

IN THE HIGH COURT OF LESOTHO

In the matter of

KUTLOANO BUILDING CONSTRUCTION CO.

Plaintiff

and

1. 'MASEELE MATSOSO	1st	Defendant
2. LESOTHO BUILDING FINANCE CORPORATION	2nd	Defendant
3. E.K. MOTOPI & ASSOCIATES	3rd	Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 9th day of November, 1984.

This is an exception to a declaration in which Plaintiff claims against the Defendants jointly and severally (a) payment of ten thousand maloti (M10,000) being damages for breach of contract (b) Interest at the rate of 11% per annum (c) costs of suit and (d) further or alternative relief.

Ad para 5 of his declaration to the summons,  
Plaintiff avers :

"on or about the 20th July, 1981, the Plaintiff entered into a written agreement, a copy of which is attached, marked annexure "A" for the erection and completion of a residential house for the first Defendant as the proprietor and third Defendant as the architects".

It is to be observed that on the face of it para. 5 of the declaration does not make it clear whether Plaintiff had concluded the agreement with either the first or the third or both the first and the third respondents. However, if the paragraph is read in conjunction with Annexure "A", there can be no doubt that the agreement (if any at all) was concluded between the Plaintiff and the first Defendant for the agreement reads:

" C O N T R A C T

THIS AGREEMENT is made the .....20th.....  
day of .....July, 1981.....  
between .....M. Matsoso.....

2/ of ....

of P.O. Box 1216, Maseru, 100  
as the Proprietor,  
and Kutloano Construction,  
of P.O. Box 919, Maseru, 100.  
as the Contractor,  
The Architect is E.K. Motopi and Associates  
of Architects, Box 706  
MASERU 100, Tel. 24296.  
The works comprise Erection and completion of house  
as shown in the drawings and/or  
describe in the specification.

The Contract Sum is Eighteen thousand Maloti.  
(M18,000.00)

This agreement witnesses that the Proprietor will pay the Contractor the contract sum or such other sum as shall become payable under the conditions of this agreement and that for the consideration thereof the Contractor will carry out and complete the Works, and both the Proprietor and the Contractor hereby agree to be bound by and observe the conditions of this agreement.

Signed by the said Proprietor  
in the presence of  
Signed by the said Contractor  
in the presence of "

As far as one can gather from this document, Plaintiff and 1st Defendant merely agreed that the third Defendant would be the Architect.

The declaration further disclosed that Second Defendant agreed in writing to finance the erection and completion of the residential house on behalf of the first defendant in the sum of Eighteen Thousand Maloti (M18,000).

3/ The alleged written .....

The alleged written agreement with 2nd Defendant was, however, not attached to the declaration on the ground that all copies thereof were kept by the second Defendant.

The Declaration disclosed that following the agreement, Plaintiff immediately moved material plant, tools and equipment necessary to carry out the whole of the contract in an expeditious manner. However, on or about 30th July, 1981, one Lehlohonolo Khoboko, an employee of the 2nd Defendant and as such acting within the scope and in the course of his employment, without any reasonable cause and in breach of contract told the Plaintiff to stop the building operations. The Plaintiff had, however, completed the foundations and dug out the septic tank. Consequently, by the aforesaid breach of contract, the Plaintiff suffered damages in the sum of ten thousand maloti (10,000) being expenses incurred as a result of Plaintiff's performance of his part of the contract.

Despite numerous demands, 1st and/or 2nd Defendants refuse or neglect to pay the ten thousand maloti (M10,000) to the Plaintiff. The third Defendant also refuses or neglects to assess and certify the value of the amount of work done despite numerous requests and demands by the Plaintiff. Wherefore, Plaintiff prayed for relief as aforesaid.

The 2nd and the 3rd Defendants filed notices of exception in which they prayed for the dismissal of Plaintiff's claim against them plus costs on the ground that his declaration to the summons disclosed no cause of action against them. 2nd Defendant added that he was not a party to the agreement which was attached to the declaration and marked annexure "A".

When the matter came before me for hearing, counsel for the Plaintiff raised a point in limine and contended that the exception which purported to be taken in terms of Rule 29(1) of the High Court Rules did not clearly and concisely state the grounds upon which it was founded. The exception did not, therefore, comply with

4/ the provisions of ....

the provisions of Rule 29(1)(b) and to that extent was bad in law. Counsels for the excipients argued that the exception was not based on vagueness or embarrassment. It was on the ground that the declaration disclosed no cause of action and in that event there was nothing more that could be said.

If I follow counsel for the Plaintiff's contention properly, his argument is that even where the exception is based on no cause of action, the excipient must state in what manner the declaration is said to disclose no cause of action.

Assuming the correctness of the argument, it seems to me that the exception of 2nd Defendant cannot be faulted for he has clearly stated that the declaration disclosed no cause of action against him in as much as he was not a party to the written agreement which was attached and marked annexure "A".

As has been pointed out earlier, annexure "A" purports to be a contract between the Plaintiff and 1st Defendant who have agreed that 3rd Defendant will be the architect. There is no indication that 3rd Defendant was a party to that agreement. On the contrary, the agreement was between the Plaintiff and the 1st Defendant. On the averments contained in the declaration, it is obvious that the basis on which 3rd Defendant says the declaration discloses no cause of action against him is that he is not a party to the agreement concluded between Plaintiff and 1st Defendant. Indeed, that is what the court was told in argument advanced on behalf of the 3rd Defendant.

I am unable to uphold the point raised in limine by counsel for the Plaintiff and it is accordingly dismissed.

Coming now to the merits of the exception, it is significant to note that on the face of it, Annexure "A" on which Plaintiff relies for his action against the 3rd Defendant has not been signed by the 3rd Defendant or any of the parties for that matter. I do not see how it can seriously be contended that 3rd Defendant is

5/ contractually bound .....

contractually bound by the terms of a written agreement which he has not signed or of which he is not a party.

As regards the 2nd Defendant, it is clear from the averments in the declaration of the summons that he is not a party to Annexure "A". His liability is based on the allegation that he has agreed in writing to finance the building of 1st Defendant's house. The alleged written agreement is a material document on which Plaintiff clearly relies for the success of his case. He has, however, not annexed that document to his declaration. At p. 228 of the Civil Practice of the Superior Courts in South Africa (1954 Ed.) by Herbstein and Van Winsen, the Learned authors have this to say on the subject:

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

Consequently, it is apparent that I take the view that the exceptions were well taken. They are accordingly allowed as prayed with costs.

B.K. MOLAI,  
JUDGE.

9th November, 1984.

For Plaintiff : Mr. Pheko  
For Defendants: Mr. Harley.