CIV/T/406/2012

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:

THAKANTŠALA MOFOKENG Plaintiff

And

SEKONYELA PULE 1st Defendant

TŠELISO MAKHETHA 2nd Defendant

SALEMONE PHOOFOLO 3rd Defendant

TEFELO FOLOKO 4th Defendant

JUDGEMENT

Coram : Hon. Mr. Justice T. E. Monapathi

Date of Hearing : 11th September 2012

Date of Judgement : 3rd October 2013

SUMMARY

Except for inelegant drafting, an exception in terms of Rule 29 (1) ought to succeed and where Plaintiff's claim itself was not actionable, in that there was being no such remedy. As in the present case the exception succeeded and the claim was accordingly dismissed.

CITED CASES

Officer Commanding Roma Police and Others v Khoete C of A (CIV) No. 7/2011
Kutloano Building Construction and Maseele Matsoso and 2 Others C of A No. 16 of 1984

STATUTES

High Court Rules (Rule 29)

[1] The First Defendant has taken an exception based on two (2) grounds. Firstly, that the declaration disclosed no action for "costs" Secondly that the declaration served on the First Defendants' attorney was unsigned. The latter challenge was abandoned.

[2] The issues were threefold. Firstly, whether "the exception for costs" was a good and valid exception. Secondly whether there was need for notice on Plaintiff to comply to remedy or to correct the defect pointed out as a ground for exception. And finally, and alternatively that even if the exception was bad the Plaintiffs claim would itself be ultimately be judged to be unsustainable in law.

[3] That, in any event, if not alternatively, that the last issue came out as the ground for absence of cause of action as was later argued although not pleaded specifically or in detail. The remedy at disposal of the Plaintiff would have been an exception to the exception. ***Kutloano Building Construction v Maseele Matsoso and 2 Others C of A No. 16 of 1984***. In this interesting case, Schutz JP spells out that:

> "Accordingly I am of the view that the second defendant's notice of exception was insufficient for the purpose of sustaining an exception that the declarator viewed no cause of action."

One complaint in the present matter was obviously that the particulars of the exception were not shown. That may have been so but I could not ignore the valid point of absence of a valid remedy in law even though raised by the Defendants in the Heads of Argument. It was apparent.

[4] While I am prepared to distinguish ***Kutloano Building Construction's*** case from the present one on account of the question of the voidnesss of the remedy, I cannot ignore the learned Judge President's remarks which are worthy of repeating. On page 8, he said:

> "I am afraid that my decision may smack of the triumph of formalism over substance. But forms are often important and the requirements of the sub-rule are such. Bad as was the declaration, so also were the notice of exception for their intended purpose. The Plaintiff had taken his life in his hands filing the declaration. But so in turn did the two Defendants when they filed their exceptions, and, as at the battle of Fontenoy, they had to fact the firing first."

[5] The Plaintiff herein who was represented by Mr Klass, alleged that Defendant had unlawfully and without justification killed Plaintiff's wife sometime on the 16th June, 2005. The Plaintiff claims that as a consequence of the said loss of his wife he had lost both the *consortium* and companionship of his wife and needed compensation. He therefore demanded damages to the tune of M500,000.00 and interest thereon.

[6] Only the First Defendant showed interest in defending the matter by filing his opposition. The rest did not. However, instead of filing is plea, the First Defendant took an exception and elected not to plead over and to respond to the Plaintiff's declaration. It was submitted by Defendants that the exception was properly taken under ***Rule 29*** of the ***High Court Rules***.

[7] The ***Rule 29*** is couched as follows:

> "1. a) Where any pleading lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party, within the period allowed for the delivery of any subsequent pleading, may deliver an exception thereto;
>
> b) The grounds upon which the exception is founded must be clearly and concisely stated.
>
> 2. a) Where any pleading is vague and embarrassing, the opposing party, within the period allowed for the delivery of any subsequent pleading, deliver a notice to the or Plaintiff, as the case may be, may within twenty-one party whose pleading is attacked, stating that the pleading is vague and embarrassing setting out the particulars which are alleged makes the pleading so vague and embarrassing, and calling upon him to remove the cause of complaint within seven days and informing him that if he does not do so an exception would be taken to such pleading;
>
> b) If the cause of complaint is not removed to the satisfaction of the opposing party within the time stated such party may take an

exception to the pleading on the grounds that it is vague and embarrassing. The grounds upon which this exception is founded must be fully stated. (My emphasis)

[8] On the first ground, Counsel for the first Defendant argued that the "exception" in question was raised under the said ***Rule 29 (1)*** in that there were no averments necessary to sustain a cause of action. As it can be seen the exception in ground 1 above was intended to be "discloses no cause of action" if reliance was based on ***Rule 29*** (1) not 2 (a) nor 2 (b). Obviously, I was persuaded that the aspect of "for costs" was merely inelegant drafting by Miss Maapesa, Defendant's Counsel. The intended meaning ought to be clear. I would condone this bad drafting. It was clearly a mistake.

[9] Be that as it may, Miss Maapesa argued that in any event it is not actionable in law to claim that one has lost *consortium* because of the death of his spouse. That the law, as it obtains, does not allow penal damages but that the law of damages is rather compensatory in nature. It was further contended that damages for sentimental loss were not recoverable and that the damages claimed by the Plaintiff in this matter were sentimental and therefore not recoverable. I agreed that that is the position of the law in relation to those kinds of claims.

[10] Mr. Klass's first response, was a challenge that the exception did not comply with the Rules as the First Defendant's attorney gave an impression that he represented all the Defendants, which was not the case. I did not see how valid or significant that point was indicated to be. It was clear indicated in prayer that it was the First Defendant who made the exception and not the others. It is also common

cause that the other Defendants did not file their opposition. The court could not be sympathetic on this point.

[11] Mr. Klass then submitted that the exception was not proper as it failed to comply with ***Rule 29*** (2) and 29 (3) of the High Court Rules. The contention here is that the First Defendant ought to have called upon the Plaintiff to correct the complaint first. On being confronted about the fact that ***Rule 29*** (1) (a) does not require notice to correct anything, the Plaintiff's Counsel was at pains to issuably respond. The Defendant's Counsel confirmed that indeed ***Rule 29*** (1) (a) was in fact the rule relied upon for the exception, that the Rule in question did not require notice or certain compliance as a prerequisite.

[12] At the end of his submissions, the Plaintiff's Counsel pointed out (by way of repetition that there was nothing called an exception to summons or declaration disclosing 'no action for costs' as it was couched in the notice of exception. He said there was no such a thing and that on that ground alone that exception should be dismissed. The answer to that by the First Defendant's Counsel was simply that that was a typographical error but she failed to apply for an amendment. She said what the notice of exception was intended to say was that the declaration and summons disclosed no cause of action as her submissions would bear testimony to that. The Plaintiff's Counsel showed that he would oppose any amendment. May be he would, but unfortunately no such application was moved.

[13] The court takes a very dim view in the manner the First Defendant's Counsel drafted the notice of exception and failure to proof read it. It is things of this nature that cause unnecessary hardships to the litigants and which occasion unnecessary costs of litigation with concomitant unwarranted postponements unduly prolonging the cases. However, taking into consideration the fact that the court was addressed fully on ***Rule 29*** in particular **Rule 29 (1) (a)** by both Counsel, the court can condone the issue of an inelegantly drafted of the exception and go to the real substance in the interest of justice. As it is often said the rules are made for the court and not the other way round.

[14] On the authorities given by the First Defendant's Counsel and on the strength of the case of the ***Officer Commanding Roma Police and Others v Khoete C of A (CIV) No. 7/2011*** at page 16-18, the Plaintiff's claim appears unsustainable in law. Despite the patent inelegance in the First Defendant's notice of exception, it may be remarked that courts would not allow themselves to be dragged into dealing with academic or moot questions. This action must accordingly fail.

[15] This is action dismissed. A proper action can still be filed. I make an order as to costs as follows:

[16] Plaintiff to pay only half (½) of the costs to Defendant.

T. E. MONAPATHI

ACTING CHIEF JUSTICE

For Plaintiff : Mr. Klass
For Defendant : Miss Maapesa