

IN THE HIGH COURT OF LESOTHO
(COMMERICAL DIVISION)

HELD AT MASERU

CCT/0325/2021

In the matter between: -

FIRST NATIONAL BANK OF LESOTHO LTD

PLAINTIFF

AND

‘MATHATO NCHEKA

DEFENDANT

Neutral Citation: First National Bank of Lesotho Ltd v ‘Mathato Ncheka
(CCT/0325/2021) [2021] LSHC 143 COM. (15TH DECEMBER 2021)

JUDGMENT

CORAM: MOKHESI J

DATE OF HEARING: 25TH NOVEMBER 2021

DATE OF JUDGMENT: 15TH DECEMBER 2021

SUMMARY

CIVIL PRACTICE: *Application for summary judgment- whether it is permissible for the applicant to lodge same after the respondent had filed the plea- Held, it is permissible to do so, - Respondent failing to show that she has a bona fide defence, summary judgment granted with costs.*

ANNOTATIONS

Legislation:

High Court Rules 1980

Books:

Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa*
5 ed. Vol. 1

Cases:

Makoala v Makoala LAC (2009 – 2010) 40

Vesta Estate Agency v Schlom 1991 (1) SA 593 (C)

Olaf Leen v First National Bank of Lesotho (Pty) Ltd C of A (CIV) NO. 16A/16 (28 October 2016)

[1] **Introduction**

This is an application for summary judgment in terms of Rule 28(1) (b) of the rules of this Court.

[2] **Factual Background**

The plaintiff issued summons against the defendant for payment of the sum of Two Hundred and Sixty Seven Thousand, Seven Hundred and Ninety Eight Maloti and Thirty Five Lisente (M267,798.35) being an outstanding balance on the defendant's personal loan account in relation to the written loan agreement entered into between the parties on the 25th October 2019. The material term of the agreement was that the defendant repays the loan amount plus interest in sixty (60) monthly instalments on the 20th day of every month until the full amount would have been repaid. It is common cause that the defendant defaulted in her monthly loan repayment and was consequently in arrears in the amount of Seventy-Three Thousand, Two Hundred and Thirty Nine Maloti and Ninety Seven Lisente (73,239.97), which arrears are increasing with every non-payment.

[3] The defendant, on receipt of the summons, entered an appearance to defend the action, which appearance to defend was simultaneously filed with her plea. In the plea, she does not dispute her default in repaying the loan, but rather seems to question what she perceives to be an inflated interest. She says she is currently unemployed. After being served with the said plea, together with the appearance to defend, the plaintiff served and filed an application for summary judgment in terms of Rule 28(1) (b) of the Rules of this court, on the ground that the defendant has no *bona fide* defence and that the appearance to defend was merely filed as a delaying maneuver, to its

claim. The defendant then filed and served her answering affidavit in terms of which she raised the two of the so-called points in *limine*, viz, dispute of fact and irregular court process. As already said, on the merits, the respondent seemed to put in contention the amount claimed by the plaintiff on account that the interest claimed, “is far too high taking into account the last payment I made.”

[4] **Issues for determination**

(i) The points in *limine* raised.

(ii) If the two points in *limine* are unsuccessful, whether the defendant has raised a *bone fide* defence to the plaintiff’s claim.

[5] I turn to consider the points in *limine* raised:

(i) Dispute of fact

It is the defendant’s contention that the calculations she made differs materially on the interest payable, and so, she argues, this shows that there is a dispute of fact which cannot be resolved on papers. She therefore argues that the amount of interest claimed is inflated. I do not wish to waste time on this issue. It keeps being hammered time and again by this court that a material dispute of fact cannot – provided it exists- and should not be raised as a point in *limine*, and this point was made more than ten years ago by the apex court in **Makoala v Makoala LAC (2009 – 2010) 40 at para.10**, but this problem continues unabatedly to plague civil practice in this court. As a reminder, when a point in *limine* is raised, only the

applicant's founding affidavit alone is considered for the purpose of deciding upon the validity of the point in *limine*. With this approach in mind, it makes logical sense then than a material dispute of fact cannot be raised as a point in *limine*, as without the respondent's answering papers, it is virtually impossible to determine whether a particular fact is disputed. It follows therefore, that this point ought to be dismissed.

[6] (ii) Irregular Court Process

It is the defendant's contention that the plaintiff's move to apply for summary judgment despite her filing the plea "violates the rules" of this court, the argument went on, a proper procedure would have been to replicate to the plea. Summary judgment is regulated by rule 28(1) which provides that:

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

[7] And further, under sub-rule (2), it provides that:

"(2) 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; it any claimed and such affidavit must state –

(a) that in the opinion of the deponent the defendant has no bona fide defence to the action and

(b) that entry of appearance has been entered merely for the purpose of delay.

If the claim is founded on a liquid document a copy of the document must be annexed to the affidavit.”

- [8] The question to be determined is whether upon the proper reading of this rule, it precludes the plaintiff from applying for summary judgment after the filing of plea by the defendant. The learned authors Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa 5 ed. Vol. 1* at p. 523, commenting of the similarly-worded Rule 32 of the South African Uniform Rules of Court, states that nothing in the rule precludes the plaintiff who has been served with the plea, as long as it within the times stipulated in the rule, from bringing an application for summary judgment as such a plea may found a good ground for lodgment of such an application (**Vesta Estate Agency v Schlom 1991 (1) SA 593 (C)** at 595. I endorse these views as being applicable in this jurisdiction, as there is nothing in the wording of Rule 28 which suggests a contrary position. In **Olaf Leen v First National Bank of Lesotho (Pty) Ltd C of A (CIV) NO. 16A/16 (28 October 2016)** at para. 14, p. 10, the court said of Rule 28:

“...Our Rule 28, in subrule (1), merely prescribes the stage in the course of litigation at which a summary judgment application may be made. It must be delivered within 14 days of the entry of appearance as provided in

subrule (2). This means that a plaintiff may not apply for summary judgment before the defendant has intimated an intention to defend...”

It follows that, on the basis of these authorities, that the so-called point in *limine* of irregular court process has no merit and ought to be rejected. I now turn to deal with the merits.

[9] **The merits**

When an application for summary judgment has been lodged, the defendant has two options available to her in terms of Rule 28(3). She may give security to the plaintiff for judgment including costs that may be awarded or to satisfy the court on affidavit, or with the leave of court, by oral evidence of herself or of any other person who can swear positively to the fact, that she has a *bona fide* defence to the action (see also **Olaf Leen v First National Bank Lesotho (above)** at para. 22. The *bona fide* defence must be such that when advanced at a trial in due course would most likely succeed (**Olaf Leen v FNB above**). In the present matter the defendant chose to depose to an affidavit, but interestingly, in the said affidavit, she did not dispute that she owes the plaintiff, what she instead wants to dispute is what she calls “inflated interest”, but does not provide any basis for it. She did not swear positively that she has a *bona fide* defence to the plaintiff’s claim. I therefore find that she did not show that has a *bona fide* defence to the plaintiff’s claim. This is a classic case of a plea being filed merely to delay the plaintiff’s claim.

[10] In the result

(a) Summary judgment is granted as prayed for in the Notice of Application,
with costs.

MOKHESI J

For the Plaintiff:

Adv. Shale instructed by Dr I. M. P. Shale

For the Defendant:

**Adv. B. E. Sekatle instructed by K. D. Mabulu
& Co. Attorneys**