

**IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)**

HELD AT MASERU

CCT/0006/2022

In the matter between –

RECO FINANCIAL SERVICES (PTY) LTD

PLAINTIFF

And

BATAUNG THULO

DEFENDANT

**Neutral Citation: Reco Financial Services (Pty) Ltd v Bataung Thulo No.1
[2022] LSHC 278 Comm. (21st October 2022)**

CORAM: M. S. KOPO, J

HEARD: 24th August, 2022

DELIVERED: 21st October, 2022

SUMMARY

*Procedural Law – Non-Compliance with the rules of court – summary judgment
– elements of a liquid document*

Annotations

Books

Bishop J M, et al .1994. Erasmus Superior Courts Practice. Main Volume. Juta and Co. Ltd

Cases

Lesotho

ICI LES (PTY) LTD V KT Goosen; Goosen V TCI Lesotho (PTY) LTD
(CIV/APN/205/94 CIV/T/148/94) LSACA 122 (27 July 1994)

Leen v First National Bank (Pty) Ltd (C of A (CIV) 16A of 2016) [2016] LSCA
27 (28 October 2016)

National University of Lesotho v Thabane (C of A (CIV)3/2008) [2008] LSCA
26 (17 OCTOBER 2008)

Moosa and Others v Lesotho Revenue Authority (C of A (CIV) 2/2014) [2015]
LSCA 36 (06 November 2015); **South Africa**

Trans-Africa Insurance Co. Ltd v Maluleka1956(2) SA 273(A)

Statutes

High Court Rules No. 9 of 1980

RULING

[A] Introduction

[1] RECO Financial Services (Pty) Ltd (RECO), is a company duly incorporated in terms of the laws of this land. On the 13th day of January, 2021, duly represented by one Moeketsi Ntaote, RECO instituted action proceedings against one Bataung Thulo (Thulo), a Mosotho male Adult of Motimposo in the district of Maseru.

[2] In its declaration, RECO pleaded that on or around the 21st day of June, 2021, it entered into a loan agreement with Thulo in terms of which it loaned him one **Hundred and Four Thousand Maloti (M104, 000.00)** which was to be paid with interest to the amount of **Twenty Thousand and Eight Hundred Maloti (M20, 800.00)**. According to RECO, it was also the term of the contract that Thulo would hypothecate their rights in land plot No. 13274-245 situated at Ha-Mabote in the district of Maseru and he duly did so.

[3] RECO further pleads that it was the term of the said contract that the loan would be repaid within a period of one month from the date of borrowing but has not been paid until the time of instituting summons (which was seven (7) months at that time). For that reason, therefore, RECO claims that the plot in question be hypothecated and that Thulo be ordered to pay **Two Hundred and Eight Thousand Maloti (M 208 000.00)**

[4] Thulo entered appearance to defend on the 21st day of February, 2022. On the 07th day of April, 2022, RECO instituted a Notice of Application for Summary Judgment which Thulo opposes. This matter is therefore about

that application for summary judgment. The parties will therefore henceforth be referred to as Applicant and Respondent respectively.

[B] APPLICANT'S CASE AND SUBMISSIONS

[5] Basically, the Applicant's case is that the Respondent breached the terms of the contract as he had to re-pay the loan in two (2) months. Secondly, the Applicant is of the opinion that the Respondent herein has no *bona fide* defence and has just entered a Notice of Appearance to defend merely for the purpose of delaying the administration of justice.

[6] On the point *in limine* raised by the Respondent that the Applicant instituted the Application for Summary Judgement way out of time prescribed by the rules, Advocate Jobo, who appeared for the Applicant argued that the Respondent should have instituted an Application in terms of **Rule 30 (1) of the High Court Rules**¹. Advocate Jobo further argued that this court has the discretion to condone the non-compliance of its rules. He based his argument on the Judgment by Monaphathi J. in **ICI LES (PTY) LTD V KT GOOSEN; GOOSEN V TCI LESOTHO (PTY) LTD**².

[7] Moreover, basing himself on **National University of Lesotho v Thabane**³, Advocate Jobo argued that this court should not encourage formalism of the rules of court based on injudicious and frivolous grounds. For this reason, therefore, he argues that this court should exercise its discretion to not allow technicalities in the absence of lack of evidence of prejudice.

¹Legal Notice No. 9 of 1980

²(CIV/APN/205/94 CIV/T/148/94) LSACA 122 (27 July 1994)

³C of A (CIV) No.3/2008 [2008] LSCA 26 (17 OCTOBER 2008)

[8] And finally, Advocate Jobo countered the argument by the Respondent that the Applicant has presented inadmissible evidence by attaching a “without prejudice letter”. She does this by arguing that this was a mistake done in an attempt to attach a loan agreement but instead attached a letter by the Respondent written without prejudice attempting to settle the matter. To this she prays that this court condones his mistake.

[C] RESPONDENTS CASE AND SUBMISSIONS

[9] Advocate Maseli appeared for the Respondent. He raised only two (2) points *in limile* in opposing the application. He firstly attacked the application by arguing that the Applicant has not complied with the rules of court, to wit; **Rule 28 (2) of the High Court Rules**. His case is that the application was filed some thirty-eight (38) days after entering the Notice of Appearance to defend contrary to rule 28 (2) that prescribes that it has to be entered within fourteen (14) days.

[10] The second leg of Advocate Maseli’s argument is that contrary to the same Rule 28 (2), the Applicant did not attach the contract in issue. He argued further that instead of attaching the said contract, the Applicant has attached inadmissible evidence. For that reason, he prays that the court should punish Counsel for the Applicant by awarding costs *de bonis propriis*.

[11] The argument in paragraph 10 above is also linked with his last argument. Advocate Maseli argues that the Applicant has presented inadmissible evidence by attaching a letter written without prejudice. Similarly, he argues that this attracts punitive costs against counsel for the Applicant.

[12] On the merits, Advocate Maseli argued that it is now settled in our jurisdiction that, a court considering a summary judgment application, in a situation where a declaration has been filed together with the summons, should not consider the declaration but only the contents of the summons. He argues that, looking at the summons alone, the Plaintiff /Applicant does not show why the interest should be fixed at twenty percent (20%). He argues that it is not clear if the interest accrued as a term of the agreement or if it is the standard rate of the interest charged on loans by Plaintiff /Applicant.

[13] Secondly on the merits, Advocate Maseli argues that even the ten percent (10%) commission sought by Plaintiff /Applicant is not well articulated as to why it is claimed. It is not clear if it is the term of the contract or if it is invoked automatically by reason of the alleged default by Defendant /Respondent. Advocate Maseli therefore, argues that the plaintiff's pleadings lack sufficient and necessary particularity to support its claim. He supports his argument with the judgment of **Leen v First National Bank (Pty) Ltd**⁴.

[D] ANALYSIS AND FINDINGS

[I] NON-COMPLIANCE WITH THE RULES

[14] The Application for Summary Judgment is governed by Rule 28 of the High Court Rules. It provides thus;

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

⁴(C of A (CIV) 16A of 2016) [2016] LSCA 27 (28 October 2016)

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

(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 the amount, if 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.

[15] It is common cause that the Applicant/Plaintiff filed the summary judgment application with the court's registry on the 08th day of April 2022. It had been served on the defendant on the 07th day of April, 2022. The Notice of Appearance to Defend had been served on the defendant on the 21st day of February, 2022. This is common cause. This is over thirty (30) days after entry of appearance to defend and some eighteen (18) days after the time that plaintiff should have filed the Application for summary judgment in compliance with the rules. It is also common cause that the plaintiff had not applied for condonation for non-compliance with the rules.

[16] The second leg of Advocate Maseli's argument on non-compliance with the rules is that Plaintiff relied on a loan contract which is (according to Advocate Maseli) a liquid document but did not attach it to the affidavit in support of the application. It is common cause that what was attached to

the said affidavit was a wrong document. In fact, on the day of arguments, the Applicant filed with the court a copy of the contract. There had not been any application for condonation for this filing of the contract nor the late filing of the application for summary judgment.

[17] Condonation for non-compliance with the rules is the discretion of the court that obviously must be exercised judiciously. In exercising that discretion, different courts justify their decisions differently. In allowing non-compliance with the rules, words such as “*the rules are made for the court and not the converse*”⁵ have been used. Elaboratively, in **Leen**⁶, the court of appeal quoted with approval the words of Schreiner JA in **Trans-Africa Insurance Co. Ltd v Maluleka**⁷ where he said;

“No doubt parties and their legal advisers should not be encouraged to become slack in their observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, in expensive decision of cases on their real merits.”

Similarly, in support of enforcing compliance with the rules, courts have used the following words;

“The Rules of court contain qualities of concrete particularity. They are not of an aleatoric quality. Rules of court must be observed to facilitate strict compliance with them, to ensure the efficient compliance administration of justice for all concerned. Non-compliance with said rules would encourage

⁵See *Leen v First National Bank (Pty) Ltd Supra*.

⁶*ibid*

⁷1956(2) SA 273(A) at 278F

causal, easy-going and slipshod practice, which would reduce the high standard of practice, which the courts are entitled to in administration of justice. The provisions of the Rules are specific and must be complied with, justice and the practice and administration thereof cannot be allowed to degenerate into disorder”⁸

[18] It is obvious that the reasoning can swing either way depending on the circumstances of each case. I believe it should be on the circumstances of each case as opposed to unsupported discretion of each judicial officer. In Casu, the plaintiff made two mistakes or has not followed the Rules in two circumstances. First of all, he filed the application for summary judgment well out of time and did not apply for condonation. Secondly, instead of annexing the contract to the affidavit in support of the application for summary judgment, Applicant annexed a wrong document. Not only a wrong document but one which this court was not supposed to see for the proper administration of justice. As if that was not enough, Advocate Maseli then filed an annexure attempting to rectify this mistake without leave of court.

[19] In keeping with the requirement of not being too legalistic or technical without seeing if the defendant will not be prejudiced per the guide by Schreiner J A in Trans-Africa above, I turn now to consider an element of prejudice. First of all, when the summons was issued, they did not include the execution of the Defendant site. In the Affidavit in support of the Application for Summary Judgment, the execution of the defendant’s site was included with the deponent saying that the contract reflects same. I must mention that even though I have not considered the plaintiff’s

⁸Moosa and Others v Lesotho Revenue Authority (C of A (CIV) 2/2014) [2015] LSCA 36 (06 November 2015) at par 13

declaration for this application (in following with **Leen**⁹), it also mentioned that the defendant and his wife *hypothecated* the site in question. With all this confusion, one would have thought that the “contract” filed by the Applicant without leave of court would reflect that indeed the said site was hypothecated. Alas, it had not.

[20] Looking at all these mistakes, and non-compliance with the rules, it is my considered view that the defendant would be prejudiced if I were to condone it. This is more so when Applicant had not even applied for condonation. Such is a classical case of lackadaisical approach to these proceedings. A mistake or two can be condoned and be understandable. An overabundance of mistakes, should not.

[II] LIQUID DOCUMENT OR LIQUIDATED AMOUNT.

[21] The non-compliance with the rules has been dispositive of this matter. Be that as it may, I thought it prudent to say a word or two on the heading of this part of the ruling. It is not clear if the Applicant is basing its application on a liquid document or a liquidated amount. The attachment or an attempt to attach the contract suggests that the application was grounded on a liquid document. If one was to look at the document that Applicant attempted to attach in isolation, it qualifies as a liquid document. However, this is only if we were to ignore confusing element of hypothecation of the site that Plaintiff alleges. Van Loggerenberg D E et al in **Erasmus Superior Court Practice**¹⁰ say:

“In order to qualify as a liquid document which will sustain a claim for provisional sentence, a document must, therefore, contain the following essential elements:

⁹supra

¹⁰Page B1 -64A

- (1) *The document must reflect an acknowledgement of indebtedness...*
- (2) *The acknowledgment of indebtedness must be unconditional...*
- (3) *The acknowledgement of debt must be for an ascertained amount of money..."*

Looking at the discarded document that Applicant sought to attach, it passes all these requirements. It shows an acknowledgment of debt in the amount of M124, 800.00 which was due to be paid on the 22nd day of July, 2021. However, due to the confusing nature of an element of hypothecation of the site that Applicant seeks, the non-availability of any part reflecting the said hypothecation and the fact that this document relied on by the Applicant did not form part of the papers that could direct the attention of defendant to it, it cannot be relied on.

[E] CONCLUSION AND ORDER

[22] Having concluded that the Applicant has not complied with the rules of court, the application for summary judgment is dismissed. The costs shall be costs in the course.

Kopo M. S
Judge of the High Court

For Applicant: Adv. Jobo

For Respondent: Adv. Maseli