C OF A (CIV) No.30/05
CIV/T/305/2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

ASSET RECOVERIES (PTY) LTD APPELLANT

and

LESOTHO DAIRY PRODUCTS (PTY) LTD FIRST RESPONDENT

RAOHANG MABEOANA
DAIRY FARMERS ASSOCIATION SECOND RESPONDENT

CORAM:

RAMODIBEDI, JA
GROSSKOPF, JA
MOFOLO, J

HEARD : 3 APRIL 2006
DELIVERED : 11 APRIL 2006

SUMMARY

Practice – Exception – Principles thereof – Trial Court going behind defendant's plea in determining plaintiff's exception thereto – Whether permissible.

JUDGMENT

RAMODIBEDI, JA

[1] This matter bears the hallmarks of a case which has regrettably been allowed to degenerate into a farce. It is a ding-dong affair between the parties with roots traced as far back as 1985 when the site forming the subject matter of the dispute was admittedly allocated to RAOHANG MABEOANA DAIRY FARMERS COOPERATIVE SOCIETY ("the Cooperative Society"). It is thus convenient to commence this judgment with the chronology of relevant events in the matter.

[2] On 17 June 2004, the present Respondents issued vindicatory summons against a certain Teboho Tsepiso and the Appellant respectively for prayers in these terms:-

> "(a) Cancellation of the sale in execution of 2nd Plaintiff's site to 1st Defendant.
>
> (b) Ordering the 1st Defendant to vacate the said site.
>
> (c) Ordering the 1st Defendant to restore possession of all the Equipment to 1st Plaintiff.
>
> (d) Return of rental of M4,400.00 for 11 months which was illegally collected from June 2003.
>
> (e) Ordering the Defendants to pay the costs in the event of opposition.

(f) Granting Plaintiff such further and/or alternative relief."

[3] On 30 June 2004, the Appellant duly entered an appearance to defend. This was followed by a request for further particulars on 12 July 2004. Such particulars were in turn furnished on 11 August 2004.

[4] On 7 September 2004, the Appellant duly filed a special plea together with a plea on the merits of the claim.

[5] The Appellant's special plea specifically referred to the Cooperative Society in these terms:-

> "Special plea
>
> The Defendants herein hereby raise the Special Plea of Non-Joinder of Raohang Mabeoana Dairy Farmers Co-Operative Society, and yet the Plaintiffs know quite well that the said cooperative society has a substantial interest in this matter in that it claims ownership of the site and machinery that are the subject matter of this claim."

[6] Of particular relevance insofar as this appeal is concerned is paragraph 4 (AD paragraphs 5 and 6) of the Appellant's plea. To the extent that the facts set out therein are crucial to a determination of the Respondents' exception to Appellant's

plea, it is convenient to reproduce the contents of the paragraph in question:-

"4.

AD PARA 5

Save to deny that the site that was attached and sold in execution belonged to 2nd Plaintiff and to contend that the site belonged to Raohang Mabeoana Dairy Farmers Cooperative Society, the rest of the contents are denied.

AD PARA 6

(a) Defendants contend that default Judgment was properly granted against the aforesaid Raohang Mabeoana Society as the latter acknowledged its indebtedness to the 2nd Defendant herein and consented to Judgment. The site that was attached in execution was allocated to the said Society long before the registration of the 2nd Plaintiff herein and the said allocation was never revoked.

(b) Defendants deny that the dairy machinery on the site in question belongs to the 1st Plaintiff and contend that the machinery belonged to the aforesaid Raohang Mabeoana Dairy Farmers Cooperative Society until it was lawfully sold in execution."

[7] On the same day, namely, 7 September 2004, the Respondents filed an exception to Appellant's plea. The particulars of the exception were stated as follows:-

"NOTICE OF EXCEPTION

SIRS,

KINDLY TAKE NOTICE THAT Plaintiff intends to raise an exception to the Defendant's Plea as follows;

The Defendants had sued and executed against present Plaintiff in CIV/T/396/2001. They had been granted Default Judgment accordingly. It is not a defence to quote that the site belongs to a third party to whom they never referred to in the original litigation. i.e. CIV/T/396/2001.

DATED AT MASERU THIS 7TH DAY OF SEPTEMBER 2004.

_____
T. MATOOANE & CO.,
PLAINTIFF'S ATTORNEY
1ST FLOOR
NKHATHO BUILDING
P.O. BOX 7089
MASERU

TO: THE REGISTRAR
HIGH COURT
MASERU

AND TO: MESSERS HARLEY & MORRIS
3RD FLOOR
CHRSTIE HOUSE
MASERU
REF: 0380/MBM"

[8] I pause there to point out that what stands out like a sore thumb is the fact that the Respondent's exception lacked a prayer. It is well settled that an exception which contains no prayer for the relief sought by the excipient is bad in law. See Beck's Theory And Principles of Pleading in Civil Actions: Isaacs Q.C., Fifth Edition at page 123.

Furthermore, in terms of Rule 29 of the High Court Rules 1980, an exception may only be taken on the following grounds:-

(a) that the pleading under attack does not disclose a cause of action or a defence, as the case may be; or

(b) that such a pleading is vague and embarrassing and the pleader has not, within seven days of a notice from the other side, removed the cause of complaint contained in the pleading.

In the light of these considerations, it is evident that the Respondents' exception lacked the necessary averments and therefore failed to comply with the High Court Rules.

THE COURT A QUO'S APPROACH TO RESPONDENTS' EXCEPTION

[9] Instead of proceeding on the basis of the correctness of the appellant's plea as fully set out in paragraphs [5] and [6] above, the court *a quo* relied on the contents of court "files" in previous proceedings, more particularly, CIV/T/396/01. In

the course of its judgment the court then said this:-

> "upon perusal of the files, nowhere did I find any reference to a third party in the name of the Society as distinct from the association since the latter had not been cited in the previous proceedings until at the time that these present proceedings were instituted."

[10] A typical example of the learned Judge *a quo*'s approach and determination in going behind the plea in question is once again contained in what she says in her judgment, namely:-

> "On the basis of the contents of these pleadings, I am of the opinion that indeed at some stage there was a Raohang Mabeoana Dairy Farmers Cooperative Society which entered into a loan agreement with the then Agric Bank. However, this Society ceased to exist at some stage resulting in the site in question being subsequently allocated to 1st Plaintiff herein. On the other hand, there is nothing in the court file to support defendants' argument that such a Society still exists which would justify its being joined in the present proceedings. There is not even a supporting affidavit from them to reinforce defendants' argument that the site is being claimed by another entity aside from 2nd Plaintiff."

THE LAW

[11] Now, it is well established that an exception to defendant's plea must be determined solely on the basis of the correctness

of the facts set out in the plea. See for example Ramakoro v Peete 1980-84 LAC 94 at 100 E-F.

In Retselisitsoe Khomo Mokhutle N.O. v MJM (Pty) Ltd C of A (CIV) NO.15/2000 (unreported) this Court said the following:-

> "For the purposes of deciding whether particulars of claim support a cause of action the allegations contained therein must be accepted as correct. If evidence can be led which can disclose a cause of action alleged in a pleading, the pleading will only be excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."

Although these remarks were made in the context of an exception to plaintiff's claim, the principle stated therein applies with equal force to an exception to a plea.

[12] It follows from the foregoing considerations that the Appellant's allegations contained in its plea must be accepted to be correct in all constituent parts for the purposes of this appeal in relation to the Respondents' exception.

[13] On this approach, therefore, the conclusion is inescapable in my view that the court *a quo* was wrong to have gone behind the Appellant's plea. Similarly, the court *a quo* was not justified in upholding the Respondents' exception on the ground that there was "not even a supporting affidavit from them (the Appellant and its co-defendant) to reinforce

defendants' argument that the site is being claimed by another entity aside from 2nd Plaintiff." With due respect to the learned Judge *a quo*, there is no procedure requiring a defendant to file an affidavit in opposition to plaintiff's exception. The contents of a defendant's plea are sufficient to dispose of an exception. The court simply proceeds on the basis of the correctness of such contents.

[14] Similarly, I point to yet another misdirection by the learned Judge *a quo*. In the course of her judgment dismissing the special plea by the Appellant and its co-defendant she said this:-

> "Their contention was that the two (namely, the Second Respondent and the Cooperative Society) exist separately from one another yet they failed to produce any evidence to show that the Society still exists as a matter of fact."

[15] The learned Judge *a quo* then concluded:-

> "I therefore find that on the pleadings before me, at present there is no such legal entity as the Cooperatives Society. For these reasons, I dismiss defendants' special plea of non-Joinder."

[16] It is clear, it seems to me, that the learned Judge *a quo* ignored the contents of the Appellant's special plea as well as

paragraph 4 of its plea as fully set out in paragraphs [5] and [6] above. I feel myself constrained to say that this, as I have said earlier and as I repeat, she was not entitled to do.

[17] Nor was the court *a quo* justified in dismissing the Appellant's special plea of non-Joinder of the Cooperative Society. One must remember that the Appellant's averments contained in its plea were to the effect that the Respondents "knew quite well" that the Cooperative Society had a substantial interest in the matter and actually owned the machinery forming the subject matter of the dispute. At the very least, the special plea raised, in my view, a triable issue on this aspect of the case. One must further bear in mind, however, that the Respondents' counter allegation contained in their further particulars to the effect that "Raohang Mabeoana Cooperative Society, and the allocation was (sic) lawfully revoked in October 2001" raises, in my view, a bona fide dispute of fact. It seems fair and just in these circumstances that this issue should be determined by the trial court by way of oral evidence.

[18] The appeal is accordingly upheld with costs. The order made by the court *a quo* is set aside and replaced with the

following order:-

> "**The Plaintiff's exception to Defendants' plea is dismissed with costs."**

[19] It is further ordered that the Defendants' special plea shall be determined by way of oral evidence at the trial before a different Judge.

_____

M.M. RAMODIBEDI

JUDGE OF APPEAL

_____

I agree: F.H. GROSSKOPF
JUDGE OF APPEAL

I agree: _____

G.N. MOFOLO
EX OFFICIO JUDGE OF APPEAL

For Appellant : **Mr S. Malebanye**

For Respondents: **Mr T. Matooane**