

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU  
1/2022**

**C of A (CIV)**

**CCT/0325/2021**

In the matter between -

**'MATHATO  
APPELLANT**

**NCHEKE**

and

**FIRST NATIONAL BANK OF LESOTHO LTD  
RESPONDENT**

**CORAM:** K E MOSITO, P  
J VAN DER WESTHUIZEN, AJA  
N T MTSHIYA, AJA

**HEARD:** 13 APRIL 2022

**DELIVERED** 13 MAY 2022

***SUMMARY***

*A plaintiff may apply for summary judgment in terms of Rule 28 of the Rules of Court after the filing of a plea by the defendant. A vague allegation that the amount of interest accumulated by an outstanding debt does not constitute a bona fide defence under Rule 28.*

## **JUDGMENT**

### **J VAN DER WESTHUIZEN, AJA:**

#### **Introduction**

[1] Unemployment, with the financial disability that results from it, is a plague in Lesotho and elsewhere in Africa and the world. It almost inevitably causes ordinary people who borrow money from financial institutions to kickstart a respectable life ending up in disputes with those institutions, who – of course – have to get their money back, inter alia in order to assist others who need to borrow.

[2] Whether the appellant in this case, ms 'Mathato Ncheka, falls in the above category, is not known. She was indeed unemployed when the respondent, First National Bank, insisted on the repayment of money loaned to her.

[3] This is an appeal against a judgment by Mokhesi J, dated 15 December 2021, in the High Court (Commercial Division). The appellant in this Court was the defendant in the High Court. The present respondent was the plaintiff.

[4] The appeal raises two crisp questions:

(i) May a plaintiff apply for summary judgment in terms of Rule 28 of the Rules of Court after the defendant has filed and served a plea?

(ii) If so, did the defendant in this case have a bona fide defence to the plaintiff's claim?

## **High Court**

[5] The respondent issued summons against the appellant for payment of M267 798.35, being the outstanding balance on a personal loan. In terms of a written agreement, she had to repay the amount she borrowed in 60 monthly installments. It is common cause that she defaulted and was in arrears in the amount of M73 239.97, which arrears were increasing with every non-payment.

[6] After receiving the summons, she entered appearance to defend. She simultaneously filed a plea.

[7] She did not dispute the agreement, its terms, or the fact that she was in default. Rather, she disputed the interest which she regarded as inflated.

[8] After being served with the appearance to defend, together with the plea, the respondent filed and served an application for summary judgment in terms of Rule 28(1)(b), on the grounds that she had no bona fide defence and that the appearance to defend was a delaying tactic.

[9] Only then did the appellant file an affidavit in terms of Rule 28(3). She raised two points *in limine*, namely that there was a dispute of fact that could not be resolved on the papers and that the court process was irregular.

[10] The High Court dismissed the first point. With reference to case law, as well as common logic, the judge strongly opined that it had been trite for about a decade in Lesotho that a material dispute of fact – should it exist – cannot be raised as a point in *limine*.

[11] The second point was that court processes had been violated by the application for summary judgment after the filing of a plea. According to the appellant, the respondent should have replicated to the plea.

[12] The High Court referred to Rule 28(1) and (2): When a defendant has entered an appearance to defend, the plaintiff may apply to a court for summary judgment on the claim in the summons if the claim is, inter alia, for a liquidated amount of money. The plaintiff who so applies must within 14 days after the date of delivery of the entry of appearance, deliver notice of the application. This notice must be accompanied by an affidavit, stating that in the opinion of the deponent the defendant has no bona fide defence to the action and that appearance has been entered merely for the purpose of delay. Subsection (3) provides for the defendant to file an affidavit in answer to the plaintiff's affidavit.

[13] According to the High Court, nothing in the Rule prohibits an application for summary judgment after the filing of a plea, as long as the stipulated timelines are adhered to. Subrules (1) and (2) describe the stages in the summary judgment procedure. The plaintiff may not apply for summary judgment before the defendant has intimated an intention to defend. The

Court referred to Herbstein and Van Winsen *The Civil Practice in the High Courts of South Africa* 5<sup>th</sup> edition vol 1 at 524, with regard to the largely corresponding Rule 32 in South Africa; *Vesta Estate Agency v Schlom* 1991(1) SA 593 (C) at 595; and *Olaf Leen v First National Bank of Lesotho (Pty) Ltd C of A (CIV)* No 16A/16 (28 October 2016) at 10. It dismissed the point.

[14] The High Court proceeded to the question whether the appellant had a bona fide defence and found that she had none. She did not dispute that she owed money to the respondent, but only what she called “inflated interest”. She did not swear positively that she had a bona fide defence, as required by Rule 28(3). The Court concluded: “This is a classic case of a plea being filed merely to delay the plaintiff’s claim.”

[15] Summary judgment was granted.

### **Grounds of appeal; submissions; analysis**

[16] The appellant’s grounds of appeal, submissions made on behalf of the parties and an analysis are dealt with together here, in order to avoid repetition. Question (i) in [4] above is addressed first. If the answer is that summary judgment may not be applied for after the filing and delivery of a plea, the matter will end there and the appeal must succeed. If found otherwise, question (ii) – whether the appellant had a bona fide defence – requires attention.

[17] On behalf of the appellant it was submitted that the High Court “had disregarded” Rule 28(1) and (2) and thus erred. Counsel argued that the Rule states that a plaintiff may apply for summary judgment after the entry of appearance to defend,

not after the filing and delivery of a plea. The argument is unconvincing. As stated by the High Court, relying on authority, the Rule merely states that a plaintiff may not apply for summary judgment before the entry of appearance to defend, after which it can be done within 14 days. As long as this time period is honoured, nothing in the Rule prevents an application after the plea.

[18] Counsel for the appellant pointed out that Rule 32 of the South African Uniform Rules of Court, referred to by the High Court, had been amended, to provide specifically for summary judgment to be applied for after the filing of the plea and not after the delivery of appearance to defend. To the extent that the South African development is relevant, it could be interpreted in two ways. It could either indicate that Lesotho deliberately refrained from amending Rule 28 in a similar way in order to prevent summary judgment applications from being launched after the filing of the plea; or that the South African amendment represents the direction in which law and practice have developed and might even be followed in Lesotho in due course.

[19] Counsel for the appellant argued for the first possibility. However, the authority quoted in his written heads of argument (*FirstRand Limited v Excel Baleni Shabangu* [2018] ZAGHCD 9 (*sic*)) indicates the opposite. The very circumstances that apply in Lesotho are mentioned as the reasons for the amendment. After mere entry of appearance to defend the plaintiff knows little about the defendant's defence and whether it is bona fide, or merely intended to delay. The defendant's affidavit in terms

of Rule 28(3) follows the application for summary judgment. The plea indicates to a much larger extent what the defence is. This case is in fact a good example. From the appellant's plea the respondent learnt that her only defence was to dispute the amount of the interest.

[20] Like the High Court, I do not find anything in the wording of Rule 28 that prevents an application for summary judgment after the filing and delivery of a plea. In this regard the Court did not err.

[21] Neither did the High Court err in concluding that the appellant had not shown a bona fide defence. To be surprised by the amount of interest accumulated as a result of an outstanding debt is a normal response, well known by those in that position; to wish to quibble about it a natural reaction; and to attempt to raise it as a defence in a court of law without a concrete alternative calculation all too common.

[22] The appellant's defence is far too vague to be regarded as a bona fide one. She stated under oath that she had thorough knowledge of the calculation of interest; and that her calculation differed from that of the respondent. However, she did not put forward a concrete calculation resulting in a different amount. Counsel for the appellant argued that the issue of a bona fide defence was irrelevant. In accordance with his submission about the timing of the summary judgment application and Rule 28, the court need not reach the bona fide defence question.

[23] The above disposes of question (ii) in [4] above. The appeal must fail. Besides human sympathy, there is no reason why the appellant should not pay costs.

**Order**

[24] The appeal is dismissed with costs.



---

**J VAN DER WESTHUIZEN  
ACTING JUDGE OF APPEAL**

I agree:



---

**K E MOSITO  
PRESIDENT OF THE COURT OF APPEAL**

I agree:



---

**N T MTSHIYA  
ACTING JUDGE OF APPEAL**

**FOR THE APPELLANT:**

ADV BE SEKATLE



**FOR THE RESPONDENT:** ADV SP SHALE