IN THE HIGH COURT OF LESOTHO

CIV/T/489/08

In the matter between:

BOIKETLO GORDEN SIBOLLA	**PLAINTIFF**
And	
SENT-A-COW	**1ST DEFENDANT**
TAOLE MANGOPE	**2ND DEFENDANT**

JUDGMENT

Coram: **Hon Nomngcongo J.**

Date of hearing: **19 April 2011**

Date of Judgment: **24 April 2013**

[1] The defendants have excepted to the plaintiff's summons in terms of Rule 29 1 (a) claiming that they lack the necessary averments to sustain the action. Their contention is that the plaintiff is suing them on a contract that has expired in as much as the contract had been entered into in April 2006 for a period of six month which therefore ended in September 2006.

[2] In his declaration the plaintiff avers that in about April 2006 he entered into a verbal agreement with the first defendant for the rental of his motor vehicle at a fixed rate of M15,000 per month. On the 10th October 2006 the rental vehicle got involved in an accident as a result of vehicle got involved in an accident as a result of which the vehicle was rendered unusable. The accident was caused; it is alleged, by the sole negligence of the second defendant acting in the course of and within the scope of his employment with the 1st defendant. The plaintiff claims against the defendants jointly and severally.

1. Payment of the sum of M15,000 as rental for the month of October, 2006 by first defendant.

2. Interest thereon at the rate of 18.5% per annum a *temporemorae*.

3. Both defendants to restore to plaintiff his aforesaid vehicle in good working condition.

4. Both dependently jointly and severally to pay plaintiff an amount of M5,000 per month from November 2006 to date of restoration of vehicle as damages for loss of business.

Interest thereof at the rate of 18.5% per annum a *tempore morae.*

5. Costs of suit.

[3] The exception then is directed only at prayer 1 viz, payment of M15,000 as rentals for the month of October 2006. The ground for exception being that it lacks the necessary averments to sustain the cause of action, the reason being that the contract between the parties ended in September calculated from the month of April.

[4] The onus rests on the excipient to establish whether the summons discloses no cause of action. It was put thus in Amalgamated Footwear Industries v Jordan and Co. LTD 1948 (2) SA 891 at 893.

> "It is the excipient that is alleging that the summons does not disclose a cause of action and he must establish that in all its possible meanings no cause of action is disclosed."

[5] It was further held in Coronation Brick PTY LTD v STRACHAN CONSTRUCTION CO (PTY) LTD. 1982 (4) SA 371 (D) at 379 F – H that:

"This being the exception stage the recipient has to satisfy the Court that the particulars of claim as amplified do not contain sufficient averments to sustain the action. If there were no averment of an essential element of the wrong complained of then the question would be whether it is a reasonable inference from the facts alleged that the elements is alleged".

And further more in Mckelvey V Cowan N0 1980 (4) SA that

"It is a first principle of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action."

[6] In *casu* the plaintiff says they had entered into agreement for a period of six months starting at same unspecified date in April. The accident complained of happened on the 10th October which the defendant says was beyond the contract period. The plaintiff avers that when the accident occurred it was negligently driven by the second defendant in the course and within the scope of his employment with the first defendant. The question is whether

these averments do not disclose a cause of action. In my view they evidently do in as much as they allege a contractual relationship between plaintiff and defendant which naturally gives rise to an obligation to pay on the part of the defendant.

[7] The defendant's objection seems to be based solely on the fact that such contract had terminated after the period of six months. This is disingenuous. This assumes first that some time in April means the first of April. This cannot be so for a contract entered into say towards the end of April may well end in October. On the facts before me at this stage the subject matter of the contract was in any case still in the possession of the defendant and we are yet to hear whether that is denied and if not why it was still in his possession after the termination of the contract. These are matters that evidence can cure (see Coronation Brick and Mekevley cases (supra)).

[8] The pleading is not excipiable and the exception is dismissed with costs. The defendants are ordered to file their plea within fourteen days hereof.

T. NOMNGCONGO
JUDGE

For Plaintiff : Mr Thulo
For Respondent: Mr T'senoli