

**CCT/173/2013**

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Division)**

In the matter between:

**FIRST NATIONAL BANK LESOTHO**

**PLAINTIFF**

**AND**

**LEBOHANG FREDERICK THOTANYANA**

**1<sup>ST</sup> DEFENDANT**

**PALESA 'MATEBOHO THOTANYANA**

**2<sup>ND</sup> DEFENDANT**

**RULING**

**Coram : L.A. Molete J**  
**Date of Hearing : 16<sup>th</sup> February 2015**  
**Date of Judgment: 25<sup>th</sup> February 2015**

**SUMMARY**

*Special Plea – Types of – Defendants raising a number of points as special plea – Failure of the points to qualify as special plea – Defendants not having pleaded over – Special plea dismissed with costs.*

## ANNOTATIONS

## CITED CASES

## STATUTES

## BOOKS

**H.J. Erasmus – Superior Court Practice (Service 1997) loose 1<sup>st</sup> edition, p81- 142-143**

**Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5<sup>th</sup> ed. Vol. 1 A. Cilliers et al. Juda & Co 2009 at p606**

- [1] The defendants raised a special plea to the plaintiff's claim.
- [2] The defendants signed a surety agreement in relation to six hire purchase agreements between Plaintiff and **Thotanyana Mining and Civil Works (Pty) Ltd.** They bound themselves as surety and co-principal debtor, in solidum, jointly and severally with the company.
- [3] The Plaintiff has already instituted proceedings against the company in CCA/0050/2014 and various other proceedings in other cases for repossession under case numbers CCA/86/2013, CCA88/2013, CCA90/2013, CCA/91/2013 and CCA91/2013.
- [4] The defendants raised a number of defences by way of special plea. They are couched as follows;
  - 1. The action is pre-mature.

2. The action is redundant and has been overtaken by events.
3. Non-joinder.
4. Defendant has been exonerated from liability.
5. The Plaintiff cannot probate and reprobate.
6. *Lis pendense* (which I must assume to be *lis pendens*).

[5] A special plea is usually a dilatory plea. It is a defence that is prescribed in our law it is not just anything that counsel or attorney may raise and choose to call a special that will qualify to be such.

[6] The special pleas that may be raised are set out in the **1997 service of H.J. Erasmus – Superior court practice** as<sup>1</sup>

- (a) Arbitration i.e. that the matter must first be referred to arbitration.
- (b) Lack of jurisdiction of the court.
- (c) Limitation of actions.
- (d) *Lis Pendens*.
- (e) Mis-joinder and non-joinder.
- (f) Prescription.
- (g) *Res Judicata*.

[7] It is therefore immediately obvious that the only two in the defendants defences which qualify as a special plea are non-joinder and *lis pendens*.

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<sup>1</sup> H.J. Erasmus – Superior Court Practice (Service 1997) loose 1<sup>st</sup> edition, p81-142-143

- [8] The other defences relating to the action being redundant and overtaken by events, defendants having been exonerated from liability and so on are clearly defences that must be raised by ordinary plea and established through the evidence to be adduced.
- [9] I should mention at this stage that when the matter was called on the 16<sup>th</sup> February 2015, **Mr Ndebele** for the defendants was not in court. Mr Mpaka proceeded with the matter as it was his right to do so. Mr Ndebele arrived to try and interrupt the court after the order was already granted. He is a habitual late comer to this Commercial Court.
- [10] I also trust that Mr Ndebele will be present on the date of delivery of this ruling. He is on record as having convinced the Court of Appeal that a judgment that was delivered by this Court on a specified date was only made available to the parties a number of weeks thereafter. That simply never happens in the Commercial Court. He misled the Court of Appeal.
- [11] Quite apart from the fact that their Lordships; the Judges of Appeal surprisingly accepted such a bizarre story; it is apparent that this counsel is prepared to mislead any Court to cover for his sloppiness. What must have happened is that he failed to collect his copy for weeks after the judgment was delivered. This Counsel must disabuse his mind of the impression that dishonesty will get him somewhere. Honesty is not only the best policy; it should be the main policy for him. He specifically asked for the reasons for this decision which I now provide. I will confine myself to the two special pleas that do qualify.

[12] The plea of non-joinder of the principal debtor is already answered by the litigation already referred to. That means the principal debtor has already been brought to Court to recover the debts in the various cases.

[13] Defendants submit in their written heads of argument on *lis pendens* that the parties are “technically same” in the eyes of the law. That even where parties are not the same, the Court cannot allow a party to vindicate an issue pending in another Court under the guise of an action against another party.

[14] The basis of the plea of **lis pendens** is that the other pending action referred to must be between the same parties. The Principal-debtor and the Surety cannot be the same parties. The debtors liability is based on the hire- purchase agreements and money advanced, while the Surety is sued on the guarantee agreement he signed with the bank.

[15] I am also persuaded by the argument advanced on behalf of the plaintiff that this plea is not an absolute bar to the proceedings. The Court in all cases reserves the discretion even if all the essentials of this plea are present it may in spite of that fact consider whether it is more just and equitable or convenient that the action proceed notwithstanding the special plea<sup>2</sup>.

See: **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa.**

[16] Having regard to all the circumstances of this matter I therefore made the order that;

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<sup>2</sup> 5<sup>th</sup> ed. Vol. 1 A. Cilliers et al. Juta & Co 2009 at p606

- (a) The special plea is dismissed with costs.
- (b) The defendants plea is to be filed within 14 days.

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**L.A. MOLETE**

**JUDGE**

**For the Applicant : Mr T. Mpaka**

**For Respondents : Mr K. Ndebele**