IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CC/0563/2021**

In the matter between:

FIRST NATIONAL BANK OF LESOTHO LTD **PLAINTIFF**

AND

LEHLOHONOLO PETER RAMOABI **1ST DEFENDANT**

'MAMAKARA MASEFATSA RAMOABI **2ND DEFENDANT**

Neutral Citation: FNB v Lehlohonolo Peter Ramoabi & Another [2023] LSHC 131 Comm. (03RD AUGUST 2023)

CORAM: **MOKHESI J**

HEARD: **23RD MARCH 2023**

DELIVERED: **03RD AUGUST 2023**

SUMMARY

CIVIL PRACTICE: *Reacting to an application for a summary judgment, the respondents contends that they have a bona fide defence in a form of counterclaim for claim for compensation and other terminal benefits on account of what they consider to be the applicant's unfair dismissal of the 1st respondent- Held, Rule 22(5) of the High Court Rules was not meant to be invoked in a situation such as the present where the counterclaim is only justiciable before the labour forums- Held, that the applicant has made out a case for a summary judgment.*

ANNOTATIONS

Books:

Van Loggerenberg *Erasmus Superior Court Practice 2nd ed. Vol. 2 (Juta)*

Legislation:

High Court Rules 1980

Cases:

Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC) (15 April 2014)

Lesotho Clothing and Allied Workers Union & Others v CGM Industrial (Pty) Ltd (CIV/APN/218/98) [1999] LSHC 34 (16 April 1999)

Maharaj v Barclays National Bank 1976 (1) SA 418 (AD)

S & R Valente (Pty) Ltd v Benoni Town Council 1975 (4) SA 364 (WLD)

JUDGMENT

[1] **Introduction**

This is an application for summary judgment. The applicant/plaintiff had instituted proceedings against the defendant/respondent for payment of the following amounts: Six Hundred and Four Thousand Five Hundred and Twenty-Seven Maloti and Seventy-one Lisente (M604,527.71); Two Hundred and Thirty-Four Thousand Eight Hundred and Sixteen Maloti and Five Lisente (M234,816.05) and had further sought cancellation of the loan agreement dated 14 April 2016. After the defendants had filed their Notice of Appearance to Defend, the plaintiff triggered the provisions of Rule 28 of the High Court Rules 1980 by applying for a summary judgment.

[2] **Background Facts**

The first defendant had two loan accounts with the plaintiff. He was the plaintiff's employee. He was summarily dismissed from his employ by the plaintiff. The circumstances surrounding his dismissal are hotly contested and are not germane for the decision of this case. It is following this dismissal that the plaintiff found it difficult to service his loan repayments and as a result fell into arrears, thereby prompting the plaintiff to institute proceedings seeking the reliefs outlined in the introductory part of this judgment.

[3] **Respective Parties' Cases**

The plaintiff's case is obvious from the preceding paragraphs and need not be repeated. I will, therefore, proceed to detail out the defendant's case. It is the 1st defendant's case that: He was unlawfully prevented from earning a

salary and therefore unable to service the loans he had with the plaintiff, after what he considers to be his unfair dismissal by the plaintiff. As a result, he referred the issue of his dismissal to the Directorate of Dispute Prevention and Resolution (AO864/19) (DDPR) in terms of which he is claiming reinstatement alternatively M2,837,337.00 as compensation including notice pay in the sum of M47,288.95. He maintains that he has a *bona fide* defence to the plaintiff's claim because:

(a) The plaintiff is guilty of repudiating the implied terms of his employment contract in terms of which he would be paid and not to be unlawfully dismissed, so that he could continue to repay his loans.

(b) He has a counter claim of M2,884,625.00 for unfair and unlawful dismissal even though this claim is pending before the DDPR.

[4] **Issues for determination**

(i) Whether the defendants have a *bona fide* defence to the plaintiff's claim.

(ii) Whether the plaintiff has made out a case for summary judgment.

[5] **The Law and Discussion**

The application for Summary Judgment is brought in terms of the provisions of Rule 28 of the rules of this court. It is only brought in the following circumstances:

(i) On a liquid document

(ii) For a liquidated amount of money

(iii) For delivery of specified movable property, or

(iv) For ejectment

The nature of the procedure was stated in **Maharaj v Barclays National Bank 1976 (1) SA 418 (AD)** 418 at 425 – 426.

[6] In the present matter the claim is for a liquidated amount of money arising out of failure by the defendants to honour repayment terms of the loan agreements they have with the plaintiff. It is not disputed by the defendants that they owe the amounts being claimed. They acknowledge their indebtedness. They, however, argue that they have a *bona fide* defence in a form of a counter claim yet to be instituted against the plaintiff.

[7] This court will firstly determine whether a defence of a counter claim may be raised to an application for a Summary Judgment. Before this question can be answered it is apposite to re-state what the defendant is entitled, in terms of this rules, to do when faced with an application for a Summary Judgment. In terms of Rule 28(3) of the High Court Rules 1980.

> *"(3) Upon the hearing of the application for summary judgment, the defendant may –*
>
> *(a) Give security to the plaintiff to the satisfaction of the Registrar for any judgment including such costs which may be given; or*

(b) 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 fact, that he has a bona fide defence of the action.

…Such affidavit or oral evidence shall disclose fully the nature and grounds of defence and the material facts relied upon therefor."

[8] The defendant contend that they have a *bona fide* defence in the form of a counter claim against the plaintiff. They rely on Rule 22(5)(a), (b) and (c). The said Rule provides that:

"(a) If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished wholly or in part, the defendant may, in his plea refer to the fact of such claim in reconvention and request that judgment in respect of plaintiff's claim, or such portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention.

(b) In such a case the defendant must, together with his plea, deliver particulars of the claim in reconvention on which he relies.

(c) Judgment on the claim shall either wholly or in part thereupon be postponed unless the court, on the application of any party interested, otherwise orders. The court, if no other defence is raised, may give judgment on such part may give judgment on such part of the claim as would not be extinguished, as if the defendant was in default of filing a plea in respect thereof, or may, on the application of either party, make such order as it seems fit including an order as to costs."

[9] The defendants contend that in terms of Section 66(4) of the Labour Code the 1st defendant had to be given an opportunity to defend himself against the allegations against him. They argue that the 1st defendant was dismissed without giving him an opportunity to fully defend himself by adducing evidence, therefore rendering his dismissal unlawful (**Lesotho Clothing and Allied Workers Union & Others v CGM Industrial (Pty) Ltd (CIV/APN/218/98) [1999] LSHC 34 (16 April 1999).**

[10] **Discussion**

Evidently, the defendants rely on a claim based on the Labour Code, which claim is currently pending before the DDPR Maseru where the 1st defendant is challenging his dismissal by claiming reinstatement alternatively M2,837,337 as compensation including notice pay in the sum of M47,288.95. It will readily be observed that the claim for compensation is pending before the labour fora before which it is *only* tenable. A question was put to Adv. Teele KC for the defendant whether Rule 22(5) envisaged a situation such as this one where a claim is tenable before a specialised forum like DDPR. He urged this court that it should consider that as making no difference because the High Court has power under Section 6 of the High Court Act 1978 to order the removal of that matter before the DDPR to be placed before it, to be heard together with CCT/0563/2021. For completeness the said Section 6 is worded as follows:

> *"No Civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save –*

(a) by a judge of the High Court of his own motion; or

(b) with the leave of a judge upon application made to him in chambers, and after notice to the other party."

[11] While it is true that this court has power to remove a matter that is serving before subordinate courts and determine it, it is doubtful whether it can do so even in relation to specialized courts such as the Labour courts (**Lesotho Revenue Authority v Dichaba (C of A (CIV) 21/2018; [2019] LSCA 29 (1 February 2019)).**

[12] In sum, if the counter claim is based on matters in terms of which this court has no jurisdiction it cannot be raised as a *bona fide* defence to a Summary Judgment application. The sub-rule is meant to cater for situations where the claim and counterclaim will be heard in the same court (**Van Loggerenberg** *Erasmus Superior Court Practice 2nd ed. Vol. 2 (Juta)* at D1 – 269: **S & R Valente (Pty) Ltd v Benoni Town Council 1975 (4) SA 364 (WLD)** at 366A – A). It should be stated that as a matter of trite law that even if a counterclaim for damages or compensation as in the present case on the face of it has merit, it cannot be a defence to a liquidated claim, because an illiquid claim cannot be set off against a liquidated claim (See a persuasive authority of **Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC) (15 April 2014)** at para. 47). The mechanism which is provided by Rule 22(5)(a) is meant to ameliorate this situation in certain circumstances through postponement of judgment in the main matter until a counterclaim is determined. This course, in this case, is unlikely to be adopted as the matter on which the defendant intents to counterclaim on is justiciable only before specialized courts which have

exclusive jurisdiction in labour matters. In the circumstances, I find that the applicant has made out a case for summary judgment as the defendants do not dispute that they are in arrears in the amount claimed by the plaintiff.

13] In the result the following order is made:

(1) The application for a summary judgment is granted as prayed for in the Notice of Motion with costs.

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MOKHESI J

For the Plaintiff/Applicant:	**Adv. S. Shale instructed by DR. I.M.P Shale Attorneys**
For the Defendant/Respondent:	**Adv. M. Teele KC instructed by T. Matooane & Co. Attorneys**