CIV/T/335/99

IN THE HIGH COURT OF LESOTHO

In the matter of :

LESOTHO BANK **Plaintiff**

vs

'MAKABELO BELINA NKALAI **Defendant**

RULING

Delivered by the Hon. Mr Justice M L Lehohla on the 15th day of December, 2000

The plaintiff acting in terms of Rule 29 has excepted to the Defendant's plea on the grounds that

(1) it does not disclose a defence

(2) it is vague and embarrassing

(3) it does not comply with the requirements of Rule 22.

Mr Mpobole for the plaintiff argued that the plaintiff has sued in respect of

moneys lent and advanced to the defendant's late husband.

He pointed out that the defendant and her husband were married in community of property.

The claims as appears in the summons are in two categories. Claim one is in the sum of M83 073-92. Claim two is in an amount of M1 569 082-84. Interest on both is at the rate of 24% per annum starting from September 1996 to date of payment.

Mr Mpobole indicated that the defendant stood surety for her late husband and was both such surety and co-principal debtor.

He demurs at the defendant making just a bare denial in her plea to the effect that "contents herein are denied and the plaintiff is put to the proof thereof".

He pointed out that in the alternative though not quite pointedly the defendant pleads that she couldn't stand surety for her husband as the two were married in community of property.

Rule 22(3) reads :

> "The defendant shall, in his plea, admit or deny or confess and avoid all the material facts alleged in the declaration or state which of the said facts are not admitted and to what extent. He must clearly and concisely state all material facts on which he relies".

Learned counsel for the plaintiff accordingly submitted that the defendant's plea does not accommodate itself into any of the essentials set out in the above Rule because it is a bare denial of liability that does not even state the nature of the defence nor disclose the material facts on which the defence is based. Thus the plaintiff is at a loss as it does not know what case to meet. To this extent the plea is embarrassing.

Mr Mpobole correctly submitted that pleadings are meant to curtail issues and therefore must fully disclose what case the other party is to meet.

It is indeed a valid challenge to point out that it is no defence to say "I deny and put the party making the allegation to proof".

It is essential to say what set of facts are denied.

Mr Mpobole's challenge is indeed valid to the extent that he has indicated that, for example, the plaintiff has alleged that the defendant's husband had an account with it and that certain amounts were disbursed to him at this special instance and request and further that certain interest was to be payable and that the amount as at issuance of summons was due and payable yet the stock response it obtains from all these allegations leaves the plaintiff without knowing if the defendant denies (1) that her husband operated those accounts; or (2) that monies were advanced at his special instance and request.

The plaintiff is totally at sea whether perhaps the defendant in fact doesn't know that her husband operated the accounts but denies the monies were due and payable.

In his reaction to the onslaught *Mr Ntlhoki* for the defendant submitted that the exception is bad in law and should be dismissed with costs.

Learned Counsel indicated that it couldn't lie in the plaintiff's mouth to say the defendant has made a bare denial of liability while at once conceding that the defendant is also relying on an alternative defence. The observation by the plaintiff

that this seems to be the case should be construed as a concession that there has been a defence disclosed by the defendant. Whether or not such a defence as has been disclosed is sustainable should not and cannot be an issue in the present proceedings but rather would have to stand over till the proper stage which is a trial stage has been reached. I agree with this submission.

Indeed the trial stage is the only proper stage wherein questions of merit can properly be traversed. The present therefore is a premature stage to embark on any such inquiry.

While I agree that it is premature to make a determination whether the defendant could be surety and co-principal debtor with her husband it would seem on the other hand that the so called power of attorney attached as proof of suretyship by the plaintiff to further particulars served on the defendant can legitimately be relied upon by the plaintiff as *prima facie* evidence that the defendant bound herself as surety and co-principal debtor for acts done by Teke Nkalai pursuant to contents of Annexure "A1". Belina 'Makabelo Nkalai designating herself as (Mrs) under her signature when executing Annexure "A1" makes the following undertaking at the bottom of that document -

> "It is understood that, so far as you are interested and concerned all such acts of the said Current Accounts shall be binding upon me and that the authority given to him (Teke Nkalai) remains in force until I shall give you notice to the contrary in writing".

Because no mention of such notice has been given to date as far as I am aware the plaintiff was entitled even in the current proceeding to use it adversely against the defendant who *prima facie* executed it.

But this is merely in passing. The area in respect of which the defendant seems to be on solid ground is the challenge by *Mr Ntlhoki* showing that while for argument sake it could be said the defendant's plea doesn't comply with Rule 22(3) and as such could be dubbed vague and embarrassing the plaintiff itself is not out of the wood yet because its exception doesn't comply with the Rules.

The plaintiff has done itself in the eye by excepting when realising that the plaintiff has not complied with the Rules. This does not accord with provisions of Rule 29.

Rule 29 which is the Rule that deals with exceptions says at sub-rule (2) :

> "Where a pleading is vague and embarrassing, the opposing party, (shall-may) deliver, within the period allowed for the delivery of subsequent pleading, a notice to the plaintiff ..... (or) party whose pleading is attacked, ... within twenty-one (days) stating that the pleading is vague and embarrassing setting out the particulars which are alleged makes(sic) the pleading so vague and embarrassing, and calling upon him to remove the cause of the complaint within seven days and informing him that if he does not do so an exception would be taken to such pleading".

In the instant matter the plaintiff seems to have paid scant regard to the requirements of the above rule in that it didn't bother -

(1) to deliver notice to the party whose pleading is attacked

(2) to state in such notice that the pleading is vague and embarrassing

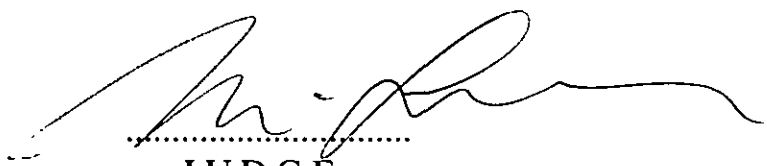
(3) to warn the party whose pleading is attacked to remove the cause of the complaint within seven days

(4) to warn such party that in the event of non-compliance then the plaintiff would move an exception before court.

Finally there is no indication that the move embarked on by the plaintiff was effected within 21 days of receiving the opposing party's offending document.

Because my general assessment of what is involved in this proceeding is that like a curate's egg it part-takes of the good and the bad in equal measures in such a way that neither the plaintiff nor the defendant is free from equal fault, I make a determination that a rare occurrence of equilibrium has been reached in this proceeding. And because where such a stage is reached it is the excipient who should be disobliged the exception is dismissed. However because of the criticisms made of the defendant's case I order that each party bear its own costs.

The plaintiff is allowed to move its exception within the next 30 days if it so wishes in order to avoid the delay which so far has unnecessarily dogged this matter.



JUDGE
15th December, 2000

For Plaintiff : Mr Mpobole
For Defendant : Mr Ntlhoki