IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU **CCT/0358/2021**

In the matter between:

KHALANYANE ELLIOT LEHORA **APPLICANT**

And

LAND R BUILDING AND CIVIL CONSTRUCTION (PTY) LTD **1ST RESPONDENT**

RELEBOHILE LEHORA **2ND RESPONDENT**

Neutral Citation: Khalanyane Elliot Lehora v Land R Building Civil Construction (Pty) Ltd & Another [2022] LSHC 64 COM (11th April, 2022)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 17th March 2022

DELIVERED ON: 11th April 2022

SUMMARY:

Application in terms of Rule 30(1) of the High Court Rules of 1980 – Applicant claiming that respondents took an improper or irregular step – Respondents having not complied with the request for further particulars instead lodged application for Summary Judgement – Applicant claiming that the respondents should have first provided the requested particulars and that the summary judgment application was set down for hearing less than seven days from the date of its delivery – Summary judgement application set aside as improper or irregular step for want of proper notice.

ANNOTATIONS:

STATUTES

High Court Rules of 1980

Interpretation Act No. 19 of 1977

CASES

Lesotho

Dencor Lesotho (Pty) Ltd v Al Barakah Investment (Pty) [2013] LSHC 37

Leen v FNB Lesotho [2016] LSCA 27

Liquidator Lesotho Bank v Raleting [2008] LSHC 79

Standard Lesotho Bank Ltd v Mahomed [2010] LSHCCD 9

South- Africa

Papenfus v Nichas and Sons (Pty) Ltd 1969 (4) SA 234 (0)

Trans-African Insurance Co. Ltd. v Maluleka, 1956 (2) SA 273 (AD)

Uitenhage Municipality v Ulys 1974 (3) SA 800 (E)

Swaziland

Dlamini v Barua (3411/10) [2011] SZHC 86

INTRODUCTION:

[1] This is an application where the applicant seeks an order in terms of rule 30(1) of the High Court Rules 1980 to set aside summary judgment application filed by the respondents on the 17th August 2021. The application was argued on the 17th March 2022 where the applicant was represented by Mr. *Masoeu* while the respondents were represented by Mr. *Letompa.*

BACKROUND:

[2] The antecedents of this case is that on the 22nd July 2021 the respondents herein sued out combined summons against the applicant herein, claiming *inter alia*, the return of five motor vehicles allegedly in possession of the applicant, cost of suit and further and/or alternative relief.

[3] In response to the summons, the applicant delivered a notice of appearance to defend on the 4thAugust 2021 which was followed by a request for further particulars on the 6th August 2021. The respondents did not respond to the request for further particulars, but instead, they delivered application for summary judgment in terms of rule 28(1)(c) on the 17th August 2021. This actuated the instant application in terms of rule 30(1) of the High Court Rules which was filed by the applicant on the 23rd October 2021 with a notice of intention to oppose the summary judgement application.

[4] The respondents filed notice of intention to oppose the rule 30(1) application on the 25th August 2021 though they used the citation in the main

matter where they appear as plaintiffs and the applicant herein as the defendant. No answering affidavit has been filed.

[5] The applicant has a two-pronged attack against the application for summary judgment. Firstly, he complains that the application is improper proceeding as it has been filed in disregard of his request for further particulars. He contends that while he has a bona fide defence to the respondents claim, it is dependent on the provision of the required particulars which are intended to enable him to plead. Secondly, he asserts that contrary to the rules, the summary judgment application has been set down in less than seven days of the delivery of the notice thereof. This the applicant argues, does not give him enough time in terms of the rules.

[6] I interpolate at this juncture to indicate that the application for summary judgment was initially set down to be heard on the 24th August 2021. However, it could not proceed as it was opposed. The instant application was already filed and set down to proceed on the 24th August 2021 with a prayer amongst others to stay the summary judgment application pending the finalization of the instant application.

[7] As a result of there being opposition to the summary judgment application, *Mahase J*, had, on the 24th August 2021, ordered that the matter be referred for allocation. The matter was allocated to me on the 8th November 2021. When the parties appeared before me on the 23rd February 2022, with the applicant represented by Adv. *Musi-Mosae* and the respondents by Mr. *Letompa*, they agreed that I will first have to hear and determine the application in terms of rule 30(1).

[8] It is also worthy of note that on the 23rd August 2021 the applicant had also filed a notice in terms of rule 48(1) of the High Court Rules requesting the respondents to furnish security for costs in the action in the amount of One Hundred Thousand Maloti (M100,000.00) within ten (10) days of service of the notice to the respondents who he claims are *peregrinus* to the jurisdiction of this Court.

[9] The respondents have not provided security for costs as demanded and the applicant did not persist with its request before me inasmuch as no application has been made in terms of rule 48(3). Neither did Mr. *Masoeu* raise the issue in his heads of argument or during his submissions on the 17th March 2022. Consequently, the issue is not yet before this Court for determination.

ISSUES FOR DETERMINATION:

[10] The foregoing having been said, there are two issues for determination in the instant matter:- Is the summary judgment application improper or irregular because it was filed before the requested particulars were furnished and by reason of it having been set down to be heard less than seven days from the date it was delivered? If so, has the applicant suffered prejudice in consequence thereof justifying the application to be set aside?

THE LAW:

[11] Rule 30 (1)of the Rules of this Court upon which this application is predicated, provides as follows:

> "30 (1) where a party to any cause takes an irregular or improper proceeding or improper step any other party to such cause may within fourteen days of the taking of such step or proceeding apply to court to have it set aside:
>
> Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.

(2) Application in terms of sub-rule (1) shall be on notice to all parties in the cause specifying particulars of the irregularity or impropriety involved.

(3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part either as against all the parties or as against some of them, and grant leave to amend or make any such order it deems fit, including any order as to costs."

[12] In **Liquidator Lesotho Bank v Raleting** (CIV/T/16/2007) [2008] LSHC 79 (03 November 2008) *Majara J*, as she then was, observed that the provision does not provide definition of the terms improper or irregular. She then adopted the Concise Oxford English Dictionary meaning which defines the word improper as "not in accordance with accepted standards of behavior" and irregular as "contrary to a rule, standard or convention". Importantly, she opined that "failure to observe time periods laid down by the rules of Court is irregular in terms of the definition of the term irregular as quoted above because it is indeed contrary to the said rules." I respectfully agree with this approach and opinion.

[13] Again, where improper or irregular step caused no prejudice to the other party, the court may refuse to set it aside, but rather order that it be corrected by some non – litigious means. *See*: **Raleting**, *supra*. There must be substantial prejudice to the other side for improper or irregular step to be set aside. *See*: **Uitenhage Municipality v Ulys**1974 (3) SA 800 (E) at 805 D-E. In **Trans-African Insurance Co., Ltd. v Maluleka**, 1956 (2) SA 273 (AD) at page. 278, Schreiner, J.A. says that -

> "... 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, inexpensive decision of cases on their real merits".

ANALYSIS:

[14] I now turn to the contentions by the applicant as they appear in paragraph 5 above. Is there any substantiality in the contention that it was improper or irregular for the respondents to file summary judgement application before they furnished the requested particulars and by scheduling the application for hearing less than seven days from the date it was delivered? To answer this question, I must of necessity have recourse to the relevant rules of this Court.

[15] I commence this exercise by considering the rule in terms of which the summary judgement application was made. Rule 28 provides as follows: -

"(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.

together with any claim for interest and costs.

(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.

The notice of application shall state that the application will be

set down for hearing on a specified date which *shall be not less than seven days from the date of delivery of the notice.*" (my emphasis)

[16] In considering summary judgment application the Court must have reference only to the summons and what is pleaded therein even where summons is filed simultaneously with declaration. This issue was put beyond disputation by *Lyons AJ*, as he then was, in **Standard Lesotho Bank Ltd v Mahomed**(CIV/T/182/2010) (NULL) [2010] LSHCCD 9 (07 June 2010) at page 3. This position was followed by *Hlajoane J,* as she then was, in **Dencor Lesotho (Pty) Ltd v Al Barakah Investment (Pty) Ltd** (CIV/T/243/2013) **[2013]LSHC 37**, paras 7 and 10.

[17] The Court of Appeal considered both judgements in **Leen v FNB Lesotho** C of A (CIV) 16A of 2016, **[2016] LSCA 27**. It opined that *Hlajoane J,* as she then was, was wrong in concluding that where summons was filed simultaneously with the declaration, the plaintiff was barred from filing summary judgment application. Significantly, the Court of Appeal did not alter the position that in considering summary judgment application, the Court should have reference to the summons only.

[18] In *casu,* there is no dispute that the summary judgment application was filed within fourteen days after delivery of the notice of appearance to defend in terms of rule 28(2). It is again obvious that the action in respect of

which the summary judgment application was made relates to delivery of specified movable property in terms of rule 28(1). It is indisputable that there is no requirement that plaintiff must, before delivering summary judgment application, furnish further particulars to enable the defendant to plead.

[19] I hold the view that furnishing further particulars is not a prerequisite for plaintiff to deliver summary judgment application. The applicant herein is clearly conflating the provisions relevant to summary judgment application and request for further particulars. In terms of rule 18 (5) 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." As a result, if summons do not disclose a cause of action due to inadequacy of material facts relied upon, summary judgment application will not succeed. *See:* **Mahomed,** *supra* and **Dencor Lesotho (Pty) Ltd,** *supra*.

[20] The applicant contends that he has a bona fide defence to the respondents claim but that same is depended on provision of further particulars which are required to enable him to plead. This means that the applicant comprehends the respondents' claim and is therefore in a position to oppose the summary judgment application by filing an affidavit or tendering oral evidence in terms of rule 28(3)(b). This is the route which the applicant should have

followed. Alternatively, the applicant should have, in line with rule 28(3)(a) provided security to the respondents to the satisfaction of the registrar for judgment, including costs, that may be given.

[21] In an instance where further particulars are required to enable the defendant to plead and the same are not provided by plaintiff, the defendant‘s remedies lie in rule 25(6) which provides that -

> “If a request for particulars is not complied with, the party requesting the same may subject to the provisions of subparagraph (5) of Rule 30 apply to court for an order for or for the dismissal of the action or the striking out of the defence and on such an application the court may make such order which it seems fit to make.”

[22] It bears repeating that the request for further particulars or failure to respond thereto is not a bar to plaintiff to deliver summary judgment application. I therefore find that the applicant’s attack to the summary judgment application based on this ground is not sustainable. Indeed, Mr. *Masoeu* was not able to provide me with any authority in support of his contention that it was improper for the respondents to deliver the summary judgment application when they had not provided the requested particulars.

[23] I now turn to the second leg of the attack - that the summary judgement application was set down to be heard less than seven days from the date it was delivered to the applicant. This contention appears in the founding affidavit, but Mr. *Masoeu* did not cover it in his heads of argument and during his submissions. However, this is not an issue to be ignored.

[24] The summary judgment application was delivered on the 17th August 2021 and set down to be heard on the 24th August 2021. In computing days, the day on which summary judgement application was delivered must be excluded, while Saturdays, except those that are public holidays, must be included. *See*: section 49 of Interpretation Act No. 19 of 1977 and rule 1 of the High Court Rules of 1980.

[25] In terms of rule 28(2) the summary judgment application "will be set down for hearing on a specified date which *shall not be less than seven days from the date of the delivery of the notice"*. (my emphasis) Bearing in mind how the period of seven days must be computed, the summary judgment application should have been set down to be heard on the 25th August 2021. It is clear therefore that the notice of hearing in *casu* was one day short. It is my firm belief that setting down summary judgment application a day early violently offends rule 28(2) and renders the whole application irregular.

[26] In **Dlamini v Barua** (3411/10) [2011] SZHC 86 (08 March 2011) *Ota J* said the following where summary judgment application was set down to be heard before the plaintiff delivered the amended summons to the defendant in line with the prescribed time:

> ‘‘[22] We must always remain conscious of the fact that *"notice"* is a component of the fundamental right of a fair hearing, therefore, the court will insist on a strict compliance with Rules of Procedure meant to safeguard the fundamental right of an adverse party to fair hearing like the right to notice.”

I respectively agree.

[27] In **Papenfus v Nichas and Sons** (Pty) Ltd 1969 (4) 234 (0), the notice of hearing of summary judgment was one day short as well. Despite the defendant raising a point in *limine* in that regard during the hearing of the summary judgment application, the court a *quo* condoned the defect on the ground that the defendant has not been prejudiced by the irregularity and granted the application. On appeal, it was held that it was not necessary for the defendant to apply to court to set aside the summary judgment application as irregular. The court concluded that the onus was on the plaintiff to show that the defendant had waived its right to object to short notice and that short notice had not prejudiced the defendant.

[28] In *casu,* it has not been denied and I have already found that the summary judgement application was set down to be heard less than seven days from the date it was delivered to the applicant. Again, the assertion that the notice does not give the applicant enough time in terms of the rules has not been denied. The applicant is by virtue of rule 28(2) entitled to notice prescribed therein and such ought to have been availed to him. Taking into account the importance of notice, which is the best way to ensure a right to a fair hearing, I am unable to find that short notice did not prejudice the applicant.

CONCLUSION:

[29] On these premises, and in the light of the totality of the foregoing, I hold the summary judgment application an improper or irregular step in these proceedings and same is accordingly set aside. The applicant has asked for costs at attorney and client scale in respect of this application. There is no justification for such special costs order on papers.

ORDER:

[30] The following order is made:

1. The summary judgment application delivered by the respondents on the 17th August 2021 against the applicant is set aside as improper or irregular step; and

2. Costs of this application shall be costs in the cause.

_____

A.R. MATHABA J
Judge of the High Court

For the Applicant: Mr.L. Masoeu
For the Respondents: Mr.L. Letompa