CIV/A/08/2012
CC93/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:

PUSELETSO LETHOLE **Appellant**

And

KEL PROPERTY CO (PTY) LTD **Respondent**

JUDGMENT

CORAM: **HON. HLAJOANE J**

DATE OF HEARING: **22ND OCTOBER, 2012.**

DATE OF JUDGMENT: **26TH NOVEMBER, 2012.**

Summary

Magistrate's Court having granted Application for summary judgment – Appeal against such a decision – the cause of action having not been disclosed – Having failed to establish clear terms of contract of Non compliance with Provisions of Rule 14 (2) (a) of High Court Rules – Appeal upheld with costs.

ANNOTATIONS

STATUTES

1. **High Court Rules Legal Notice No.9 of 1980**

CASES

1. **Joel's Bargain Store v Shorkend Bros (Pty) Ltd 1959 (4) S.A. 263 at 266**
2. **Dowson & Dobson Industrial v Vanda Werf 1981 (4) S.A 417 at 423**

[1] The appeal is against the decision by the Magistrate's Court Berea which granted summary judgment against the appellant herein.

[2] The case before the Magistrate was for ejectment from admittedly the respondent's premises situated on plot no. 19223/561 at Teyateyaneng Urban area.

[3] There was no dispute that the appellant was in occupation of the respondent's property on some tenancy agreement. The respondent contented that the appellant sublet the premises without prior consent by the respondent and that that new tenant was not even paying any rentals to him.

[4] Respondent's case has been that it had given the appellant a one month's notice to vacate the premises on or before the 31st January 2011, but that appellant failed, neglected or refused so to vacate. Hence the claim for ejectment.

[5] I must say that though the appellant showed that respondent applied for summary judgment as appellant before filing her plea had entered appearance to defend, there appeared to be no such appearance in the papers forming part of the record placed before me. However a plea was filed.

[6] The respondent applied for summary judgment after the filing of plea, but though was opposed the Court however granted summary judgment.

[7] It has been the appellant's case that she effected improvements on the property which by agreement constituted rent. He also said though tenancy has not been in dispute but the length of such tenancy was in dispute so that could not be proper to say there was no defence.

[8] Appellant further showed that the amount of rent had not been specified, even the amount of arrear rentals. There has been no prayer for payment of arrear rentals.

[9] On the question of the terms of that contract it was argued by appellant that in the absence of any clear terms of their contract of tenancy it could not be said that the cause of action in the summons was disclosed.

[10] He relied for such argument on the case of **Dowson & Dobson Industrial v Vander Werf**[1]**,** where it was stated that;

"there can be no doubt that summary judgment cannot be obtained in respect of a summons which fails to disclose a cause of action."

Appellant has thus contented that the respondent failed to allege the terms of the contract as required by law to sustain a cause of action. The amount of rent has also not been specified.

[11] Summary judgment would only be granted where the trial Court is of the feeling that there is no defence and that the defendant has only entered appearance to defend just to delay the proceedings and buy time to enjoy what clearly does not belong to him. But at the trial the appellant had pleaded issues that constituted a defence.

[12] The appellant clearly pleaded that there was an agreement for her to make improvements to the property and even showed the amount which were involved that were to be taken as constituting rent. That was a clear defence to the claim against her and defeated the whole idea of asking for a summary judgment.

[13] But from the papers filed by the appellant in her affidavit opposing the granting of a summary judgment, she said at paragraph 7 thereof that their five year contract was to end on 31st December,

[1] 1981 (4) S.A. 417 at 423

2010, yet at para 5 she had said was to terminate on the 31st December, 2012.

[14] True enough in argument counsel for the appellant showed that the 31st December 2010 was a typo error, but have not been told as to from when the five year period was supposed to start.

[15] But again from the affidavit filed by George Thabo Monaheng in support of the summary judgment application, he has deposed to the fact that as a member of Board of Directors of the 1st respondent it came to their attention that 1st defendant had sublet to 2nd defendant for a period of five years ending on the 1st June, 2012.

[16] If therefore we were to believe when appellant said the tenancy agreement with 1st respondent was for five years ending on the 31st December, 2012, then she must have sublet the premises shortly after she took occupation so that she must have not been paying rent for the whole of that period.

[17] All these goes to show that the facts of this case have not been that straight forward to have concluded that there was no defence and therefore a proper case for the granting of a summary judgment.

[18] Again looking at Annexures "L1" and "L2" attached to the affidavits to oppose summary judgment application, the letters are dated 22nd November 2005, which means the tenancy agreement

was already in operation in 2005. And counting the five years from that period could not be correct to say termination was supposed to be anytime in 2012 but earlier. The 2010 could therefore not have been a mistake as from 2005 five years would go up to 2010.

[19] I am obliged to endorse what has been said by the appellant in the heads of argument that authoritatively summary judgment is only to be granted in clear cases particularly because it is a drastic step.

[20] I would not even bother to go to the issue of absence of Ministerial Consent in entering into a sublease agreement as it was not pleaded but only raised for the first time in the affidavit in support of application of summary judgment.

[21] Appellant has also challenged the affidavit in support of application for summary judgment from another angle. The deponent had shown that he deposed to facts that were known to him and those gleaned from the records. Appellants argued that it was necessary to have stated which facts fall under either category.

[22] The argument above was based on the fact that the deponent averred that he was Director, but not Managing Director of 1st respondent. Appellant has challenged the deponent to that affidavit when he said the facts fall within his personal knowledge. That was because the appellant has specifically stated that she had

been dealing with Messrs Mokhahlane and Molemohi and never mentioned Mr Monaheng. Annexures "L1" and "L2" confirmed her dealings with Mr Molemohi.

[23] Based on the decision in **Joel's Bargain Store v Shorkend Bros (Pty) Ltd**[2] the appellant submitted that summary judgment should not have been granted unless the 1st respondent could have filed an amplifying affidavit dealing with that aspect.

[24] Again in terms of **Rule 28 (2)**[3] the appellant submitted that deponent to an affidavit in support of summary judgment should be one who must swear positively to the facts. And also that in terms of **Rule 28 (2) (a)** such person must state that in his opinion the defendant has no *bona fide* defence to the action. But such has not been the case *in casu*.

[25] Because of the following;

(a) non-compliance with the provisions of **Rule 28 (2) and 28 (2) (a)** and

(b) absence of clear terms of the alleged contract between the parties thus failing to disclose a cause of action, and

[2] 1959 (4) at 263 at 266
[3] High Court Rules

© failing to reveal which facts were known to deponent in affidavit in support of application for summary judgment, and which were gleaned from the records, and

(d) failing to have filed an amplifying affidavit when there was proof of correspondence by people whom appellant stated she had been dealing with besides the deponent to the affidavit in support of application for summary judgment.

The appeal must be upheld, and it is so upheld with costs.

A. M. HLAJOANE
JUDGE

For Appellant: Mr Teele KC

For Respondent: Mr Mohau KC