CCT/0467/2014

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

METCASH TRADING AFRICA (PTY) LTD **PLAINTIFF**

AND

FRASERS CONSOLIDATED (PTY) LTD **1ST DEFENDANT**
FRASERS LESOTHO LTD **2ND DEFENDANT**

RULING

Coram : **Hon. Chaka-Makhooane J**

Date of hearing : **18th August, 2016**

Date of Ruling : **29th November, 2016**

Summary

Defendants raising exception in terms of Rule 29 of the High Court Rules – Defendants claiming plaintiff's summons and declaration do not disclose a cause of action and that plaintiff's pleading is vague and embarrassing – Acknowledgement of debt sufficient to disclose cause of action to allow defendant to plead – Procedure laid down in Rule 29 (2) for pleading that is vague and embarrassing, not followed by defendant – Nexus between defendants created – Exceptions dismissed with costs.

ANNOTATIONS

CITED CASES

1. Adam v SA Motor Industry Employers Association 1981 (3) SA 1981.
2. Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) Sa 106 (AD).
3. Dilworth v Reichard [2002] 4 all SA 677 (W).
4. First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA).
5. Francis v Sharp & Others 2004 (3) SA 230 C.
6. Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 at 107D.
7. Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C).
8. Mahomed Adam (Pty) Ltd v Raubenheimer 1966 (3) SA 646 (TPD).
9. Minister of Safety and Security V Hamilton 2001 (3) 50 (SCA).]ZXBN,\,.
10. Salzman v Holmes 1914 AD 152.
11. Sanan v Eskom Holdings Ltd 2010 (6) SA 638 (GSJ).
12. Southernpoort Developments (Pty) Ltd v Transnet Ltd 2003 (5) SA 665 (W).
13. Vermuelen v Goose Valley Investments (Pty) Ltd [2001] 3 All SA 350.

STATUTES

High Court Rules, No.9 of 1980.

[1] This is an application for exception in terms of **Rule 29** of the **High Court Rules** ("Rules").[1] The defendants have claimed that the plaintiff's Summons and Declaration have failed, in relevant parts, to disclose a cause

[1] Legal Notice No. 9 of 1980.

of action and further that the averments thereat are vague and embarrassing.[2] **Rule 29 (1)**, **(2)** and **(4)** of the Rules provide that:

> "*29(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 (may), within the period allowed for the delivery of any subsequent pleading, deliver a notice to the party whose pleading is attacked, stating that the pleading is vague and embarrassing setting out the particulars which are alleged to make 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.*"
>
> *(4) An exception on any grounds may be set down for hearing on a date allotted by the Registrar on notice given to both parties.*

[2] Prior to the lodging of the present application, the plaintiff had instituted action proceedings against the defendant on the 12th November, 2014 in which action the plaintiff claimed the following:

[2] See Notice of Exception; page 13-16 of the record.

"*(a) Paymentin the amount of M1, 999, 994.00 (One Million Nine Hundred and Ninety Nine Thousand Nine Hundred and Ninety Four Maloti);*

(b) Interest on the above amount at 15.5% per annum a tempore morae;

(c) Costs of suit; and

(d) Further and /or alternative relief."

[3] It is the plaintiff's case that on the 20th July, 2011 at Bloemfontein, Republic of South Africa, the plaintiff (represented by Mr Marthinus Frylinck Crafford) and the 1st defendant alternatively the 2nd defendant (represented in either event by Mr O Moosa) concluded a partly written, partly oral contract ("the contract").[3] It is further the plaintiff's case that in terms of the contract, the 1st defendant, alternatively the 2nd defendant, acknowledged its liability to the plaintiff in the aggregate amount of R6, 486, 422.99.[4]

[4] Furthermore, the plaintiff claimed that the 1st defendant, alternatively the 2nd defendant undertook to make payment of the amount of R6, 486, 422.99 to the plaintiff in the following manner: R1, 486, 422.99 immediately following the conclusion of the contract; R1, 000, 000.00 on the 31st August, 2011; R1, 000, 002.00 on the 30th September, 2011; R1, 000, 003.00 on the 31st October, 2011; R1, 000, 000.00 on the 30th November, 2011 and R999, 994.00 on the 31st December, 2011.[5] The plaintiff averred

[3] See paragraph 4 of the summons; page 5 of the record and also see annexure "POC1; page 11 of the record.
[4] See paragraph 5 of the Summons; page 5 of the record.
[5] Ibid.

that the contract amounted to an acknowledgement of debt on the part of the defendants.

[5] The plaintiff alleged that in terms of the contract, the 1st defendant, alternatively the 2nd defendant, made the following payments to the plaintiff: M1, 486, 422.99 in July, 2011; M1, 000, 001.00 on the 31st August, 2011; M1, 000, 002.00 on the 30th September, 2011; and M1, 000, 003.00 on the 31st October, 2011.[6] According to the plaintiff, the 1st defendant, alternatively the 2nd defendant, is liable to the plaintiff for the remaining balance of M1, 999, 994.00.[7]

[6] The basis of the plaintiff's case is that the defendants have failed to make payments for November and December, 2011. The plaintiff claimed that despite demand, the 1st and 2nd defendants have failed to pay the amount of M1, 999, 994.00 or any part thereof.

[7] On the 19th November, 2014 the 1st and 2nd defendants delivered their notice of appearance to defend the action proceedings.[8] Subsequent to that and on the 15th December, 2014 the plaintiff filed a notice of exception in terms of **Rule 29** of the Rules.[9]

[8] The defendants have alleged that the plaintiff's Declaration lacks averments which are necessary to sustain an action and also to enable the

[6] See paragraph 6 of the Summons; page 6 of the record.
[7] See paragraph 7 of the Summons; page 6 of the record.
[8] See notice on page 12 of the record.
[9] See notice on pages 13-16 of the record.

plaintiff to plead.[10] They have further alleged that the plaintiff has failed to disclose the underlying *causa* for its claim and that the plaintiff ought to have revealed the factual background leading to the defendants' indebtedness. In addition, the defendants claimed that the plaintiff has failed to establish the *nexus* between the 1st and 2nd defendants.

[9] The present application for exception is vehemently opposed.

[10] The defendants' counsel, **Mr Lesupi**, argued that the acknowledgement of debt is not sufficient to disclose the underlying cause of action without the benefit of some background surrounding the conclusion of the said contract. He further argued that the facts are necessary to explain why liability has accrued against the defendants. The plaintiff's counsel, **Mr Loubser**, submitted that the underlying *causa* is the acknowledgement of debt as stipulated in the contract.

[11] **Mr Loubser** further submitted that there was no need for the plaintiff to create a separate and distinct cause of action other than the acknowledgement of debt itself. He added that a creditor can elect whether to found his action on the original cause of action or on the acknowledgement of debt.[11] On the other hand, **Mr Lesupi** challenged this submission and argued that pleadings are meant to define the issues in question, and that exercise can only be obtained when each party states its case with precision.[12]

[10] Ibid.
[11] Mahomed Adam (Pty) Ltd v Raubenheimer 1966 (3) SA 646 (TPD).
[12] Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (AD) at 107D.

[12] **Mr Lesupi** submitted that the written contract was grossly vague and not enforceable in law. He argued that the plaintiff ought to have pleaded and incorporated the oral terms and conditions of the contract into his papers for it to qualify as a complete contract. **Mr Loubser** countered this submission and argued that the apparent deficiencies in the contract would be cured during evidence. Moreover, the question that remains is whether a written acknowledgement of debt, which is allegedly lacking in particularity in the pleadings, may be excepted to.

[13] **Mr Loubser** submitted that in the case of **Chemfos Ltd v Plaasfosfaat (Pty) Ltd**[13] the court quoted with approval, the case of **Adams v SA Motor Industry Employers Association**[14] where the court had to decide whether admissions made, gave rise to causes of action upon which the appellant could successfully sue for payment of the admitted debt. In **Chemfos**'s case, it was held that "the decisive question is whether the acknowledgement contains an express or implied undertaking to pay, a matter which relates to the intention of the parties may be inferred from the wording and form of the acknowledgement, the conduct of the parties and all the relevant attendant circumstances."[15]

[14] In cases of exception, the Court must look at the pleading excepted to as it stands,[16] no facts outside those stated in the pleadings can be brought into issue and no reference may be made to any other document.[17] The test on

[13] 1985 (3) SA 106 (AD).
[14] 1981 (3) SA 1981.
[15] At page 115 E-F.
[16] Salzman v Holmes 1914 AD 152 at 156; and Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA) at 52 G-H,
[17] Dilworth v Reichard [2002] 4 All SA 677 (W) at 681*j*-682*a.*

exceptions was laid out in **Southernpoort Developments (Pty) Ltd v Transnet Ltd**[18] in the following terms:

> "*(i) The excipient must establish that the pleading is excipiable on every reasonable interpretation.*
>
> *(ii) The pleader is entitled to a charitable interpretation.*
>
> *(iii) Minor blemishes can be cured by further participation.*
>
> *(iv) The pleadings must be read as a whole.*[19]"

[15] For an exception to succeed, the excipient must persuade the Court that upon every interpretation of the pleading in question, it can reasonably be concluded that no cause of action exists, as a result therefore, the exception ought not to be upheld.[20] *In casu*, it is clear that when read together, the summons, declaration together with the acknowledgment of debt, have disclosed the necessary cause of action to allow the defendant to plead. Therefore, the exception on the ground that the pleadings have not disclosed a cause of action, cannot be upheld.

[16] Where an exception is taken on the ground that a pleading is vague and embarrassing, the party so alleging should call upon the other party to remove the cause of complaint within seven days and inform him that if he does not do so, an exception would be taken to such pleading.[21] An exception that the pleading is vague and embarrassing will also not be

[18] 2003 (5) SA 665 (W) at 669 A-E.
[19] This approach was later followed in Francis v Sharp & Others 2004 (3) SA 230 C.
[20] First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) at 965 C-D; Vermuelen v Goose Valley Investments (Pty) Ltd [2001] 3 All SA 350 (A); and Sanan v Eskom Holdings Ltd 2010 (6) SA 638 (GSJ) at 645D.
[21] See Rule 29 (2) (a) of the Rules.

allowed unless the excipient will be seriously prejudiced if the offending allegations are not removed.[22]

[17] *In casu*, the defendant has not followed the procedure laid down in **Rule 29 (2)**, and on that ground alone, the exception on the ground that the pleading is vague and embarrassing must equally fail.

[18] Another ground which the defendants excepted to in the plaintiff's summons and declaration, was that the plaintiff had failed to establish the *nexus* between the 1st and 2nd defendants or the correlative relationship between them in relation to the alleged claim. The defendant also claimed that the plaintiff had failed to identify a legal *nexus* between the alleged claim and the defendants which support their averment of liability against either one or both of them.

[19] The plaintiff showed in the summons that at the time when the contract was concluded, the defendants were represented by Mr Moosa and further that the plaintiff was not certain as to whether Mr Moosa represented the 1st or the 2nd defendant, since it only knew that he represented Frasers. The plaintiff further stated that it was equally not aware that there were two separate entities bearing the name of Frasers, this is why the 2nd defendant was sued in the alternative.

[22] Levitan v Newhaven holiday Enterprises CC 1991 (2) SA 297 (C) at 298A.

[20] The fact that a contract was allegedly concluded between the parties in question, and that payments were allegedly made to service the debt, that in my view somewhat created the necessary *nexus* to litigate at this stage.

[21] It is for the foregoing reasons that the following order is made:

(a) The exception on the ground that the Summons and Declaration do not disclose a cause of action is dismissed.

(b) The exception on the ground that the pleading is vague and embarrassing is also dismissed.

(c) The applications for exception are dismissed with costs.

L. CHAKA-MAKHOOANE
JUDGE

For Plaintiff : **Mr Loubser**

For Defendant : **Mr Lesupi**