff : Mr Mpobole
For Defendant : Mr Phafane