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IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0166/2023

IN THE CONSOLIDATED MATTERS BETWEEN:

VISION TRANSPORT & LOGISTICS (PTY) LTD

PLAINTIFF

V

RIGHT TO CARE LESOTHO

DEFENDANT

AND

CCT/0167/2023

TICHERE PULE (PTY) LTD T/A TICHERE

PULE VAN RENTALS

PLAINTIFF

V

RIGHT TO CARE LESOTHO (PTY) LTD

DEFENDANT

Neutral Citation: Vision Transport & Logistics (Pty) Ltd v Right to Care Lesotho (Pty) Ltd; Tichere Pule (Pty) Ltd t/a Tichere Pule Van Rentals v Right to Care Lesotho (Pty) Ltd [2023] LSHC 147 Comm. (30 NOVEMBER 2023)

CORAM: MOKHESI J

HEARD: 23 AUGUST 2023

DELIVERED: 30 NOVEMBER 2023

SUMMARY

CIVIL PRACTICE: *This is an application for summary Judgment in terms of Rule 28(2) of the High Court Rules, 1980 - In applications for summary judgment only the summons and in a case where Particulars of Claim have been attached thereto should be looked at to determine whether the application should succeed - In the present matter as the applicant's summons merely set out the reliefs sought without more, the summonses held not to disclose causes of action- The applications dismissed with costs - Failure by the respondents' counsel to file heads of argument on time contrary to the Rules of this Court - Respondents deprived of costs on this score.*

ANNOTATIONS

LEGISLATION

High Court Rules 1980

CASES

LESOTHO

Basotho Congress Party v Bus Stop Holding Ltd and Another CCT/0268/2018 [2022] LSHC 242 Comm. (unreported, dated 23 September 2022)

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

Makoala v Makoala LAC (2009 - 2010) 40

SOUTH AFRICA

Group Five Building Ltd v Government of the Republic of South Africa 1991 (3) SA 787

Icebreakers No. 83 (Pty) Ltd v Medi Cross Health Care Group (Pty) Ltd 2011 (5) SA 130 (KZD) (18 Feb. 2011) (at para.10).

Susan v Kikillus 1955(2) SA 137

BOOKS

Van Loggerenberg, *Erasmus Superior Court Practice*, 2 ed. Vol. 2

JUDGMENT

[1] Introduction

These proceedings concern opposed consolidated applications for summary judgments. The consolidated applications are Vision Transport & Logistics v Right to Care Lesotho (Pty) Ltd case (CCT/0166/2023), Tichere Pule (Pty) Ltd t/a Pule Van Rentals v Right to Care Lesotho (Pty) Ltd case CCT/0167/2023. In terms of CCT/0166/2023 the plaintiff seeks the following reliefs:

“1. Payment of the sum of Nine Hundred and Thirty-Three Thousand, Eight Hundred and Thirty-One Maloti (M933,831.00) being the sum owing in terms of the Car Rental Agreement;

2. Interest thereon at the prime rate of 8.5% from 30th April 2023 to the date of payment;

3. Payment of 10% collection commission on the above amount;

4. Payment of costs of suit on a scale as between Attorney and own client;

5. Granting Plaintiff such further and/or alternative relief.”

[2] In the CCT/0167/2023, the plaintiff is seeking the following reliefs:

“1. Payment of the sum of One Million Two Hundred and Seventy Thousand Six Hundred and Forty Eight Maloti and Fifty Six Lisente (1,270,648.56) being the sum owing in terms of the Service Level Agreement;

2. Interest thereon at the prime rate of 8.5% from the 30th April 2023 to the date of payment;

3. Payment of 10% collection commission on the above amount;

4. Payment of costs of suit on a scale as between Attorney and own client;

5. Granting Plaintiff such further and or alternative relief.”

[3] **Background Facts**

In both matters the defendant had entered into an agreement with both plaintiffs for rental of vehicles. For convenience’s sake, I will refer to the parties as they are in

the summons. In both matters following what the plaintiffs regarded as a breach of contract by the defendant for failing to make due payments for rented vehicles, sued out summonses against the defendant seeking the reliefs outlined in the preceding paragraphs. In both matters after the defendant was served with the summonses it filed its Notice of Appearance to defend the actions. Consequent to this notice, the plaintiffs, in both matters, served upon the defendant the Notice of application for summary judgment. Of particular importance is that when the summonses were issued out, they were accompanied by a Declaration not a 'Particulars of claim' explaining the basis of the cause of action. In the summonses, the plaintiffs only set out the reliefs sought. The details of the claims were set out in the Declaration.

- [4] In the opposing affidavits the defendant raised three points in *limine*, namely, (i) Non-compliance with Rule 28 (2) of the High Court Rules 1980 in that the plaintiffs are applying for summary judgment based on the summonses which do not

disclose cause of action; (ii) foreseeability of material dispute of facts arising. The latter point was dismissed outright on the basis of **Makoala v Makoala LAC (2009 - 2010) 40.** (iii) failure to attach a liquid document. Ms Hlakametsa conceded that this point was also without merit.

[5] **Issues for determination**

- (i) Points in *limine* raised
- (ii) The merits

[6] **(i) Non-compliance with Rule 28 (2).**

Ms Hlakametsa for the defendant urged this court to dismiss the application on account of the plaintiffs' non-compliance with Rule 28(2) as the summonses on which summary judgments were sought, do not disclose the causes of action. She referred this court to the decision of Mathaba J in **Basotho Congress Party v Bus Stop Holding Ltd and Another CCT/0268/2018 [2022] LSHC 242 Comm. (unreported, dated 23 September 2022)**, as supporting her contention. She urged, this court, on the basis of this

authority to disregard the Declarations and concentrate on the summons, and that when regard is had to the summonses, they do not disclose the causes of action.

[7] Adv. Shale on the one hand argued this court should grant the reliefs sought by looking at the summonses together with the Declarations filed. He, however, did not cite any authority which support his standpoint. I turn to consider the applicable law.

[8] Summary Judgment application is regulated by the provisions of Rule 28 of the High Court Rules, 1980, which provides (in relevant parts) that:

“(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 of money

(c) for delivery of specified movable property, or

(d) for ejectment

together with any claim for interest and costs.

- (2)
- (3)
- (4)
- (5)
- (6)
- (7)
- (8)
- (9)
- (10)"

[9] I do not wish to engage in an exercise of examining the nature of summary judgment procedure, that has been done in various decisions in this jurisdiction (see: **Leen v First National Bank (Pty) Ltd (C of A (CIV) 16 OF 2016 [2016] LSCA 27 (unreported, dated 28 October 2016)**). In this matter the court is principally concerned with the issue whether a Declaration should be disregarded in determining whether a case has been made out for summary judgment. It is evidence from the above rule that summary judgment is meant to afford the plaintiff an expedited relief against the defendant who does not have a triable defence to his claim (**see: Van Loggernberg, Erasmus Superior Court Practice, 2 ed. Vol. 2 at D1-380-D1-381**).

[10] In terms of Rule 18(1) the plaintiff commences litigation and invites the defendant to appear before court to answer to its stated claims by means of summons. Summons is not a pleading. It is merely a first step in the process of litigation **(see: Susan v Kikillus 1955 (2) SA 137 (W); Group Five Building Ltd v Government of the Republic of South Africa 1991 (3) SA 787 at 791A - J; Icebreakers No. 83 (Pty) Ltd v Medi Cross Health Care Group (Pty) Ltd 2011 (5) SA 130 (KZD) (18 Feb. 2011) (at para.10).**

[11] Rule 18(5) provides that:

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

[12] This sub-rule makes it mandatory for the plaintiff to set out material facts on which he/she relies for a claim, in sufficient detail to disclose a cause of action. Even when this sub-rule makes this mandatory decree, it does not turn the summons into a pleading. Pleading commences with the delivery of a Declaration after the defendant will have filed its Notice of

Entry of appearance to defend. The fact that Declarations, as it happened in both cases before this court, have been filed simultaneously with the summons, does not turn the summonses into pleadings.

[13] When summary judgment is sought only the summons are considered to determine whether they disclose a cause of action to justify granting of the reliefs sought in the application. It would be different story where summons is delivered together with the 'Particulars of claim' because the particulars of claim set out in sufficient detail, as required by Rule 18(5), the material facts on which the plaintiff's claim is based.

[14] In **Leen (*supra at para.[9]*)**, at paras. 12 and 18 thereof, the Court of Appeal stated that:

"[12].... Her paragraph [2] is clear that the plaintiff filed "his summons with particulars of claim at the same time." Whether what is filed is a declaration or particulars of claim is of no significance to this appeal. The only point that must be highlighted is that particulars terms are invariably filed together with the summons whereas a declaration, is, in terms of the

rules, to be delivered within the period provided in the rule but after the entry of an appearance to defend. Because particulars of claim are invariably, nay inevitably, filed with or attached to the summons the question arising in this appeal assumes greater significance.

.....

[18] Whereas as in this case particulars of claim are attached to the summons, not for convenience but in order to set out the claim in sufficient detail as required by rule 18(5) the party doing so should not be precluded from asking for summary judgment ...”

[15] What can be discerned from this dictum is that particulars of claim is part and parcel of this summons. It fulfils the role of detailing out the facts upon which the claims are based. The plaintiff’s case is pleaded only when a declaration is filed. The decision of **Leen** has led Mathaba J **Basotho Congress Party** supra, at paras. [16] and [17] to say:

“[16] The court must have reference only to the summons and what is pleaded therein is considering summary judgment application. Summary judgment application. Summary judgment relates to such claims as pleaded in the summons. This is so even when

*summons is filed simultaneously with declaration. See: **Standard Lesotho Bank Ltd v Mahomed (CIV/T/182/201) (NULL) [2010] LSHCCD 9 (07 June 2010) at page 3; 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 judgments in **Leen v FNB Lesotho C of A (CIV) 16A of 2016, [2016] LSCA 27.** It opined that the decision in **Dencor Lesotho, supra,** that where summons was filed simultaneously with the declaration, the plaintiff was barred from filing summary judgment application, was wrong. Significantly, the Court of Appeal left intact the position, propounded in both judgments that summary judgment relates to such claims as are pleaded in the summons and that the court should only have reference to summons in considering summary judgment application.”*

[16] When regard is had to the summons in the two matters, one is inclined to agree with the defendants’ counsel that they do not disclose the causes of action justifying the granting of summary judgments. They only set out the reliefs sought against the defendant without more.

[17] **Failure of the respondent’s counsel to file the heads of argument on time.**

In the present matter the respondent's counsel filed the heads of argument a day before the hearing contrary to Rule 34C of the Commercial Court Rules 2011 which obliges the respondent to file its heads of argument at least three days before the hearing of the matter. I put it to respondents' counsel that in the event that the respondents succeed I will deprive them of the costs as mark of my displeasure for non-observance of the rules of this court.

[18] In the result the following order is made:

- (i) The application for summary judgment is CCT/0166/2023 is dismissed with not order as to costs.
- (ii) The application for summary judgment in CCT/0167/2023 is dismissed with no order as to costs.

MOKHESI J

**For the Plaintiff: Adv. S. Shale instructed by Dr I.M.P
Shale Attorneys**

**For the Defendant: Ms. Hlakametsa from Webber
Newdigate Attorneys**