

# **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CCT/0034/2021**

In the matter between

**NEDBANK LESOTHO LTD**

**PLAINTIFF**

**AND**

**D & P DRILLING AND BLASTING (PTY) LTD 1<sup>ST</sup> DEFENDANT**

**DEREK RONALD JACOBS**

**2<sup>ND</sup> DEFENDANT**

**NEO JEANETT TLHOMOLA**

**3<sup>RD</sup> DEFENDANT**

**DAVID IRELAND**

**4<sup>TH</sup> DEFENDANT**

**BMI GROUP (PTY) LTD**

**5<sup>TH</sup> DEFENDANT**

## **JUDGEMENT**

Neutral Citation: Nedbank Lesotho Ltd v D & P Drilling and Blasting (Pty) Ltd & 4 Others CCT/0034/2021 [2022] LSHC 14

**CORAM: BANYANE J**

**HEARD: 16/08/2021**

**DELIVERED: 04/03/22**

## **Summary**

*Application for summary judgement - Rule 28(3)(b) requirements restated - defendant making bald assertions of their defense - failing to meet the requirements of the rule - application for summary judgement granted.*

## **ANNOTATIONS**

### **Cases cited:**

#### **LESOTHO**

1. National University of Lesotho v Thabane LAC (2007-2008) 476
2. Leen v First National Bank (Pty) Ltd C of A (CIV) 16A of 2016
3. White life Consultancy (Pty) Ltd v Mookoli Holdings t/a Mookoli Infra-Cons (Pty) Ltd C of A (CIV) No 57/2016.
4. Lesotho Bank v Matsaba t/a Father and Son Butchery CIV/T/432/97

#### **SOUTH AFRICA**

5. Trans-African Insurance Co. Ltd v Maluleka 1956(2) SA 273(A)
6. Breitenbatch v Fiat SA (Edms) Bpk 1976(2) SA 226 (T) 228
7. Maharaj v Barclays National Bank, 1976(1) SA 418
8. Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009(5) SA (SCA)
9. Phillips v Phillips and Another (292/2018) [2018] ZAECGHC 40(22 May 2018)

#### **ZIMBABWE**

1. Scotfin Ltd v Ngomahuru: Ex parte Law Society of Zimbabwe 1998 (3) SA 466

#### **Subsidiary legislation and Practice Directions**

1. High Court Rules 1980
2. Superior Courts practice Direction No 2 of 2021

#### **BANYANE J**

## **Introduction**

**[1]** This is an application for summary judgement filed in terms of Rule 28 of the High Court Rules 1980 against the defendant for the following;

- a) Payment of the amount of M 25 755 344.05
- b) Interest thereon at the prime rate plus 1% per annum from 31<sup>st</sup> December 2020 to date of payment
- c) Collection commission thereon at the rate of 10%
- d) Costs of suit on attorney and client scale

**[2]** The action is commenced by means of combined summons. It is evident from particulars of claim that the claim is for payment of an amount due and payable to the plaintiff in terms of a written asset-based finance agreement(s) and fluctuating overdraft facility concluded between the parties, (copies of which are annexed to the particulars of claim). It is the plaintiff's assertion that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants bound themselves as sureties and co-principal debtors of the 1<sup>st</sup> defendant jointly and severally for the unlimited indebtedness of the 1<sup>st</sup> defendant, that the 4<sup>th</sup> defendant in his capacity as a member and director of the 5<sup>th</sup> defendant bound himself as a surety and co-principal debtor of the 1<sup>st</sup> defendant. Further that as security for the obligations of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant, the 5<sup>th</sup> defendant entered into a deed of cession on the 11<sup>th</sup> April 2017 in terms of which he bound himself as a cedent of rights, title and interest in and to all monies due by the 1<sup>st</sup> defendant in favour of the plaintiff.

## **The defendant's opposition of summary judgment**

**[3]** The defendants oppose this application. In resisting same, the 4<sup>th</sup> defendant filed an affidavit. It reveals the basis of their opposition as follows;

**3.1** First, the agreements signed between the parties in 2018 and 2019 respectively forming the basis of the plaintiff's claim were later replaced by a new agreement dated the 16<sup>th</sup> June 2020. It is for this

reason that the plaintiff has not made out a case based on the attached agreements.

**3.2** Secondly that the amount claimed by the plaintiff differs from the amount due and payable and it is only through evidence that this can be established.

**3.3** Thirdly; he denies that he bound himself a surety and co-principal debtor, and therefore denies any liability to plaintiff. His denial is based on the assertion that he never signed any suretyship agreement. In short, his signature had been forged and expert evidence will reveal this at trial.

**3.4** Fourthly the plaintiff has failed to attach the suretyship agreement in terms of which it alleges that 2<sup>nd</sup> defendant bound himself as a co-principal debtor.

**[4]** His further complaints are that;

- a) The financed machines are extremely Technical with only a few people skilled to use them. For this reason, an attachment and sale by plaintiff to recoup the loan will not yield their true value, to the defendant's prejudice, hence their request to have the matter to be settled through mediation(NB a procedure objected to by the plaintiff in its summons, for reasons there set out).
- b) Some of these machines are outside the country while some have been sold to buyers in Lesotho by the plaintiff without an order of Court or legal basis. He is of the view that proceeds from these sales must be disclosed as they surely will defray the outstanding amount of the loan.

**[5]** The 4<sup>th</sup> defendant contends on the basis of the above that he has disclosed a bona fide defence to the plaintiff's claims.

**[6]** The defendants have also raised a preliminary issue of irregular service of the summons. It is apposite to consider it first.

### **The preliminary issue**

**[7]** The first issue raised by the 4<sup>th</sup> defendant in their affidavit relates to service of Court process. He avers that service of the summons through e-mail is not sanctioned by Rule 5 of the High Court Rules. Since the summons was not served with leave of Court as required by this rule, so he contends, the application for summary judgement must be refused.

**[8]** The plaintiff in response stated that no leave of Court was required because Rule 2 of the Superior Courts Practice Direction No.2 of 2021 permits service by electronic mail. At any rate, summons was received by defendants' attorneys who accordingly acknowledged receipt and requested that any exchange of the subsequent papers should be via email.

**[9]** Rule 5 of the Rules of this Court provide that; *no process or any document whereby proceedings are instituted shall be served outside Lesotho except by leave of Court.*

**9.1** Superior Courts Practice Direction No.2 of 2021 provide as follows;

*"2 The exchange of hard copies of court papers in pending matters shall be minimized, and service in such instances shall be done via email or other forms of electronic transmission between the parties..."*

*"3 service of all other process in all matters shall be in terms of the High Court Rules of 1980"*

**[10]** The corona virus disease 2019 (COVID-19) pandemic, as we know has affected normal activities in various institutions. It is undoubtedly clear that the Directives were issued for purposes of management of cases in the Superior Courts during the COVID-19 pandemic. The objective as I see it, is to minimize physical contact of persons and exchange of

hard copies, (thereby curbing the spread of the virus) regard being had to the manner in which the virus is transmissible from person to person. It is for this reason that service via electronic means is permitted.

**10.1** While the rule sanctions service via e-mail in pending matters, the mode of service of summons in these proceedings cannot be an impediment in the hearing of this matter for reasons that follow. The mere fact that the summons was not served in terms of Rule 5 of the High Court Rules read with practice Direction 3, cannot singly render the summary judgement dismissible. What is important is the fact that the defendants were duly notified of the plaintiff's claim. It is for this reason that I consider the objection technical and should not in the absence of prejudice carry any weight nor impede the hearing of this application. As stated in **National University of Lesotho v Thabane LAC (2007-2008) 476** that pure technical objections should not be permitted, in the absence of prejudice, to impede the hearing of the merits of a matter.

**10.2** See also similar remarks by Schreiner JA in **Trans-African Insurance Co. Ltd v Maluleka 1956(2) SA 273(A)** at 278 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”

**10.3** In this matter the defendants were duly notified of the plaintiff's claim and no judgement was obtained in their absence. They are before Court and have accordingly opposed the matter. No prejudice is shown to exist. The mode of service complained of will therefore be overlooked.

**[11]** I turn now to deal with the merits of the application.

### **The parties' submissions**

**[12]** Relying on **Maharaj v Barclays National Bank, 1976(1) SA 418 at 423 F-H**, the plaintiff's attorney Mr Letsika contended that in order for

the defendant to successfully oppose a claim for summary judgement, he must satisfy the Court by affidavit that he has a bona fide defence to the claim. That in doing so, he is required to sufficiently and fully disclose the nature and grounds of his defence and the material facts upon which it is founded.

**[13]** He also cited the case of **Lesotho Bank v Matsaba t/a Father and Sons Butchery** in which the Court cited with approval the case of **Breitenbatch v Fiat SA (Edms) Bpk 1976(2) SA 226 (T) 228 G-F**, to submit that while the defendant is not required to set out the full details of all the evidence which he proposes to rely on in resisting the plaintiff's claim, or set out the defence with the precision apposite to pleadings, he should not however state the defence in a bald, vague or sketchy manner, for this would be considered in the assessment of whether the defence is bona fide.

**[14]** In submitting that the plaintiff has established through evidence that the defendants do not have a valid defence, he referred the Court to **Job Job Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009(5) SA (SCA)**.

**[15]** He finally submitted that the defendants have not supplied facts that fully disclose the nature and grounds of their defence because they have not suggested that the monies claimed were paid.

**[16]** The defendants' counsel on the other hand referred this Court to the case of **Phillips v Phillips and Another (292/2018) [2018] ZAECGHC 40(22 May 2018)** to contend that where there are triable issues of fact, summary judgement must be refused. While he agrees that a defendant must disclose his defence and the material facts upon which it is based with sufficient particularity and completeness, he is of the view that the defendants affidavits raises several triable issues of fact and for this reason the application for summary judgement must be refused.

**[17]** According to defendants, the plaintiff failed to disclose in its summons and particulars of claim that the agreements on which they rely have been superseded and replaced by a new Asset based Finance Agreement. That the defendants must for this reason be permitted to defend the matter in order to demonstrate that the plaintiff relies on a wrong agreement and also that the amount claimed is incorrect.

**[18]** He goes further to contend that the particulars of claim make no case or basis for the claim of 10% collection commission; which calculated might amount to more than M2.5 million.

**[19]** His further contention is that the security agreement on the basis of which the defendants are allegedly liable for the claim have not been attached, similarly in violation of the Rules of the Court. In addition, the security agreement in relation to 04<sup>th</sup> defendant does not bear his signature and for this reason, the agreement cannot be enforced against him. He contends on this basis that the issue of the signature must be tested, and this can only be achieved if he is allowed to defend the claim.

**[20]** Addressing the issue of collection commission, Mr Letsika's contention is that the defendants bound themselves to pay collection commission in the event that the plaintiff is forced to pursue its claim through the medium of attorneys.

**[21]** He finally contends that the 4<sup>th</sup> defendant's affidavit does not raise any triable issue nor bona fide defence.

## **Discussion**

**[22]** In order to address the parties' respective argument, I start from the premise that rule 28(3)(b) of the High Court Rules 1980 requires the defendant to satisfy the Court by affidavit or, with leave of the Court, by oral evidence of himself or of any other person who can swear positively to the facts, that he has a bona fide defence to the action.



**22.1** In terms of this rule, the affidavit referred to therein or oral evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefore.

**[23]** This Rule 28(3)(b) has been interpreted to mean that the defendant must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.

**23.1** See for example **Maharaj v Barclays National Bank, 1976(1) SA 418** where it was held that the remedy of summary judgment is not intended to shut out a defendant who is able to demonstrate a bona fide intention to defend the action. That in order to successfully oppose summary judgement, the defendant must show what his intended defence is and he/she must in this connection set out in his/her affidavit the nature and grounds for the defence and the material facts upon which it is founded. The Court went further to say that If the averments made by the defendant in the opposing affidavit are vague, or markedly lacking in particularity that might be expected in the circumstances of the case, then the court is likely to hold that that a bona fide defence has not been disclosed. See also **White life Consultancy (Pty) Ltd v Mookoli Holdings t/a Mookoli Infra-Cons (Pty) Ltd C of A (CIV) No 57/2016**.

**[24]** In **Leen v First National Bank (Pty) Ltd, C of A(CIV) 16A of 2016**, the Court held that summary judgement is designed to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to the claim.

**[25]** I turn now to consider whether the defendants have satisfied the rule 28(3)(b) requirements; that is whether, their affidavit fully disclose the nature and grounds of their defence and the material facts relied upon.

**[26]** It is apparent from the allegations in the particulars of claim, read with the attached agreement(s) that the 1<sup>st</sup> defendant sought and obtained loans from the bank in the amounts M52 785 000.00 in August 2018 payable within a period of thirty-six (36) months and a further amount of M 34 991 053. 00 in December 2019 payable over a period of 20 months and lastly, an overdraft facility in the amount M1 500 000.00. It is noteworthy that clause 12 of the agreement sets out security held by the bank. Suretyship agreements in relation to 3<sup>rd</sup> and 4<sup>th</sup> respondents have been annexed as well as a deed of cession in terms of which the 5<sup>th</sup> defendant made its undertaking.

**[27]** Some of the significant terms of the agreement are that the bank holds a lien over the assets financed. Further that the plaintiff is entitled to terminate the agreement and demand payment of the loaned amount upon breach of the contract or the happening of certain events of default set out under clause 15 of the agreement.

**[28]** I should add further that in terms of the parties' agreement, the certificate of the manager of the bank shall for any purposes be prima facie proof of the amount due and payable by the borrower. This is in terms of clause 9 of the agreement. The manager has accordingly certified the amount outstanding as at February 2021, and records from the bank forming the basis of the claim have been attached. The basis of the claim is therefore reasonably confirmable from these records.

**[29]** In contesting the amount, the 1<sup>st</sup> defendant makes a bald assertion that the amount claimed is incorrect. It will be observed that he does not in whatever way dispute the defendants' indebtedness to the bank but challenges its extent. In doing so, he simply claims the incorrectness of the claimed amount without stating what the correct figure is. In the absence of supporting facts therefore, the statement by the manager must be accepted as a true reflection of the outstanding amount.

**[30]** The 4<sup>th</sup> defendant further asserts that the agreements concluded by the parties in 2018 and 2019 respectively were superseded by another agreement in 2020. He has annexed this to his opposing affidavit. Upon examination of this document, it is not only unsigned by the defendants, but does not in any manner portray what the 4<sup>th</sup> defendant alleges. No alteration of the main agreement is discernible from this document. As I see it, it merely proves that the defendants sought and obtained repayment holiday for the period specified therein and per the terms set out therein.

**[31]** Moving on to the 4<sup>th</sup> defendant's challenge of his liability under the agreement, he asserts that his signature has been forged and is not as appears on the suretyship agreement attached (annexure A5 to the particulars of claim). Likewise, he makes bald denial or assertion without substantiating particularity that the surety agreement does not bear his signature. He fails to put up facts on how personal information of his wife (filled on the declaration of *marital status form*) (a form apparently intended to be filled by a debtor/surety, cedent or pledgor to the bank) such as passport number, that they are married out of community of property could find their way into the bank's records or why such form would be filled if he never bound himself as a surety.

**[32]** In the circumstances, I conclude that the 4<sup>th</sup> defendant has failed to set out sufficient allegations in his opposing affidavit which if established at the trial would entitle him to succeed in his defence that he is not personally liable for the amount reflected on the suretyship agreement.

**[33]** The defendants failed in my view to furnish sufficient particularity of their defence (as discussed above). It is therefore doubtful whether the defence is genuinely raised. Where defences are cast in sketchy or inadequate terms, no reason exists for rejecting an application for summary judgement. If the defendant fails to put up facts that it obviously should have been able to do were it advancing a genuine defence,

summary judgment must be granted. see for example the remarks of Navsa JA in **Job Job Investment(supra) para 26.**

**[34]** The most reasonable inference in the circumstances is that no particulars have been furnished because the defences are not genuinely advanced. This is especially so because the defendants failed, quite dismally, to satisfy the requirements of Rule. The 4<sup>th</sup> defendants simply makes bald assertions without substantiating particularity.

**[35]** All things considered, I conclude that the mere fact that issues of the signature, alleged incorrect amounts and non-filing of a surety agreement would be arguable or triable does not mean that summary judgement must be refused. The reason for this is that in terms of Rule 28(3)(b), the defendant's affidavit must disclose a bona fide defence not an issue for trial. At any rate, I have stated above that the bare denials of these aspects cannot be regarded as sufficient or satisfactory as to the existence of a bona fide defence. I am satisfied on the facts presented that the plaintiff is entitled to its liquidated claim, only in so far as (a), (b) and (d) are concerned as these are ascertainable from the records attached.

**[36]** One last issue raised by the defendants is whether collection commission is claimable against them. They are of the view that no basis is made for payment of same. The plaintiff's attorney on the other hand contended that the defendants bound themselves to pay the commission in the event that the debt is recovered through attorneys. He however referred this Court to no specific clause in the agreement to that effect.

**36.1** I need not for purposes of this judgement decide whether collection commission is claimable simultaneously with costs on the higher scale since the claim for payment of 10% commission in this matter is the agreement between the parties. I therefore confine myself to the terms of the agreement on this issue.

**36.2** In **Scotfin Ltd v Ngomahuru: Ex parte Law Society of Zimbabwe 1998(3) SA 466**, the High Court of Zimbabwe (**per Smith J and Gillespie J**) stated (at 472) that;

Where a creditor seeks to recover the defaulting debtor expenses incurred as commission on the collection of the debt, he must be able to rely upon a specific cause of action in respect of that commission. The cause of action must be a contract between the debtor and the creditor that obliges the debtor to pay to the creditor commission charges incurred. The agreement according to which collection commission is claimed as part of the judgment is almost invariably a term in the main agreement giving rise to the debt, that in the event of the debtor failing to make payments in terms stipulated in the contract, then he will be obliged to pay any legal costs incurred and collection commission.

**36.2** Upon my perusal of the agreement in the matter before me however, no such clause was found. It is questionable whether the defendants bound themselves to pay collection commission. I am therefore not convinced that there exists an agreement between the parties that the defendants will be liable to pay collection commission. The plaintiff therefore failed to make out a case for payment of the Collection Commission.

### **Order**

**[37]** In the result, the following order is made;

- a) Summary judgement is granted in favour of plaintiff in the sum of M25 755 344.05 together with interest at the prime rate plus 1% per annum from 31<sup>st</sup> December 2020 to date of payment.
- b) The defendant is ordered to pay the plaintiff's costs of suit on attorney and client scale.

**P. BANYANE**  
**JUDGE**

For Plaintiff: Mr Letsika

For Defendants: Advocate Kleingeld assisted by Ms Chabana