CIV/T/ 182/ 2010

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

In the matter between:

STANDARD LESOTHO BANK LTD PLAINTIFF

And

ILECK MAHOMED DEFENDANT

Hearing date : 3rd of June 2010

JUDGMENT

Delivered by the Honourable Mr. Acting Justice J.D. Lyons
On 7th day of June, 2010

Summary judgment – further forward step precludes summary judgment – evidence not permissible in summary judgment application – unacceptable practice of annexing copies of documents to pleadings – rules of evidence for production of copies of documents and of pleading must be followed.

This is an application to summary judgment.

The plaintiff bank issued a summons on 26 March against the defendant claiming monies owing.

The defendant entered an appearance on 20 April. It appears that this notice was served on the plaintiff on 15 April.

On 20 April the plaintiff filed its declaration.

On the same day the plaintiff filed a notice of application for summary judgment pursuant to rule 28 (1) (b).

Counsel for the defendant raised a number of preliminary points. I do not intend to canvass each point individually. The thrust of his argument was that, as this is a matter of summary judgment, the plaintiff must strictly follow the rules.

Counsel also raised an objection to the annexures to the summons and the declaration. He is correct. They are evidential documents and not pleadings. As such they are excluded in a summary judgment application – see rule 28 (4).

I do not intend to rehearse all counsels' arguments. To my mind the matter is very clear. Counsel for the defendant has made out his case.

Rule 18 (5) reads as follows: --

"The summons shall contain a concise statement of the material facts relied upon by the plaintiff in support of his claim, in sufficient detail to disclose a cause of action."

Matters pertaining to a declaration are found in the rule 21. A declaration is different from a summons. That is so obvious as to not need explanation.

Rule 28 (1) as is relevant, reads as follows: --

"Where the defendant has entered appearance to defend the plaintiff may apply to the court for summary judgment on such of the claims in the summons as is only --
(b) for a liquidated amount in money."

The rule is pellucidly clear. Summary judgment relates to such claims as are

pleaded in the **summons**. That does not mean that reference is to be had to any declaration or other pleading that may have been filed.

So when deciding a summary judgment application the court must have reference only to the summons and what is pleaded therein. I turn to that pleading.

The pleading states that the plaintiff, (I quote, as it is written)

"hereby institutes action against the Defendants in which action the Plaintiff's claim is for the balance of M 5,849,414.80;

in respect of monies lend and advanced by the Plaintiff to the Defendant at the latter's special instance and request which amount remains due and payable notwithstanding proper demand, the detail of which are set out in Annexure 'A" hereto."

Annexure 'A' is a photocopy of what purports to be a facility letter addressed to the defendant by the plaintiff. As counsel for the defendant correctly pointed out, it is an evidential document. Furthermore it is not properly before the court. It is a copy of an original document. There is a proper manner of putting such documents before the court. There is no certification that states that it is a true copy and it cannot be considered as part of a plea. It is not a pleading of a material fact and presented in that manner it is inadmissible. I have noticed this practice that instead of pleading with particularity, the pleader simply annexes documents to the pleading. This practice is unacceptable. The documents are evidence and there is a correct way in which to put them before the court. Annexing them to a pleading with no certification is not the correct way and does not comply with the rules of evidence or pleading. Whilst not saying this has happened here, photocopied documents are capable of manipulation. The

correct manner to present them to a court is to have a witness swear to the fact that the exhibited copy is a true copy of the original. This is fundamental.

If lawyers wish to persist in this practice they may do so at their own risk for the Court is perfectly entitled to disregard documentary evidence presented this way. It appears to me that this is just a lazy practice that has been adopted over the years to avoid the precision required in properly pleading a case.

I am left therefore with the cause of action as pleaded by the plaintiff and as set out above. It is woefully inadequate. It goes nowhere near representing "a concise statement of the material facts relied upon by the plaintiff in support of his claim, in sufficient detail to disclose a cause of action". There is no mention of the date of the agreement, the date of the default (or if there has even been a default) or the date of the demand. The matters pleaded in paragraph 6,7,8 and 9 of the declaration are more like the pleadings that one would expect to find in a summons where summary judgment was anticipated.

As I have said the summons is quite inadequate for the purposes of summary judgment. For that reason the application to summary judgment is dismissed with costs to the defendant to be taxed if not agreed.

For completeness I will cover two other preliminary points raised by counsel for the defendant. Mindful of what the Court of Appeal said in **K. Makoala v M. Makoala** (C of A Civ 4.09), they are proper preliminary points (or points in limine).

In the attestation clause to the affidavit of Mr. Snelgar filed in support of the application, the words ‘knows and understands’ are missing. This does not strictly comply with regulation 5(2) of the Oaths and Declarations Regulations. In

my view this does not vitiate the affidavit. The content of the affidavit and the fact that it is properly sworn with apparent knowledge of the meaning of ‘swearing’ to the truth are what is important. To be fair Counsel did not pursue this point with his usual vigour.

It was argued that by the plaintiff having taken a further step after the filing of the entry of appearance (the filing of the declaration), it had precluded it self from bringing the application for summary judgment.

This point appears obvious.

The law is concerned with the proper procedure, without which the law would descend to ‘Rafferty’s rules”. (For the uninitiated, ‘Rafferty’s rules’ in an informal Australian and New Zealand expression that means there are no rules at all and anything goes). The law operates on a foundation of certainty both in the application of the law and procedurally in its administration.

With that in mind, the process of commencing civil litigation by summons is provided for in the rules. A summons is first filed and served. The entry of appearance then follows (if not judgment can be taken by default). Then the plaintiff has to take one of two options:- either proceed towards trial by filing the declaration, or proceed by way of summary judgment. There is no room in the process for any other step. The process defined in the rules is clear:- file the summons, receive the entry of appearance, then if summary judgment is the chosen option, proceed only on the pleading in the summons.

I note the practice of filing the summons and declaration at the same time. I suppose that is a convenient way of proceeding, and though not in strict compliance with the rules, can probably benefit from an exercise of the Court's discretion by application of rule 59 – provided, of course, that the rules and proper processes of evidence and pleading are followed. I harbour some doubt that this 'practice' would permit a summary judgment application. Certainly the declaration could not be relied on. The rules as to pleading differ. Unlike the summons, the declaration allows for the pleading of conclusions of law - see rule 21 (2).

As summary judgment relies solely on the pleading contained in the summons, then, logically that pleading must contain all the particularity necessary to support a judgment against the defendant. Once the summons has been filed and an entry of appearance made, the further steps a plaintiff can take to move the matter forward are to move to summary judgment, to file a declaration or to file an answer for further particulars if so requested (although this latter step would be unusual prior to delivery of a declaration). The point is that which ever further step a plaintiff took other than summary judgment it would most likely (by definition and by application of the rules – see rule 21.2), result in the pleading by the plaintiff of additional particulars. A plaintiff must plead such particulars as are necessary to prove its case. By taking a further forward step that must require pleading of further particulars, a plaintiff is tacitly (at least) acknowledging that the pleading contained in the summons is deficient of sufficient particularity to prove its case. Hence it must follow that the summons is unable to support summary judgment. Thus the taking of a further forward step must logically be said to preclude (or disqualify, if you like) a plaintiff from taking summary judgment under rule 28.

The practice is straightforward, and if properly followed this problem should

seldom be encountered. If the client's instructions lead to a conclusion that summary judgment is a viable option, bearing in mind that the law requires that the defendant's position be demonstrated on the pleading to be hopeless, then the summons is comprehensively pleaded so as to prepare for the forthcoming summary judgment application. Practitioners should keep in mind that the threshold is set very high. This is due to the very nature of summary judgment, which is the removal of the defendant from the judgment seat without being given a full hearing. If there is any doubt, it is best to take the trial process option.

J.D. LYONS

JUDGE (AGT)

For plaintiff : Mr. Mpaka.

For defendant : Mr. Mahlakeng.