

**CIV/T/243/2013**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**DENCOR LESOTHO (PTY) LTD**

**Plaintiff**

**and**

**AL BARAKAH INVESTMENT (PTY) LTD**

**Defendant**

**JUDGMENT**

**Coram:** **Hon. Hlajoane J**

**Date Heard:** **8<sup>th</sup> August, 2013.**

**Date of Ruling:** **19<sup>th</sup> August, 2013.**

**Summary**

*Application for summary judgment – Plaintiff having filed both summons and Declaration at the same time before the application – Contravention of Rules 28 (1) and 15 (1) of the High Court Rules 1980 – application dismissed with costs.*

## Annotations

## Statutes

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

## Books

## Cases

### **1. CIV/T/182/2010 Standard Lesotho Bank v Ileck Mahomed**

- [1] Plaintiff has instituted an action against the defendant for payment of the amount of M200, 000.00 with 18.5% interest *tempore morae* and costs.
- [2] Plaintiff filed his summons together with the particulars of claim all at the same time on the 17<sup>th</sup> March, 2013. Service of the summons on the defendant was effected on the 23<sup>rd</sup> April, 2013. Notice of appearance to defend was duly served and received by the plaintiff on the 6<sup>th</sup> May, 2013.
- [3] Though filed on the 31<sup>st</sup> May, 2013 defendant served his plea or had served his plea on the 27<sup>th</sup> May, 2013. He has attached to his plea document on conditions of sale and a memo of a sublease. Plaintiff's counsel filed notice of application for summary judgment on the 23<sup>rd</sup> May 2013 which means that when the plea was filed and served plaintiff's counsel had already filed the notice

for summary judgment which was received same day the 23<sup>rd</sup> May 2013.

[4] The Application for summary judgment was opposed and in the opposing affidavit defendant's counsel raised some points *in limine*.

[5] The first point being that when plaintiff filed application for summary judgment, he was already time barred as he had filed both the summons and declaration at the same time which amounted to taking a further step.

[6] The Court per Lyons AJ in **Standard Lesotho Bank Ltd v Ileck Mahomed**<sup>1</sup> explained the import of **Rule 28(1) and 28 (1) (b)**<sup>2</sup> which read as follows:

**Rule 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 –*

*28 (1) (b) for a liquidated amount in money*

[7] The Court in the above case showed that summary judgment

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<sup>1</sup> CIV/T/182/2010

<sup>2</sup> Legal Notice No.9 of 1980 High Court Rules

relates to such claims as are pleaded in the summons. So that when deciding a summary judgment application the Court must have reference only to the summons (my emphasis) and what is pleaded therein.

[8] **Rule 18 (5)** deals with summons and it reads:-

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

[9] **Rule 21 (1)** on the other hand deals with declaration and it reads thus:-

*“within 14 days after service upon him of the entry of appearance the plaintiff shall deliver a declaration.”*

[10] The reading of the two Rules above makes it clear that in filing a trial action, summons must first be filed and served on the defendant. That it would only be after the filing of appearance to defend that the declaration shall be filed. That clearly indicates that declaration is a step different from a summons. So that as was decided by my brother Lyons AJ in deciding a summary judgment application the Court must have reference only to the summons and what would be pleaded therein.

[11] It becomes clear therefore that *in casu* since the plaintiff had filed both the summons and declaration / particulars of claim at the same time he must be considered to have taken a further step, so that he was barred from applying for a summary judgment.

[12] On the point of failing to file power of Attorney by plaintiff's counsel, defendant's counsel relying on the provisions of **Rules 15 (i)** argued that such failure rendered the action so filed a nullity. The rule is framed thus;

*“Any party bringing or defending any proceedings in person may at any time appoint an attorney to act on his behalf, who shall file a power of attorney.....”*

[13] It is clear from the above that since the word shall has been used, failure to comply with that mandatory provisions by not filing any power of Attorney rendered the papers filed a nullity because of lack of mandate to act for client.

[14] Even assuming that it was proper for the plaintiff to have applied for summary judgment where he had filed both summons and declaration at the same time, the filing of plea would have been taken as a bar to the application for summary judgment until such

time that it would have been set aside as an irregular step on an application in terms of **Rule 30 (i)**.

[15] Because the respondent has been successful in all the points taken *in limine* which points went to the roots of the claim plaintiff's application for summary judgment stands to be dismissed and it is so dismissed with costs.

**A. M. HLAJOANE**  
**JUDGE**

**For Plaintiff / Applicant:            Mr Kleingeld**

**For Defendant / Defendant:        Mr Nteso**