

IN THE HIGH COURT OF LESOTHO

In the Matter of :-

M.M. GENERAL ENGINEERING  
AND BUILDING CONTRACTORS

v.

THOLLY MONAHALI

J U D G M E N T

Delivered by the Hon. Acting Chief Justice  
J.L. KHEOLA on the 30th day of June, 1986.

On the 26th February, 1986 the plaintiff filed in the Registrar Office a summons in which he claimed against the defendant:

- (a) The payment of the amount of M2,135-58;
- (b) Interest at the rate of 21% per annum;
- (c) Costs of suit.

On the 1st April, 1986 the defendant took an exception to the plaintiff's summons on the ground that it lacks averments which are necessary to sustain an action in that the summons does not disclose cause of action for the amount of M2,135-58.

/Rule....

Rule 18 (5) of the High Court Court Rules, 1980 provides that the summons shall contain a concise statement of the material facts relied upon by the plaintiff in support of his claim, in sufficient detail to disclose a cause of action. It is common cause that the summons in this case does not contain any concise statement referred to in Rule 18 (5). However, Mr. Hlaoli, for the plaintiff, submits that Rule 18 (5) must be read with Rule 21 (1) which provides that within 14 days after service upon him of the entry of appearance the plaintiff shall deliver a declaration.

I disagree. A declaration is an entirely different pleading which serves a different purpose. It cannot be taken as curing the defects in a summons that does not disclose a cause of action. In any case, the exception was taken long before the declaration was filed. The pleading or summons to which an exception is taken as disclosing no defence or cause of action as the case may be, must alone be looked to (Puffett v. Fennell and Austin, 1906 E.D.C.6). A declaration is a detailed account of the nature of the plaintiff's claim and sets out the conclusions of law which the plaintiff claims he is entitled to deduce from the facts therein and a prayer for the relief claimed.

Mr. Hlaoli further submits that the exception is bad in law in that it does not afford the opposing party the opportunity to remedy the default. He referred to Rule 29 (3) of the High Court Rules, 1980. The wording of the rule clearly shows that there is no obligation on the defendant to afford the plaintiff that opportunity. He may do so if he pleases. In the present case the defendant elected to except. I have seen no authority that he was bound to give the plaintiff an opportunity to remedy the position.

/The.....

The authorities in South Africa seem to be that if a pleading lacks averments which are necessary to sustain an action or a defence there is no obligation on a party to give his opponent an opportunity of remedying the position (see The Civil Practice of the Superior Courts in South Africa by Van Winsen, third edition page 340).

In my view the exception must be upheld but not to the extent that the whole action must be dismissed. As the plaintiff has already filed a declaration it seems to me that it would be a waste of time to give it the opportunity of remedying a defect that has already been removed by the declaration. The defendant knows exactly what claim he is facing. The summons shall be regarded as amended by the declaration.

It was submitted on behalf of the defendant that costs must be paid de bonis propriis. I do not think that this is a proper case in which I can order costs de bonis propriis. The attorney omitted to insert important averments in the summons and that is negligence. The question is whether the omission amounts to gross negligence for which this Court must punish the attorney. In my view that is not so. The exception is upheld with costs against the plaintiff.

  
J.L. KHEOLA  
ACTING CHIEF JUSTICE

30th June, 1986.

For Plaintiff - Mr. Hlaoli  
For Defendant - Mr. Kambule