

IN THE HIGH COURT OF LESOTHO

In the Matter between :

THABISO LEBALLO

Plaintiff

and

ROMAN CATHOLIC SCHOOLS SECRETARIAT

Defendant

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice B.K. Molai
on the 25th day of March, 1983.

On 23rd March, 1983, I allowed Defendant's exception to Plaintiff's declaration of the summons and intimated that reasons for my decision would be filed later. These now follow.

On 6th October, 1982, Plaintiff in this matter filed with this Court summons commencing action in which he sued the Defendant on a contract alleged to have been concluded between the parties on or about 3rd September, 1979 for:

- "1. (a) payment of the sum of M9,040-00 (nine thousand and forty maluti) by Defendant to Plaintiff for construction work rendered by the Plaintiff to Defendant,
 - (b) Payment of 12½% interest (twelve and half per cent) as from the date of issue of summons to date of payment,
 - (c) costs of suit on an attorney and client scale.
2. Further and or alternative relief.

In his declaration attached to the summons, the Plaintiff disclosed, in part :

4.

"In terms of the Agreement -

- (a) Two classrooms were to be erected by Plaintiff for Defendant at Liphokoaneng Secondary School.
- (b) Two D2 houses were to be erected by Plaintiff for Defendant at Dahon High School for Defendant.

(c) One Laboratory was to be erected by Plaintiff for Defendant at Dahon High School.

5.

The Defendant had agreed to pay Plaintiff M61,000.00 (SIXTY-ONE THOUSAND MALOTI) being the initial amount of money agreed to by both Plaintiff and Defendant as a contract sum. See attached true copy of the said contract and marked "A".

6.

The contract sum referred to in Paragraph 5 above was computed as follows :-

(a)	Two Class Rooms	--	M18,000.00
(b)	Two D2 Houses	--	M23,000.00
(c)	One Laboratory	--	M20,000.00

7.

There was also an agreed additional M5,000.00 (FIVE THOUSAND MALOTI) for extras. See page two of the Agreement referred to in Paragraph 5 above.

8.

Defendant has effected part-payment of the total contract sum but since August 1980, Defendant refused to pay the outstanding arrears, infact the said Rev. Motanyane literally denied plaintiff audience everytime he went to see him on the matter.

9.

Defendant is now in default of his obligations under the Agreement, and as the date hereof, he is in arrears of his instalments together with arrear interest in the sum of M9,040.00 (NINE THOUSAND AND FORTY MALOTI) plus 12½% interest.

10.

A formal notice calling upon the Defendant

3/ to pay the

to pay the arrears was despatched to the Defendant on or about the 8th September, 1982.

11.

Defendant is at the date indebted to Plaintiff in the sum mentioned in paragraph 9 hereabove plus the interest.

12.

Defendant is liable to pay all legal costs on an Attorney and Client scale together with all other reasonable costs incurred as a result of his default."

To this Declaration, the defendant has taken exception on the grounds that it disclosed no cause of action for the following reasons :-

"(a) Nowhere in the Declaration is it alleged by Plaintiff that he has fulfilled his obligations in part or fully, namely that he has either completed the services he was supposed to render in terms of the Contract or prevented from so doing by the Defendant.

(b) (i) Paragraph 8 of the Declaration read with paragraphs 9, 10 and 11 of the Declaration renders the Declaration all the more excipiable as it avers part-payment of the total Contract sum and at the same time and in the same paragraph avers refusal by Defendant to pay the outstanding arrears without any allegation in the Declaration;

(ii) How and when the Contract Price was to be paid.

2.

AD PARAGRAPH 4 OF THE DECLARATION merely states what the Plaintiff was supposed to do nor is the said Agreement alleged to be attached to the summons in paragraph 5 of the Declaration so attached.

3.

AD PARAGRAPH 5 OF THE DECLARATION:

Makes the entire Declaration meaningless as it alleges the Defendant, having agreed to pay

Plaintiff a sum of R61,000.00 being the initial amount of money agreed to by both Plaintiff and Defendant as the Contract sum. Thus implying subsequent amount independent of the initial Contract amount of R61,000.00.

WHEREFORE Defendant prays that Plaintiff's Summons be dismissed with costs."

It may be observed that it is clear from Plaintiff's Declaration that relief he is seeking from the Court is based on a contract. Rule 21(7) of the High Court Rules 1980 provides that:-

"the declaration must comply with the provisions of Rule 20" sub-rule six (6) of which reads:

"where a party, in his pleading, relies upon a contract, he shall state whether the contract was verbal or in writing, and where and when and by whom it was concluded."

(my underlinings)

The words I have underscored in the above quoted sub-rules indicate, in my view, that in the circumstances of this case the Rules make it mandatory to state in the declaration whether the contract was verbal or in writing. Although ad para. 3 of his declaration Plaintiff has disclosed that the parties entered into a building construction agreement at Maseru on 3rd September, 1979, he does not state whether the agreement/contract was verbal or in writing. That the contract was in writing can only be presumed from para 5 of the declaration, where it is stated that a true copy of the contract marked "A" is attached. That in my opinion is not sufficient and for that reason, the declaration does not fully comply with the requirements of the Rule.

Be that as it may, the Defendant's exception to the declaration was not based on that ground but, as has been pointed out, on the basis that the declaration disclosed no cause of action for the reasons given in the notice of exception.

In my view, the most serious flaw in the declaration filed by Plaintiff was that notwithstanding the averment at para.5 of the declaration that a copy of the

contract on which Plaintiff relied for his relief was attached, no such copy was in fact attached. Assuming that the parties had, indeed, entered into a written contract, it seems to me that in the absence of a copy of such contract, it is difficult to know the exact contractual rights and obligations of the parties. In a contract such as of a building construction, one would assume that Plaintiff's claim for payment would be based on the fact that he had either made specific performance in accordance with the terms of the contract or Defendant had deliberately chosen to prevent him from doing so and this must clearly be averred in the declaration.

It may be mentioned that at the start of the arguments, Mr. Khaue for the Plaintiff conceded, and rightly so in my opinion, that the omission to attach the deed of agreement in the declaration to the summons was an error. He, however, took the view that the agreement could be handed in from the bar with leave of the Court. That, in my view, could not be done at this eleventh hour, for it would no doubt prejudice the case for the defendant as the exception was based exactly on failure to attach the agreement to the declaration.

It was further argued that the grounds on which the exception was based were minor technicalities and a better course for the defendant would have been to proceed by way of request for further particulars rather than exception to the declaration. While I agree that where minor details are lacking in the declaration, a correct procedure would be to request for particulars. I do not share the contention that where a claim is based on a written contract failure to attach in the declaration, a copy of that contract can be regarded as a minor technicality. This goes to the very roots of the matter for the success of Plaintiff's claim depends on whether or not he himself has performed according to the terms of the contract. As Davis J. said in City of Cape Town vs National Meat suppliers Ltd 1938 C.P.D. at P. 67


"while a demand for particulars is the correct procedure, where minor details are required, which are not given in the pleadings itself, a party is not compellable to resort thereto to

remedy vital omissions in a pleading which is so vague and embarrassing as a whole as to be altogether bad in law." - See also

Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa (1954 Ed.) at p. 228 where the learned authors had this to say on the issue:

"If the pleader relies on a document or portions thereof and it is material, his failure to annex the document or incorporate the material terms will lay his declaration open to exception."

In the premises, I took the view that the exception was well taken and ought to be allowed with costs as prayed. I accordingly ordered. Plaintiff was given leave to amend within 21 days of this order if he so wished.


B.K. MOLAI
JUDGE

25th March, 1983.

For the Plaintiff : Mr. Khaueo
For the Defendant : Mr. O.K. Mofolo.