

CIV/T/298/07

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TSELISO QHOMOKO

PLAINTIFF

And

TEBOHO KAHLLOLO

DEFENDANT

RULING ON EXCEPTION

Coram : Hon. Majara J.

Date of judgment : 8th December 2011

Summary

Exception to a declaration – whether exception is substantial and goes to the root of the case – whether the defendant will be embarrassed in his plea – in general mere technical exceptions will not be sustained unless the court is satisfied that the excipient will be prejudiced – exception dismissed with costs.

ANNOTATIONS

CITED CASES

1. **Sueltz v Bottler 1914 EDL 176**
2. **Lobo Properties v Express Lift Co. (S.A.) (Pty) Ltd 1961 (1) SA 704**

STATUTES

High Court Rules 1980

BOOKS

1. **Isaacs; Beck's Theory and Principles of Pleading in Civil Actions, 5th Edition**
2. **Herbstein and Van Winsen; the Civil Practice of the Supreme Court of South Africa; 4th Edition p489**

[1] The plaintiff in the present matter instituted an action against the defendant wherein he claims payment of the sum of M47, 000.00, interest at the rate of 18.5% per annum from July 2006 to the date of payment and costs of suit. The defendant has raised an exception to the plaintiff's summons on the ground that it fails to sustain a cause of action recognized at law such as restitution as a result of cancellation for breach of contract pursuant to High Court Rule 29 (1).

[2] A brief summary of the facts is that the parties herein entered into an agreement of sale of a motor vehicle and that the full purchase price was duly paid as agreed. In terms of the plaintiff's declaration the defendant subsequently demanded the return of the motor vehicle and paid back to him the sum of M18,

000.00 with the promise that he would pay up the balance. It is his case that the defendant has not done so to-date.

[3] This matter was set down for hearing on the 9th June 2011 but due to unforeseen circumstances it did not proceed on that day. It was then agreed that Counsel for the parties should submit their written heads of argument for the determination of the exception.

[4] In terms of the heads of argument that were submitted on behalf of the defendant, it is the latter's contention that it is apparent from the contents of the declaration that the plaintiff took possession of the subject matter but that it is not clear whether the alleged refusal by the defendant to transfer ownership amounted to a breach of the agreement. Further that the declaration lacks the necessary averments to establish exactly what the defendant ought to do, to effect transfer of ownership.

[5] That in addition, it is unclear if the agreement was cancelled or if the defendant was placed in *mora* regarding the issue of transfer. Further that the declaration is silent on why the defendant made a demand and subsequently returned the sum of M18, 000.00. It was his Counsel's further contention that in essence, there is no clear connection between the sale agreement and the demand for the vehicle.

[6] On behalf of the plaintiff, it was submitted that the issue for determination is whether or not the plaintiff's summons and declaration as amplified by the further particulars do not disclose a cause of action and thus exceptionable.

[7] **Mr. Tsenoli**, Counsel for the plaintiff made the submission that the claim in this matter is for payment of the balance of the money that the plaintiff paid to the defendant namely, M47, 000.00 and not cancellation or specific performance of the

sale agreement. He added that there is no need to establish what the defendant ought to do to effect transfer of ownership, state whether or not the agreement was cancelled or if ever the defendant was placed in *mora* or state why the defendant demanded the return of the vehicle and paid back the sum of M18, 000.00. Further that what is clear is that the agreement was cancelled and the plaintiff did not object to that cancellation.

[8] It was Counsel's further submission that the factors that the defendant seeks to rely on to sustain his exception could have been raised and well addressed through further particulars and not by way of exception. That alternatively, they could have been sustained by evidence during trial.

[9] In his declaration the plaintiff states that at the beginning of the year 2006 the parties entered into a written agreement of sale in terms of which the plaintiff was to buy the vehicle the subject matter herein from the defendant for consideration of M65, 000.00 and that ownership would pass to the plaintiff upon payment of the full purchase price.

[10] He adds that pursuant to that agreement the plaintiff did pay the said sum in cash in two instalments to the defendant on the 3rd February 2006 and 11th February 2006 respectively.

[11] At paragraph 6 of the declaration he states as follows:-

“Despite the said full payment defendant refused to pass or transfer ownership of the vehicle in issue to plaintiff. However, defendant demanded the said vehicle and returned the sum of EIGHTEEN THOUSAND MALOTI (18,000.00) to plaintiff and promised to pay the balance of FORTY SEVEN MALOTI (sic) M47,000.00 by end of July 2006 but has failed without any reasonable cause.”

[12] I now turn to deal with the issue whether given these circumstances the plaintiff's summons does as a matter of fact, not disclose a cause of action and is as such exceptionable. The grounds upon which the exception is raised are tabulated in the notice of exception namely that the summons lacks necessary averments to determine if the defendant was in breach in allegedly refusing to transfer ownership. Secondly that it is unclear if the plaintiff cancelled the agreement is claiming the consequential relief of restitution. Thirdly that it lacks necessary averments to determine the basis for the defendant's alleged demand of the vehicle and his subsequent return of the amount of M18, 000.00 as well as the basis for the plaintiff's assumption that the defendant was returning the consideration. Lastly that it fails to establish if the defendant's demand was met.

[13] I might also add that having been served with the summons and declaration the defendant made a request for further particulars which the plaintiff duly furnished.

[14] The plaintiff's claim as it appears in the summons is payment of M47, 000.00, interest thereon and costs of suit. In terms of the rules relating to exceptions, the excipient is bound by the pleading to which he excepts and is taken to admit those facts. *In casu*, the defendant does not dispute that there was, a written sale agreement between the parties, payment of the full purchase price was made by the plaintiff who demanded the return of the vehicle from the plaintiff and paid back a portion of the amount with the promise that he would pay the balance at a later stage. Against this background the plaintiff does not claim either cancellation of the contract, specific performance or damages for breach. He claims that he be repaid the balance owing after the defendant demanded his vehicle back.

[15] In my opinion, the grounds that the defendant seeks to rely on to sustain his exception are technical ones because it cannot be correctly argued that the pleading as amplified by the further particulars does not establish a sufficient case for the claim namely, payment of the balance of the money allegedly paid by the plaintiff to the defendant pursuant to the agreement. This is especially because the defendant admits the existence of the contract of sale, payment of the purchase price by the plaintiff, repayment by him to the plaintiff of part of the purchase price and the outstanding balance owed to the plaintiff.

[16] In *Isaac's book*¹ the learned author has this to say in relation to exceptions that are merely technical:-

“Mere technical exceptions will not in general be sustained unless the court is satisfied that the excipient is prejudiced. The policy of the court is against entertaining exceptions which are not substantial, which do not go to the root of the case and where there is no embarrassment, and exceptions will not be sustained which merely increase costs without serving any good purpose.”

[17] These sentiments have been echoed in *inter alia*, the case of Lobo Properties v Express Lift Co. (S.A.) (Pty) Ltd² wherein De Villiers A.J. had this to say:-

“It cannot be repeated too often that the object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner.”

[18] I have already stated that it was submitted on behalf of the plaintiff that the other averments that the defendant contends are wanting can be cured with the furnishing of further particulars or by evidence during trial. In the light of the sentiments that I have quoted above, I am persuaded to accept this submission

¹ 5th Edition, p122-123

² 1961 (1) SA 704 at 711

especially in light of the fact that the plaintiff's claim is for repayment of his money the fact of which payment has not been disputed by the defendant. It is my further opinion that the defendant could have obtained greater details by requesting further particulars in relation to the matters he has raised as warranting the declaration exceptional. See in this regard the case of **Sueltz v Bottler**³ quoted to this Court. I am also not persuaded that the defendant stands to suffer any prejudice if the exception is not upheld.

[19] This is because in the declaration, it is clear that what the plaintiff is seeking is for this Court to determine whether or not the defendant is liable to pay back to him the outstanding balance of the purchase price he allegedly paid to him. Thus, his failure to state whether the defendant was in breach in allegedly refusing to transfer ownership of the vehicle, whether he cancelled the agreement and is claiming the consequential relief of restitution, or the basis for the defendant's alleged demand of the vehicle and his subsequent return of the amount of M18,000.00 as well as the basis for the plaintiff's assumption that the defendant was returning the consideration can cause any real embarrassment to the defendant.

In light of these reasons, it is my view that the exception does not go to the root of the plaintiff's claim that being one of the points of determination per *Herbstein and Van Winsen*⁴.

[20] It is for these reasons that I dismiss the exception. Costs will be in the cause.

N. MAJARA
JUDGE

³ 1914 EDL 176 at p180

⁴ The Civil Practice of the Supreme Court of South Africa; 4th Edition p489.

For the plaintiff : Mr. P. Tsenoli

For the defendant : Mr. Q. Letsika