CIV/T/61/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

JOSEPH MAQELEPO t/a JOSMOTMA CONSTRUCTION — PLAINTIFF

vs

THE BRANCH MANAGER (LESOTHO BANK) & 2 OTHERS — RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 19th day of January, 2001

This is a matter of an application for summary judgment. This plaintiff/applicant issued out of this court the civil summons, in which he claimed from the defendants:-

(a) Payment of an amount of M140,000.00

(b) Interest at the rate of 8.5% per month from 22nd April 1996

(c) Costs of suit.

This is a very poor record. It is not paginated. There are missing pages. From the information on the papers filed of record the summary of the facts of the case can be pieced together as follows:-

The plaintiff/applicant is the customer of the 3rd respondent bank: In this bank, he has at least two accounts. (1) 31 days call or fixed deposit account

(2) un specified loan account

The 31 days call account was opened or an investment in it made on 22nd April 1996 in an amount of M140,000.00. On 31st May 1999, the balance in this call account was confirmed as M108,842.80. In paragraph 2 of the opposing affidavit, it is alleged that the plaintiff/applicant is indebted to the 3rd defendant/respondent, in the sum of M505,583.44. Presumably this was the outstanding balance in his loan account. On 14th February 2000, while the state of affairs of his accounts was as described above, plaintiff/defendant demanded payment of the proceeds of his call account from 3rd defendant/respondent. There was no payment of the said proceeds made as demanded. Perhaps plaintiff/applicant came to know that the 3rd defendant/respondent has, as alleged in paragraph 2 of the opposing affidavit, already used the money to set-off the debt owed by plaintiff /applicant to the 3rd defendant/respondent.

That is how the problem which led to this present litigation, arose. The plaintiff/applicant issued out summons described at the beginning of this judgment on 29t February,2000. An entry of APPEARANCE TO DEFEND was filed. This application then followed. The summary judgment procedure is provided for by a statute, i.e. Rule 28 of HIGH COURT RULES, Legal Notice N0.9 of 1980. The objective of this procedure is therefore limited within the perimeters of that enabling statute. The plaintiff is permitted to go through this shortcut in order to effect almost immediately, the enforcement of his claim, only in those circumstances where such plaintiff has a very clear and unanswerable case against the defendant MAHARA J v BARCLAYS NATION BANK LTD 1976 (1) SA 418. This procedure has been described in numerous cases as the most extraordinary and "very stringent" in that it closes the door to the defendant, without first giving him or her an opportunity to be heard. e. g. *Schoemann v Newmark LTD 1919 CPD 55*

Maisel v strul and others 1937 CPD 128
Roscoe v Stewart 1937 CPD 138
Wise & Co (africa) LTD v Gin 1946 CPD 524
Mowschenson + Mowschenson v Merccintile AcceptanceCorporation of S A Ltd 1959 (3) S A 365
Shingadia v Shingadia 1966 (3) S A 24
Nedbank v (Lesotho) Limited and Sotho Development Corporation (Pty) LTD CIV/T/450/99 [unreported]

The drastic nature of this summary judgment procedure has worried the courts all

the time and invariably calls for close attention and perspection. The attitude to be adopted throughout such a procedure has been succinctly described in the judgment of *FASHION CENTRE AND ANOTHER V JASAT 1960 (3) SA 221 (N) at 222 B-C by HARCOURT AJ* [as he then was] thus:- "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 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". [My underlining]

In order to resist this summary judgment application, the defendant is required by Rule 28 (3) HIGH COURT RULES *[supra]* to do the following:-

> "(a) give security to the plaintiff to the satisfaction of the registrar for judgment including such costs as 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 facts, that he has a *bona fide* defence to the action".

In compliance with the above mentioned rule, one NYAKALLO MOHAPELOA,

has deposed to an affidavit which was filed with this court in terms of the rules. At paragraph 2 of that opposing affidavit by NYAKALLO MOHAPELOA, it is alleged that plaintiff is indebted to the 3rd respondent in the sum of M505,583.44. This amount is due and payable and despite demand the plaintiff has failed to pay the same. It is further alleged that the 3rd respondent is entitled in common law as the circumstances dictated to take and use money deposited by plaintiff in other accounts to set-off the debt which plaintiff owes the 3rd defendant.

It is sufficient, in the resistance to an application for summary judgment, by oral evidence or by opposing affidavit, as in this case, for the defendant to show the court that he or she has a *bona fide* defence. The defendant is not required to deal exhaustively with the facts on which the defence is founded. The particularity and completeness of the *bona fide* defence alleged in the opposing affidavit should not be exactly as in the plea. *FASHION CENTRE AND ANOTHER V JASAT [supra].* The main and perhaps the only question, which the court considering an application for summary judgment, should determine, is whether or not, in the light of the facts alleged in the opposing affidavit, is there a fairly triable or arguable issue before court? *FASHION CENTRE [supra] at 222 F-G.* If the answer is in the affirmative, the application for summary judgment must fail. *MAHARA J V BARCLAYS NATIONAL BANK LTD 1976 (1) SA 418 (A) at 425 G - H*

In the submissions made on behalf of plaintiff/applicant, the indebtedness to the defendant/respondent in the amount of M505583.44 is not denied. The main argument on behalf of the plaintiff/applicant is to the effect that the defendant is not entitled to set-off or to take and use the money deposited in the plaintiff/applicant's other accounts to set off the debt owed by plaintiff/applicant to the defendant/respondent. This issue must be determined at the trial in this matter not at this stage. The submission, goes on to describe the set-off claimed as a *bona fide* defence against plaintiff/applicant's claim, as a form of self-help which is not permitted in law unless there exist exceptional circumstances whereby the defendant might suffer more harm in the course of resorting to lawful means. The determination of the validity of the said defence of set-off, does not arise at this stage.

There are great difficulties with the above argument, particularly bearing in mind that set-off comes into operation immediately when the two parties are mutually indebted to each other and both debts are liquidated and due. It is not denied that plaintiff/applicant is indebted to the defendant/respondent in the sum alleged in paragraph 2 of the opposing affidavit. There is a document attached to the opposing affidavit of NYAKALLO MOHAPELOA. It is the Account Summary Enquiry dated 28th March 2000. Therein, it is shown the grant total of the loan account of

the plaintiff/applicant as M435,582.24. I am therefore satisfied that the indebtedness of the plaintiff/applicant to the defendant/respondent has been sufficiently alleged and proved *MOHAMED V MAGDEE 1952 (1) SA 410 (A)*. There is no dispute that both debts i.e. plaintiff's M108,842.80 and defendant's M505.583.44 are due and payable. *MAHOMED V NAGDEE* [*supra*] *SCHNEHAGE v BEZUIDENHOUT 1977 (1) SA 362 (0).* The defendant has a *bona fide* defence and therefore entitled to the granting of leave to defend. The application for summary judgment must fail and it is dismissed with costs.

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K.J. Guni
JUDGE
19th January, 2001

For Plaintiff : Mr. Matooane
For Defendant : Mr. Mphalane