

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCT/0468/2021

In the matter between:

‘MAMPOETSI LEMEKE

PLAINTIFF

And

THABANG SEFALI

1ST DEFENDANT

‘MABAFOKENG SEFALI

2ND DEFENDANT

Neutral Citation: ‘Mampoetsi Lemeke v Thabang Sefali & another (No.1 [2022] LSHC 311 COM (30th November, 2022)

CORAM: MATHABA J

HEARD ON: 17th October 2022

DELIVERED ON: 30th November 2022

Summary:

Exception – Defendants raising non - joinder and misjoinder by way of exception under rule 29 (1)(a) of the High Court Rules – Whether the defence is within the ambit of the rule – Exception is permissible where the defect complained of is ex facie pleadings – Exception dismissed

Annotations

Statutes

High Court Rules 1980

Cited Cases

Lesotho

Jonothane v Lephole (C of a (CIV) 5 of 2017 [2018] LSCA 4

VVM Kotelo & Co v Monyane and Another (C of A (CIV) 15/2006) (NULL)
[2007] LHSC 47

South Africa

Curoscore (Pty) Ltd v Nqobile Nxumalo 1619/2020 [2021] ZAECBHC 6

Deon Stuart Frank v Premier Hangers CC 11821/05 [2007] ZAWCHC 21;
2008 (3) SA 594C

Knoesen v Maritz 5001/2018 [2019] ZAFSHC 92

Songo v Minister of Police (220/2021) [2022] ZASCA 43

Vermeulen v Goose Valley Investments (Pty) Ltd 121/99 [2002] ZASCA 53;
[2001] (3) ALL SA 350A

Books

Herbestein and Van Winsen, Civil Practice of the High Court of South Africa 5th
ed Vol 1

RULING

BACKGROUND

[1] This is an application purportedly brought in terms of Rule 29 (1) (a) of the High Court Rules 1980 (*The Rules*). The plaintiff (*respondent herein*) issued summons against the defendant (*applicant herein*) on the 27th September 2021 seeking an order for payment of a refund in the sum of M95,000,00 and of M32, 644,00 for damages and interest at the rate of 18.5% per annum. For convenience, the parties will be referred to as plaintiff and defendants as they appear in the main matter.

[2] The claim arises from cancelled agreement of sale of a site. The defendants were sued for breach of the sale agreement. The purchase price for the said plot was M150,000,00 which plaintiff paid to the defendants. Contrary to the agreement, the defendants failed to hand over the necessary documents including a lease to the plaintiff as well as to transfer the plot into plaintiff's names.

[3] Rather, the defendants sold the same plot to another person unknown to the plaintiff. As a result, the agreement was cancelled by the parties and the defendants paid M55,000,00 as refund but failed to pay the balance of M95,000,00 to the plaintiff. The plaintiff had taken a loan for payment of the purchase price which accumulated interest in the amount of M32,644.00 which she also claims from the defendants. The defendants filed a notice of appearance to defend and subsequent thereto an exception to the declaration.

[4] It is the defendants' case that the plaintiff failed to join the owner of the site in issue, being the heir to second defendant's mother, and that they are improperly joined in the proceedings. This defence is raised by way of an exception in terms of rule 29 (1) (a) of the rules. They submit that there is no cause of action against them as a result of which the action has to be dismissed.

[5] The plaintiff submits that the defendants ought to have raised special pleas of non-joinder and misjoinder and not an exception. It is the plaintiff's contention that the defendants do not allege that the declaration lacks the necessary averments to sustain a cause of action and as such, the exception does not fall within the ambit of Rule 29(1) (a).

[6] It was argued on behalf of the plaintiff that in an exception the Court may have regard only to the facts appearing in the pleading that is being attacked and not on allegations which are not contained in the pleadings. The

plaintiff submits that there is no reference to the second defendant's deceased mother, who is claimed to be the owner of the site, in the declaration.

ISSUES

What I am called upon to determine is if the defences of non-joinder and misjoinder can be raised by way of an exception and if the defendants have brought their attack within the ambit of rule 29(1)(a).

APPLICABLE PRINCIPLES

[7] The formal requirements for an exception to succeed are either to demonstrate that a pleading is vague and embarrassing or a pleading lacks the averments necessary to sustain a cause of action or a defence.¹ Rule 29 deals with exceptions and application to strike out. It stipulates that where a pleading is vague and embarrassing or lacks averments to disclose either a cause of action or defence, as the case may be, an opposing party may deliver an exception thereto.

[8] *Oppernman J* aptly put it as follows in **Knoesen v Huijink – Maritz**² in explaining what an exception is:

“An exception is a legal objection to the opposition's pleading. It complains of a defect inherent in the pleading; admitting for a moment that all allegations in the summons or plea are true; it asserts that even with such admission the pleading does not disclose either a cause of action or a defence as the case may be.”

¹ *Songo v Minister of Police* (220/2021) [2022] ZASCA 43 at paragraph 31: rule 29 (1)(a) 29(2)(a).

² *Knoesen v Maritz* 5001/2018 [2019] ZAFSHC 92 page 7 paragraph 11.

[9] Exception may only be taken when the defect appears *ex facie* the pleading, since no facts may be adduced to show that the pleading is excipiable³. Thus, in **VVM Kotelo & Co v Monyane and Another**⁴ the court stated as follows:

“It is a well-established principle that in ruling on an exception a court may have regard only to the facts appearing in the pleading that is attacked and not outside allegations, whether contained in other documents or in counsel’s submissions.”

[10] In short, an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which plaintiff’s cause of action may be based, is bad in law. *See: Vermeulen v Goose Valley Investments (Pty) Ltd*⁵. The excipient bears the onus to convince the court that upon every interpretation which the pleading can reasonably bear, no defence or cause of action is disclosed. *See: Deon Stuart Frank v Premier Hangers CC*⁶.

[11] It is thus evident that misjoinder or non-joinder may be raised by way of exception where the alleged defect appears *ex facie* the pleadings and no additional evidence is required to substantiate the defence. *See: Herbstein and Van Winsen, Civil Practice of the High Court of South Africa 5th ed Vol 1 page 633; Knoesen v Maritz*⁷. Where additional facts need to be placed before

³ Coruscore (Pty) Ltd v Nqobile Nxumalo 1619/2020 [2021] ZAECHC 6, page 9 para 8

⁴ (C of A (CIV) 15/2006) (NULL) [2007] LHSC 47

⁵ 121/99 [2002] ZACSA 53; [2001] 3 ALL SA 350 A page 21 – 22 para 7

⁶ 11821/05[2007] ZAWCHC 21; 2008 (3) SA 594 C para 22.

⁷ *Ibid* para 5

the court to show that there has been a misjoinder or non-joinder, a special plea is generally used⁸. It is permissible however that where it is apparent *ex facie* the particulars of claim that the court lacks jurisdiction, or that the plaintiff does not have *locus standi*, the defendant may take an exception rather than file a special plea.⁹

[12] The essential difference between exception and a special plea is that in the case of the former the excipient is confined to the four corners of the pleading.¹⁰ Special pleas however, can be established by introduction of fresh facts from outside the circumference of the pleading and those facts have to be established by evidence in the usual way.¹¹

DISCUSSIONS

[13] The defendants are relying on rule 29(1)(a) for their exception. Curiously, it is not their complaint that the pleading under attack “lacks averments which are necessary to sustain an action” against them. Rather their complaint relates to non – joinder and misjoinder. Far from being a ground for exception, this is a classic case for special plea. The defendants are raising new issues that are not stated in the declaration which is being excepted to, that is, non- joinder of the heir to second defendant’s mother and misjoinder of defendants. As a consequence, these issues will require evidence.

⁸ Ibid

⁹ Curoscore at page 14 paragraph 8.

¹⁰ Herbstein and Winsen at page 600.

¹¹ Op cit footnote 3.

[14] The defendant's approach is contrary to the principle that for one to succeed in an exception he or she should be confined to the pleadings and that no new evidence may be introduced. Certainly, as one reads the complaints from the defendants, they do not constitute an exception in the legal sense. It seems incongruous to me that the defendants raised non-joinder as an exception rather than by way of special plea in circumstances where they introduce facts that are not stated in the pleading excepted to. In a veiled manner the defendants' Counsel conceded that an inquiry into whether a party proceeds by way of an exception should be determined by whether the defect complained of is *ex facie* the pleading excepted to or there is a need for introducing new evidence.

[15] In my view, the plaintiff has pleaded the facts necessary to sustain her claim against the defendants. It is clear that her claim is rooted in the fact that when the sale agreement was cancelled, she was not refunded all the money she had paid for the site and that she had to pay interest on the loan she had taken to purchase the site. Put differently, the necessary facts which the plaintiff would be required to prove in order to support her claim, have been disclosed in sufficient detail.

[16] Clearly, the defence of mis-joinder and non-joinder cannot be subsumed under the attack that the pleadings do not disclose a cause of action as

envisaged in rule 29 (1)(a), rather a special plea of mis-joinder and non-joinder would assist the defendants in the circumstances of this case. The Counsel for the defendants was unable to provide relevant authorities for the proposition that non joiner or mis-joinder may be taken by way of an exception even where the defect complained of does not appear *ex facie* pleadings.

[17] I agree with the defendant's submission that as a general rule, a party who has a direct and substantial interest in the outcome of a case ought to be joined in that proceedings. However, reliance by defendants' counsel on **Jonothane v. Lephole**¹² is misconceived. This case cannot be regarded as an authority that non-joinder and mis-joinder may be raised by way of exception. In that case the court dismissed an appeal on the ground that there was non-joinder of an interested party. The court was not called upon to determine whether non-joinder ought to be raised as an exception or special plea. This case therefore does not assist the defendants in their argument.

ORDER

¹² (C of A (CIV) 5 of 2017 [2018] LSCA 4

[18] The defendants have manifestly failed to bring their attack within rule 29(1)(a). As a consequence, I make the following order:

18.1 the exception is dismissed with costs.

A.R. MATHABA J
Judge of the High Court

For the plaintiff's: Advocate T.A Lesaoana

For the Defendants: Advocate P. Khutlang