

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/650/2020

In the matter between:

TAUMANE MAKOKO

PLAINTIFF

AND

‘MAMMAKO ‘MAKO

DEFENDANT

Neutral Citation: Taumane Makoko v ‘Mammako ‘Mako (CIV/T/650/2020)
[2021] LSHC 23 (25th MARCH 2021)

JUDGMENT

CORAM:

MOKHESI J

DATE OF HEARING:

25TH FEBRUARY 2021

DATE OF JUDGMENT:

25TH MARCH 2021

SUMMARY

CIVIL PRACTICE: *An exception being taken to the pleadings on the ground that the prayer sought in the main does not disclose the cause of action- Given that the prayer seems to present a distinct and separate cause of action not pleaded in the Declaration, held, it is therefore excipiable- A further exception targeted at Declaration that it does not support some of the claims- Held, that an exception of this sought is not allowed as it does not serve the purpose for which the exception is employed.*

ANNOTATIONS:

Legislation:

High Court Rules 1980

Cases:

Voget v Keynhans 2003 (2) SA 148 (c)

First National Bank of Southern Africa Ltd v Perry N.O. 2001 (3) SA 960 (SCA)

Tobacco Exporters & Manufacturers v Bradbury Road Properties 1990 (2) SA
420

Group Five Building Ltd v Government of the RSA (Minister of Public Works
and Land Affairs) 1993 (2) SA 593 (A)

Barclays National Bank Ltd v Thompson 1989 91) SA 547 (AD)

Dharumpal Transport (PTY) Ltd v Dharumpal 1956 (1) SA 700 (AD)

[1] The plaintiff and defendant are neighbours. Their residential sites are adjacent to each other. On the 07th August 2020, the plaintiff instituted an action against the defendant claiming relief in combined summons. It must be said that the framing of prayers is not a model for drafting, lucidity and clarity. In the summons the plaintiff pleads that he is claiming the reliefs that:

1. *The Defendants be ordered to abate the said nuisance by removing their livestock or in some other effective manner to remedy the unbearable smell and flies.*
2. *An interdict directing the Defendants to ensure that the nuisance does not reoccur in the future.*
3. *Damage to the lawn due to the flooding. The damage amounts to M29,726.00 (twenty-nine thousand, seven hundred and twenty-six Maloti)*
4. *Damage to in yard drains. The damage amounts to M2,500.00 (two thousand five hundred Maloti).*
5. *Excavation of drains to divert water from wall. The damage amounts to M2,418.75 (two thousand four hundred and eighteen Maloti seventy-five cents)*
6. *Damage to the barrier wall. The repair and or the damage amounts to M13,400.00 (thirteen thousand four hundred Maloti)*
7. *Breaking and reconstruction of affected aprons. The damage amounts to M19,800.00 (nineteen thousand eight hundred Maloti)*
8. *Spoiling all material. The damage amounts to M7,010.00 (seven thousand and ten Maloti)*
9. *Costs of suit*

- [2] The factual matrix upon which the reliefs are sought was pleaded as follows in the Declaration: (in relevant parts)

-4-

“Plaintiff is the owner and occupier of site in Borokhoaneng, site number 13293 – 026 and the Defendant owns property adjacent to it.

-5-

The Defendant has constructed or caused to be constructed a furrow on her property which channels rain waters and sewage. The furrow extends beyond her property to the Plaintiff’s barrier wall.

-6-

The Defendant’s furrow channels rain waters and sewage to Plaintiff’s barrier wall where it seeps into his property. This has created a puddle of water in front of the plaintiff’s residence. See annexures marked “T1”, “T2” and “T3”, showing the collection of water in the site, the wall where water seeps in from the furrow channelling the water from Defendant’s site.

-7-

7.1 As a result Plaintiff’s site has an intolerable smell from the sewage and water collection.

7.2 This status of affairs is not only a nuisance but a health hazard that disturbs the Plaintiff’s enjoyment of his property.” (sic)

- [3] Crucially, when the plaintiff tabulated the reliefs he is seeking in the Declaration, that relief differs materially from the first relief stated in the summons. In the Declaration he prays for the relief that “1. The Defendants be ordered to abate the said nuisance by removing the sewage and rain waters channelling furrow in some other effective manner to remedy the unbearable smell.” In the summons, in terms of the prayer 1, he sought a relief that:

“1. The Defendants be ordered to abate the said nuisance by removing their livestock or some other effective manner to remedy the unbearable smell and flies.” (emphasis added)

[4] Faced with these pleadings, the defendant, on the 24th September 2020 filed Notice of Exception in terms of Rule 29 (1) of the Rules of Court. Essentially the defendant is arguing that the plaintiff's summons and declaration do not disclose the cause of action because:

“a) The nature of prayer 1 in the Summons talks of the defendant's and removal of their livestock in some effective manner to remedy the unbearable smell and flies. There is no mention of the said livestock in the declaration which links the plaintiff [defendant] with the said livestock.

b) The prayer 1 in the declaration talks about the defendant to remove the sewage and rain waters in some other effective manner to remedy the unbearable smell. Similarly, there is no nexus between the plaintiff and the rainwater and sewage.

c) Plaintiff claims damages but does not plead, in his declarations, how those damages are the result of the defendant's attitude”.

[5] On the 19th October 2020, the after being served with the Notice of Exception, the plaintiff filed a Notice in terms of Rule 33, effectively seeking to amend prayer 1 of the summons to read like prayer 1 in the Declaration. Reacting this attempt to amend the summons while the exception was pending, the plaintiff invoked Rule 30 of the Rules of this court arguing that this was an irregular step. I do not think it is necessary to determine whether this was an irregular step, instead I proceed to deal with the exception so raised.

[6] In terms of Rule 29(1), if pleadings lack averments which are necessary to sustain a cause of action or defence, a party may deliver an exception, within a period allowed for delivering a subsequent pleading. For purposes of determining the veracity of this exception, the correctness of the factual averments made in the impugned pleading must be assumed, unless the factual averments are so palpably untrue or improbable that they can be safely rejected (**Voget v Keynhans 2003 (2) SA 148 (c) at 151**). The onus

is on the excipient to persuade the court that the pleading is excipiable on every possible interpretation that can reasonably be placed upon it (**First National Bank of Southern Africa Ltd v Perry N.O. 2001 (3) SA 960 (SCA) at 965 C – D**).

- [7] In the instant matter the cause of action arose of the drainage system the defendant dug out to channel rainwater and sewage out of her property. This drainage system has created a situation where water and sewage seeps into the plaintiff's property creating puddles of water in front of his residences, and the foul smell generated by this puddle of water. The cause of action is clear, it is nuisance created by defendant's channelling of rainwater and sewage out of her property into the plaintiff's property. Undoubtedly, prayer 1 of the summons is not backed up by any factual averments in the declaration and is therefore excipiable. It is directed at a cause of action which was not pleaded, and therefore represented a distinct and separate cause of action (**Tobacco Exporters & Manufacturers v Bradbury Road Properties 1990 (2) SA 420 at 424 D – E**). The question to be answered is whether this conclusion is fatal to the plaintiff's case. A straight answer is that, his is conclusion does not spell an end to the plaintiff's case because as I mentioned in the background facts to this case, the plaintiff faced with the Notice of Exception, in turn filed Notice to Amend summons. In **Group Five Building Ltd v Government of the RSA (Minister of Public Works and Land Affairs) 1993 (2) SA 593 (A) at 602 C – E** the Appellate Division (now SCA) held that a successful challenge to combined summons or declaration that it discloses no cause of action does not carry with it the dismissal of the action or summons. The plaintiff is still free to apply for leave to amend his pleadings. In fact, in this matter the plaintiff has already filed a Notice of Amendment which

I have no hesitation in acceding to as it will occasion no prejudice to the defendant.

- [8] The other objection to which the defendant has had with the combined summons is that the plaintiff does not plead in his declaration how the damages are attributable to her conduct. The essence of this objection is to say that the plaintiff's pleading does support some claims out of the cause of action pleaded by him because in the main, that the plaintiff is claiming for abatement of nuisance by the defendant. This, the defendant is not allowed to do, because an exception is principally employed for purposes of obviating the leading of unnecessary evidence at the trial. The fact that the declaration does not support one or more claims arising out of one cause of action would not make the difference to the evidence to be led to prove the main claim of abatement of nuisance (**Barclays National Bank Ltd v Thompson 1989 91) SA 547 (AD) at 553 G – H**). Thus, in **Dharumpal Transport (PTY) Ltd v Dharumpal 1956 (1) SA 700 (AD) at 706 E – Hoexter, JA** said:

“The main purpose of the exception that a declaration discloses no cause of action is to avoid the leading of unnecessary evidence. That purpose cannot be served by taking exception to a declaration on the ground that it does not support one of several claims arising out of one cause of action. In the present case, for instance, the upholding of the exception that the declaration does not support the minor claim would make no difference whatever to the evidence to be led at the trial. All the averments in the declaration would have to be proved by evidence in order to establish the major claim. Even assuming that the declaration does not support the minor claim, I cannot see in what way the defendant will be embarrassed in pleading, in view of the fact that it is bound to plead to the declaration as framed in order to meet the major claim...”

[9] **COSTS**

The issue of costs is a matter within the exercise of this court's discretion, which discretion must be exercised judicially. In the present matter the defendant has had substantial success and is, therefore entitled to her costs.

[10] In the result the following order is made:

- (a) The exception directed at prayer 1 of the summons is upheld with costs.
- (b) The exceptions stated in prayer 1.1 (b) and (c) of the Notice of Exception are dismissed.
- (c) The proposed amendment to prayer 1 of the summons is granted as prayed.
- (d) Costs in (a) above shall be costs in the cause

MOKHESI J

**For the Plaintiff: Adv. Senatsi
 instructed by Nthontho Attorneys**

**For the Defendant: Adv. Lejakane
 Instructed by C. T. Poopa Consulting Attorneys**