

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.46/2021

In the matter between:

**SWAZI EMPAYER
APPELLANT**

AND

GRIFFITH MOJAPELA MAJORO **1ST**
RESPONDENT
DEPUTY SHERIFF (MR 'MUSI) **2ND**
RESPONDENT

CORAM: K E MOSITO P
P MUSONDA AJA
M H CHINHENGO AJA

HEARD: 19 APRIL 2022

DELIVERED: 13 MAY 2022

SUMMARY

Practice - Judgments and orders - Summary judgment — Appeal against granting of — Court hearing application for summary judgment should be slow to defeat purpose of summary judgment procedure by granting rescission, where satisfied that defendant has no bona fide defence.

Summary judgment — Liquidated amount — Appeal against granting of — Court hearing application for summary judgment should be slow to defeat purpose of summary judgment procedure by granting leave to appeal, where satisfied that defendant has no bona fide defence.

JUDGMENT

K E MOSITO P

Background to the appeal

[1] This is an appeal against a judgment of the High Court (Makara J). The court granted summary judgment against the appellant, ordering him to pay a certain amount of money allegedly due and owing to the respondent.

[2] When the proceedings in this appeal commenced, the appellant moved an application for condonation for the late filing of the record and heads of argument. There was no opposition to the application, and this Court duly granted it.

Facts

[3] The facts of this appeal are not in dispute. On 23 April 2019, the parties entered into a commercial contract in which the plaintiff (first respondent) was to perform certain professional services for the defendant (appellant). The first respondent duly performed his obligations. The appellant failed to pay as agreed. The first respondent issued summons against the

appellant for payment of the sum of Three Hundred and Twenty thousand Maloti and Thirty Five Lisente (M320,000.25) being a contract sum agreed between the parties with interest and costs of sued. The appellant duly entered an appearance to defend. Plaintiff moved for summary judgment. The appellant did not file an opposing affidavit to the summary judgment application.

[4] On 16 December 2020, Makara J granted the summary judgment order. On 15 March 2021, the first respondent brought a rescission application but did not file security for the sum owing. The appellant only filed security for costs. The first respondent successfully opposed the rescission application.

[5] The appellant has approached this Court on two grounds. The first is that "[t]he courts below had not properly taken into consideration what is a liquid document for the purpose of granting of a summary judgment in terms of Rule 28(1)(b) of the High Court Rules 1980". The second ground of appeal was that the court a quo erred in granting the first respondent the order of summary judgment when the document before the court was not a liquid document which requires extrinsic evidence.

The issues

[6] The issue for determination is whether the court a quo erred in granting summary judgment on the facts of this case. Before considering the issue and grounds of appeal, it is apposite to turn to the legal principles applicable to the resolution of this appeal.

Law

[7] The purpose of summary judgment is to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim. The summary procedure is there to prevent delay where the defendant has no tangible or plausible defence and save the plaintiff from subjection to the rigours and expense of a trial only to establish that a defendant had no defence.¹ A defendant confronted with an application for summary judgment must show that he has a bona fide defence or a triable or arguable issue. It is a procedure intended to prevent fake defences from defeating parties' rights by delay and, at the same time, causing significant loss to plaintiffs who were endeavouring to enforce their rights. Suppose a court hearing an application for summary judgment is satisfied that a defendant has no bona fide defence to a plaintiff's claim and grants summary judgment. In that case, it should be slow thereafter to grant rescission thereof, lest it undermines the very purpose of the procedure.

"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) (b)for a liquidated amount in money
- (c) (c)for delivery of specified movable property,
- or
- (d) (d)for ejectment."

¹ Leen v First National Bank (Pty) Ltd C of A (CIV) 16A of 2016;

[8] And further, under sub-rule (2), it provides that 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 amount; if any claimed and such affidavit must state -that in the opinion of the deponent the defendant has no *bona fide* defence to the action and, that entry of appearance has been entered merely for delay. If the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit.

Consideration of the appeal

[9] As indicated above, there are two grounds of appeal in this matter. The first complaint is that “[t]he court below had not properly taken into consideration what is a liquid document for the purpose of granting of a summary judgment in terms of Rule 28(1)9b) of the High Court Rules 1980”. The appellant contends that the plaintiff’s claim was not based on a liquid document and, therefore, summary judgment was incompetent.

[10] Advocate Monate for the appellant contended that the judgment is not based on a liquid document and is therefore incompetent for a liquidated amount in money. Before this Court delving into the merits of this ground, it must be borne in

mind that, under Rule 28(1)9b) of the High Court Rules 1980, the plaintiff may apply for summary judgment on a:

"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
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- (c) (c)for delivery of specified movable property, or
- (d) (d)for ejectment."

[11] In this case, the first respondent has not purported to base his claim on a liquid document. His claim is based on a 'liquidated amount in money.' It is trite law that "[a] claim cannot be regarded as one for 'a liquidated amount in money unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.'"² The law is settled that:

"A liquidated amount in money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or put differently, where ascertainment of the amount in issue is a mere matter of calculation."³

[12] The Court must not look only at the summons in deciding whether a claim is for a liquidated amount of money, but the opposing affidavit must be taken into account if it has been filed. There was no opposing affidavit in this case. In my opinion, the court a quo correctly granted the summary

² Botha v W Swanson & Company (Pty) Ltd 1968 (2) PH F85 (CPD).

³ Tredoux v Kellerman 2010 (1) SA 160 (CPD) at 166E-F.

judgment application because the application was based on a liquidated amount in money which is expressly agreed upon in the written contract between the parties. This ground must therefore fail.

[13] The second ground of appeal was that the court *a quo* erred in granting the first respondent on the order of summary judgment when the document before the court was not a liquid document which requires extrinsic evidence. This ground is, in essence, not different from the first because it is based on a misconception of the law. I agree with advocate Ratau for the first respondent that the application was based on a liquidated amount in money which is expressly agreed upon in the written contract between the parties. In my opinion, the contract document spells out the document and the amount to be paid. As indicated above, a liquidated amount in money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment.

[14] By way of concluding, it is necessary to say something regarding the grant of rescission in cases in which summary judgment has been granted. Suppose a court hearing an application for summary judgment is satisfied that a defendant has no *bona fide* defence to a plaintiff's claim and grants summary judgment. In that case, it should be slow thereafter to grant leave to appeal, lest it undermines the very purpose of the procedure.

[15] I am of the opinion that the appeal must be dismissed. The judgment in the court *a quo* which the plaintiff sought to

rescind was not founded on a liquid document of debt; it was based on the claim as set out in the summons, supported by the consent to judgment signed by the defendant.

Disposal

[16] I am of the view that the plaintiff's claim is capable of speedy and prompt ascertainment. The plaintiff could rely on a liquidated amount in money to obtain summary judgment in the circumstances. From the foregoing, I conclude that the appeal cannot succeed on any of the points raised by the appellant. When this factor is considered together with the facts and circumstances surrounding the appellant's failure to file an opposing affidavit and the prejudice to the respondent, the result is inevitable. There is simply no basis upon which this appeal can succeed. The appeal must be dismissed for lack of a *bona fide* defence.


Order

[17] For the reasons stated in this judgment, the appeal is dismissed with costs.



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I Agree



P MUSONDA AJA
ACTING JUSTICE OF APPEAL

I Agree



M H CHINHENGO
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADVOCATE K MONATE

FOR RESPONDENTS: ADVOCATE S RATAU