

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

**HELD AT MASERU**

**CCT/0415/2021**

In the matter between:

**MASSMART RETAIL (PTY) LTD**

**PLAINTIFF**

and

**KR CONSULTANTS (PTY) LTD**

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

**KHOBOKO THULO**

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

**RAMAJAKE THULO**

**3<sup>RD</sup> DEFENDANT**

**REFILOE THULO**

**4<sup>TH</sup> DEFENDANT**

**Neutral Citation:** Massmart Retail (Pty) Ltd v KR Consultant (Pty) Ltd and 3 others (No.1 [2022] LSHC 253 Com (30<sup>th</sup> September 2022)

CORAM: MATHABA J  
HEARD ON: 14<sup>th</sup> September 2022  
DELIVERED ON: 30<sup>th</sup> September 2022

### **SUMMARY:**

*Civil Procedure – Special plea – Plaintiff annexing evidential documents to its summons - Defendants moving court to dismiss action on that basis - Summons compliant with court rules and disclosing a cause action – The special plea dismissed.*

### **RULING ON SPECIAL PLEA**

#### **ANNOTATIONS:**

#### **STATUTES**

**High Court Rules 1980**

#### **CASES**

#### **Lesotho:**

**Leen v FNB Lesotho C of A (CIV) 16A of 2016, [2016] LSCA**

**Lesotho Bank v Nkalai (CIV/APN/402/02) (CIV/APN/402/02) [2006] LSHC 25 (17 November 2006)**

**Motebele v Matekase (LC/APN/152/2014) [2015] LSHC 23 (16 March 2015)**

**Mothuntsane v Mothuntsane and Another (CIV/APN/67/2003) [2004] LSHC 159 (17 December 2004)**

**National University of Lesotho and Another v Thabane LCA (2007 – 2008)**

**Standard Lesotho Bank Ltd v Mahomed (CIV/T/182/2010) (NULL) [2010] LSHCCD 9**

### **South Africa**

**Absa Bank Ltd v Janse Van Rensburg and Another 2013 (5) SA 173 (WCC)**

**Absa Bank Limited v Studdard and Another (2011/24206) [2012] ZAGP JHC 26 (13 March 2012)**

**Bantry Head of Investments (Pty) Ltd & Another v Murray & Stewart (CT) 1974 (2) SA 386 (C)**

**Edwards v Woodnutt, N.O 1968 (4) SA 184**

**Moosa v Hassam 2010 (2) SA 410 (KZP)**

**Nel v Waterberg Landbouwers Ko-operative Vereeniging (1949) A.D 597**

**Phofung Project Consulting (Pty) Ltd v Standard Bank of South Africa Ltd (A232/2017) [2018] ZAFSHC 21**

### **BOOKS**

**INTRODUCTION:**

[1] On the 26<sup>th</sup> August 2021, the plaintiff issued summons against the defendants claiming **M100,894.88** and interest at the rate of 18.5% *tempore morae*. To its particulars of claim the plaintiff has annexed, the credit application, statement of account, letter of demand and proof of service of registered letter.

[2] The sole issue for determination at this stage is whether the action should be dismissed because plaintiff has annexed evidential documents to its summons.

**THE SPECIAL PLEA:**

[3] In its plea to the summons the defendant raised the special plea in the following terms: -

**“SPECIAL PLEA:**

**NON COMPLIANCE WITH THE RULES:**

- (i) The Plaintiff has accompanied the summons with the Particulars of Claim whereas it ought to have accompanied the Summons with the Plaintiff's Declaration. On this point alone Defendants plead that the Plaintiff be

ordered to amend its papers failing which this action be dismissed with costs on the highest scale.

- (ii) The Plaintiff has failed to concisely state its claim against the Defendant as mandated by the rules of this honourable court. Instead, Plaintiff has led evidence in the ‘particulars of claim’ contrary to the rules of this honourable court. On this point also, this action deserves to be dismissed with costs on the highest scale”.

[4] Unlike with exception where facts stated in the pleadings must be accepted, evidence may be led in the case of a special plea. *See: Edwards v Woodnutt, N.O* 1968 (4) SA 184 at 186 C- H. The parties in *casu*, opted not to lead evidence. In fact, that was not necessary in my view.

#### **THE DEFENDANTS’ CASE:**

[5] The first leg of the special plea was not pursued during argument. Neither was the argument that the plaintiff has failed to concisely state its claim against the defendants. Mr. *Mariti* conceded that he abandoned the first leg of the special plea in view of the decision in **Leen v FNB Lesotho** C of A (CIV) 16A of 2016, [2016] LSCA which emphatically stated that particulars of claim invariably have to be filed with or attached to the summons if the summons were to disclose a cause of action.

[6] Mr. *Mariti* commenced his argument by referring to rule 18(5) of the High Court Rules (“*the rules*”) which states that: -

“The summons shall contain a concise statement of the material facts relied upon by the plaintiff in support of his claim, in sufficient detail to disclose a cause of action”.

[7] Accordingly, nowhere in the rules is the plaintiff allowed to adduce or annex evidence to the pleadings, so goes the argument. Plaintiff can only bring documentary evidence before court at the stage of discovery under oath in terms of rule 34, Mr. *Mariti* submits. He relies on the decision of Lyons AJ, as he then was, in **Standard Lesotho Bank Ltd v Mahomed** (CIV/T/182/2010) (NULL) [2010] LSHCCD 9. In that case the learned Judge strongly deprecated the practice of annexing evidential documents to pleadings.

[8] As a consequence, so proceeds the argument, the Court set aside ‘Plaintiff’s Declaration’ for non – compliance with the rules and dismiss the action with costs on the strength of the decisions in **Mothuntsane v Mothuntsane and Another** (CIV/APN/67/2003) [2004] LSHC 159 (17 December 2004) and **Lesotho Bank v Nkalai** (CIV/APN/402/02) (CIV/APN/402/02) [2006] LSHC 25 (17 November 2006).

**PLAINTIFF’S CASE:**

[9] The plaintiff’s main contention on the second leg of the special plea as I understood Mr. *Kleingeld* ‘s argument, came to this: the evidence attached to the particulars of claim is necessary for plaintiff to comply with rule

20(4) and 21 (2). Therefore, so goes the argument, the defendants’ special plea must be dismissed with costs as between attorney and client.

[10] Mr. *Kleingeld* distinguished the instant case from **Standard Lesotho Bank Ltd v Mahomed**, *supra*. He correctly stated that in that case, summons could not sustain a summary judgement application. The learned Judge found that what was pleaded in the summons goes nowhere near representing ‘a concise statement of the material facts relied upon by the plaintiff in support of his claim, in sufficient detail to disclose a cause of action’. Mr. *Kleingeld* forcefully submitted that in the instant case, the summons discloses a cause of action.

### **DISCUSSIONS:**

[11] In **Motebele v Matekase** (LC/APN/152/2014) [2015] LSHC 23 (16 March 2015) at pages 5 to 6, Sakoane AJ, as he then was, quoted with approval LAWSA 3 rd Edition Vol.4 para 183 where a special plea is defined as follows:

“A special plea is one that, apart from the merits, raises some special defence, not apparent ex facie the claim and which either destroys or postpones the operation of the cause of action. If the special defence is apparent from the claim, the proper course would be to take an exception. A special plea accordingly does not raise a defence on the merits of the case but interposes some defence not apparent on the face of the pleading. This can be a statutory defence.

.....

A special plea, which destroys a cause of action, is called a plea in abatement (or a plea in bar) and one which postpones the cause of action, a dilatory plea. Examples of pleas in abatement are extinctive prescription, non-joinder or misjoinder and res judicata. On the other hand, a plea relying on an arbitration agreement and praying that the proceedings be stayed pending the final determination of the dispute by the appointed arbitrator, or a plea of lis alibi pendens, are examples of dilatory pleas. The onus usually falls upon the party relying on a special plea to prove the allegations relied upon. The dismissal of a special plea is a judgment or order and appealable.” (See Joubert (ed) The Law of South Africa, 3rd Edition Vol.4 Lexis Nexis Butterworths: Durban)

[12] It is therefore pellucidly clear that a special plea is not just an objection, but it must constitute the defence, though not on merit. It is not the defendants’ complaint that the summons, read together with the particulars of claim, which are incorporated thereto by reference, do not disclose a cause of action or that it falls short of the requirements of rule 18(5). The only complaint is that it is not permissible to annex evidential documents to the summons.

[13] It is beyond disputation that South African decisions have persuasive effect in this jurisdiction. I must therefore interpose to say that even prior to the introduction of rule 18(6) of the Uniform Rules, it had been a standing practice in South Africa to require a pleader relying on a written agreement to attach such agreement on the summons. *See: Bantry Head of*



**Investments (Pty) Ltd & Another v Murray & Stewart (CT)** 1974 (2) SA 386 (C) at 392 – 393; **Absa Bank Limited v Studdard and Another** (2011/24206) [2012] ZAGP JHC 26 (13 March 2012); **Phofung Project Consulting (Pty) Ltd v Standard Bank of South Africa Ltd** (A232/2017) [2018] ZAFSHC 21; **Absa Bank Ltd v Janse Van Rensburg and Another** 2013 (5) SA 173 (WCC).

[14] I accept as correct, the argument that in terms of the rules, plaintiff is not required to annex evidential documents to its summons. However, notwithstanding a stern warning from Lyons AJ, in **Standard Lesotho Bank Ltd v Mahomed**, *supra*, the practice of annexing evidential documents to pleadings has continued unabated. In my view, while the practice is not accommodated in the rules, it affords the defendant full particulars of the written agreement relied upon for the action as it was correctly stated in **Moosa v Hassam** 2010 (2) SA 410 (KZP), at paras 16 to 18. But it could have its own inconveniences as I will highlight in due course.

[15] Mr. *Mariti* argued that annexing evidential documents to the summons prejudiced the defendants as they were not able to plead. I find this argument preposterous because besides taking the special plea, the defendants proceeded to plead over. Where a cause of action arises out of a written

agreement, affording the defendants full particulars of the agreement illuminates the issues instead of prejudicing the defendants.

[16] The argument that evidential documents can only be introduced under rule 34 is flawed. Rule 28(2) requires plaintiff to summary judgment application to annex a copy of a document to the affidavit filed in support of the application if his claim is founded on a liquid document. As Mr. *Kleingeld* correctly conceded that the implication of the rule is that if the plaintiff in *casu* had wanted to apply for summary judgment, it would have been forced to resubmit a copy of the agreement on which it relies for its cause of action under oath.

[17] Undoubtedly, when the agreement has already been filed with the summons, filing it once again under oath in order to comply with rule 28(2) results in unnecessary duplication of documents before court. This is inherently undesirable because it leads to incurrence of unnecessary costs. Therefore, I am constrained to opine that filing evidential documents prematurely with the summons, has its own inconveniences. But should this necessarily result in the delay or dismissal of the action? As I explain hereafter, the answer must be in the negative.

[18] In my view, of significance is that summons must disclose a cause of action and comply with all the relevant rules. Once plaintiff meets this threshold and there is no demonstrable prejudice suffered by defendant, premature introduction of relevant evidential documents is inconsequential. Unless premature introduction of evidential documents causes injustice to the other side which cannot be compensated even by an order of costs, there is no basis to dismiss the action when summons is compliant with the relevant rules.

[19] In other words, action cannot simply be dismissed as a result of plaintiff annexing evidential documents to his summons which are otherwise compliant with the rules. Rather, should inconvenience arise as a result of duplication of documents in court, an order of costs or denying plaintiff his costs, may be sufficient for the court to mark its displeasure. Having emphasized the importance of compliance with the rules, Smalberger JA, as he then was, said the following in **National University of Lesotho and Another v Thabane LCA** (2007 – 2008) 26 para 4

“...At the same time formalism in the application of the rules should not be encouraged. Opposing parties should not seek to rely upon non – compliance with the rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent’s legitimate rights. Thus what amounts to purely technical objections should not be permitted in the absence of prejudice to impede the hearing of appeals on the merits. The rules are not cast in stone. This Court retains a discretion to condone a breach

of its rules (see Rule 15) in order to achieve a just result. The attainment of justice is the Court's ultimate aim. Thus it has been said that the rules exist for the court, not the court for the rules."

[20] If this Court were to dismiss the action as argued by Mr. *Mariti* in the circumstances of this case, a purely technical objection to less than perfect procedural step would have earned underserved triumph against a need to finalise this case with the required efficiency and effectiveness.

[21] I need to say something about the case of **Mothuntsane v Mothuntsane**, *supra*, on which Mr. *Mariti* relies for the dismissal of the action in *casu*. What Maraja AJ, as she then was, grappled with in that case was an affidavit from respondent which did not comply with mandatory requirements of regulation 5(2)(b) of the Oaths and Declaration Proclamation of 1964. Instead of granting the application on that basis alone, the learned Judge allowed the respondent to file a proper affidavit looking at the importance of the case before her.

[22] Again, **Lesotho Bank v Nkalai**, *supra*, concerns an answering affidavit that fell short of the requirements of regulation 5(2)(a) of Oaths and Declaration Proclamation of 1964. Guni J, did not recognize the 'affidavit' and proceeded with the application for rescission on an unopposed basis.

[23] Both cases are distinguishable from the case at hand. It bears repeating that in *casu*, the plaintiff has complied with the rules relevant to the form and substance of summons. The summons discloses a cause of action as required by the rules. More tellingly, what the learned Judges dealt with in the two cases was an affidavit. It is trite that an affidavit constitutes both pleadings and evidence. Once an affidavit is fatally defective, it means that there is no evidence before court, hence Guni J proceeded with the case on an unopposed basis.

[24] I am of the view that even Mr. *Kleingeld's* response to the special plea in issue was flawed. Rules 20(4) and 21(2) do not require a pleader to annex evidential documents to the pleadings. Rule 20(4) applies to all pleadings and what it requires is particularity and conciseness in drawing pleadings. Rules 21(4) governs declaration and equally does not require documents to be annexed to the declaration.

**COSTS:**

[25] Mr. *Kleingeld* moved the Court to dismiss the special pleas with costs on attorney and client scale. Nothing was said to motivate the special costs. A Court can grant costs on attorney and client scale by reasons of special considerations arising either from the circumstances which give rise to the

action or from the conduct of the losing party. *See: Nel v Waterberg Landbouwers Ko-operative Vereeniging* (1949) A.D 597 at page 607. I cannot say that the defendants' objection in querying the premature production of evidential documents was objectionable or that their conduct is deserving of condemnation. Though I cannot categorise the defendants' objection as a special plea as it does not raise any defence, considering the scheme of the rules, the defendants are right that there is a misstep. But seeking an order of dismissal of action in the circumstances of this case is rather ambitious. The same can be said for the plaintiff that is seeking special costs when there are no grounds justifying such.

**ORDER:**

[26] In the circumstances of this case the following order is issued:

1. the special plea is dismissed.
2. costs to be costs in the cause.

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**A.R. MATHABA J**  
Judge of the High Court

For the Plaintiff: Mr. A.J Kleingeld  
For the Defendants: Mr. K.A. Mariti