

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCT/0249/2021

In the matter between:

MOEKETSI DANIEL PALIME

1ST PLAINTIFF

LIMPHO MAPHEKO PALIME

2ND PLAINTIFF

And

CHARLES SEKONATA KELE

1ST DEFENDANT

NTHATENG MAFILUPI KELE

2ND DEFENDANT

SARA INVESTMENT (PTY) LTD

3RD DEFENDANT

LAND ADMINISTRATION AUTHORITY

4TH DEFENDANT

Neutral citation: Moeketsi Daniel Palime & 1 another v Charles Sekonata Kele & 3 others (No.1 [2022] LSHC 43 COM (6th March, 2023)

CORAM: MATHABA J
Heard On: 30th November, 2022
Delivered On: 6th March, 2023

SUMMARY

*Agreement of sale of plot-Cancellation of the sale agreement-Defendants
excepting to court's jurisdiction-Exception misguided and not in conformity*

with guiding principles- exception dismissed.

ANNOTATIONS:

Statutes

High Court Rules 1980

Commercial Court Rules

Cited Cases

Lesotho

‘Mafole Malokotsa v Maakhente Seqhee CIV/T/565 of 18) [2022] LSHC 30

Mafube Investment Holdings (Pty) Ltd (LC/APN/137/2014) [2015] LSHC 20

Thabiso Makepe v Lebohang Thotanyana CCA/0070/15 [2017] LSHC 31

South Africa

Akbar Hassim v Lishiva Mbengeni (35381/202) [2021] ZAGPJHC 120

Antonys Theodosiou and others v Schindlers Attorneys (14038/2021) [2022]

ZAGPJHC 252

Curoscore Pty Ltd v Nxumalo (1619/2020) [2021] ZAECBHC 9

Inzinger v Hofmeyer (7575/2010) [2010] ZAGPJHC 104

Jowell v Bramwell Jones and Others 1998(1) SA 836

Miller and Others v Bellville Municipality 1971 (4) SA 544 (C)

Trope and others v South African Reserve Bank 1993(3) SA 264

JUDGMENT

INTRODUCTION:

[1] The facts of the case are straightforward. The plaintiffs instituted action against the defendants for cancellation of sale agreement, damages for breach of the said sale agreement, payment of sum of M130 000.00 being the purchase price paid to the 1st and 2nd defendants and interest at the rate of 18.5% per annum. The 1st and 2nd defendants duly filed appearance to defend and their plea. As the matter was being enrolled for annexed mediation, the defendants reacted with a notice of exception to the set down of the matter for mediation.

BACKGROUND:

[2] The factual matrix for this action is that on or about July 2019 the first and second plaintiffs and the first and second defendants concluded a sale agreement of which the plaintiffs bought rights and interests on an unnumbered site at Masianokeng, Maseru, Urban Area. The purchase price was agreed to be a sum of M130,00-00. As a result of this agreement the plaintiffs became bona fide possessors and occupiers to the land the subject of the sale agreement.

[3] The plot in question had not been transferred to the plaintiffs and

they pursued the defendants to transfer rights to them but to no avail. The plaintiffs became aware that the defendants were planning to transfer the land in question to the 3rd defendant. It is upon the above background that since the plot has not been transferred in their names for failure to obtain consent and that the defendants are at the verge of obtaining consent in respect of the same land on behalf of the 3rd defendant, the plaintiffs instituted this action for cancellation of the said sale agreement and consequential reliefs.

EXCEPTION:

[4] The exception raised reads as follows:

**“KINDLY TAKE NOTICE THAT plaintiff’s set
down of mediation process is excipiable for the
following grounds:**

1. (a) The matter does not conform to the definition of commercial matter as provided for under Commercial Court’s Rule 10 and it is therefore not a commercial matter in terms of that Rule.
(b) Provisions of Commercial Court Rule 11(1) and (5) have not been complied with, thus the matter has not been designated a commercial matter in terms of this Rule”

[5] The basis of this argument is that this case does not fall within jurisdiction of this Court regard being had to rule 10 (1)¹. Consequently, the matter should first have been designated as a commercial action in terms of rule

¹ The High Court (Commercial Court) Rules, 2011

11², asserts the defendants.

[6] The defendants rely on two factors in support of this contention. Firstly, that transfer of land was not complete since consent from proper authority was yet to be obtained, thus rendering the matter to be a border line case. If the matter has resemblance of a commercial agreement, then it calls for invocation of rule 11, so goes the argument. Secondly, that the citation of the Land Administration Authority as well as a prayer to interdict the 3rd respondent from developing the plot in issue pending finalization of this matter show that even the plaintiffs appreciate that this is not a purely commercial matter.

[7] The plaintiffs on the other hand submits that the defendants have not followed the prescripts of Rule 29(3) and consequently the exception is bad in law and ought to be dismissed. Rule 29 of the High Court Rules encapsulates circumstances under which an exception may be raised.

ISSUES:

The issue I need to grapple with is whether the defendants have validly raised the exception in terms of the rules.

APPLICABLE PRINCIPLES:

² Ibid

[8] Rule 29 of the High Court Rules of 1980 provides guidance how and when an exception ought to be raised. Before embarking on this rule it is imperative to unpack what an exception is and later the circumstances under which an exception may be raised as encapsulated under rule 29. The court in **Curoscore Pty Ltd v Nxumalo** (1619/2020) [2021] ZAECBHC 9 para 8 succinctly explained an exception as follows;

“An exception (in part) is a legal objection to the plaintiff’s pleading. It complains of a defect inherent in a pleading. Admitting for the moment that all the allegations in a summons are true, it asserts that even with such admission the pleading does not disclose a cause of action. An exception may only be taken when the defect in the pleadings appears *ex facie* the pleading, since no facts may be adduced to show that the pleading is excipiable.”

[9] In terms of Rule 29 (1) (a) of the High Court Rules a party may except to his or her adversary’s pleadings where it can be shown that they lack averments which are necessary to sustain an action. The purpose of an exception alleging that a pleading lacks averments necessary to sustain action or defence is meant to dispose the leading of evidence at the trial. This is because a defendant cannot plead the defence to a cause of action which does not exist “*therefore the exception being upheld disposes of the whole matter*”. See: **Akbar Hassim v Lishiva Mbengeni** (35381/202) [2021] ZAGPJHC 120, page 9 para 14; **Trope and others v South African Reserve Bank** 1993(3) SA 264 @ 270 @ para F-G

[10] The court in **Antonys Theodosiou and others v Schindlers Attorneys** (14038/2021) [2022] ZAGPJHC 252 at page 9 para 15 cited with approval the disposition in **Miller and Others v Bellville Municipality** 1971 (4) SA 544 (C) that;

“An exception founded upon the contention that a plea lacks the averments necessary to sustain a defence is designed to obtain a decision on a point of law which will dispose of the case in whole or in part. If it is not to have that effect the exception should not be entertained (*see Kahn v Stuart and Others*, 1942 CPD 386, *and Miller v Muller*, 1965 (4) SA 458 (C) at p. 468).

[11] In terms of rule 29(2)(a) an exception to a pleading may be taken on the ground that it is vague and embarrassing. An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. *See: Inzinger v Hofmeyer* (7575/2010) [2010] ZAGPJHC 104 para 4. This was crystalized in *Jowell v Bramwell Jones and Others* 1998(1) SA 836 at 905 para H, where the court stated that the first question to be asked relates to whether the exception goes to the heart of the claim and if it does, whether the claim is vague and embarrassing to the extent that the defendant does not know the claim he has to meet.

[12] It is evident that an exception may be raised under the above mentioned circumstances as is envisaged in Rule 29. However, as it was stated in **Curoscore**, *supra*, it is still permissible where it is apparent *ex facie* the particulars of claim that the court lacks jurisdiction, or that the plaintiff does not

have *locus standi*, for the defendant to take an exception rather than file a special plea.

[13] A similar approach was adopted by the court in ‘**Mafole Malokotsa v Maakhente Seqhee** CIV/T/565 of 18) [2022] LSHC 30 at para 9 citing with approval *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 at 759 H where the court interpreted rule 23 (1) of the South African Uniform Rules of Court which is worded similarly to rule 29 (1) a and 29 (2) (a) where *Steyn* AJ explained that;

“In my opinion it is clear, therefore, that the above-quoted phrase in sub rule (1) of Rule 23 has a meaning wide enough to cover a case where the absence of the necessary jurisdiction is apparent *ex facie* the pleading concerned, and that a defence based upon the absence of such jurisdiction can validly be raised by way of exception..... The court has however, in my opinion, the power to dismiss a claim *mero motu*, if it is clear *ex facie* the pleadings that it has no jurisdiction whatever to entertain such a claim....”

DISCUSSIONS:

[14] It is not clear in terms of which rule the exception, which is inelegantly drafted, is being raised. The defendants do not plead that the particulars are vague and embarrassing or that they lack the necessary averments to sustain a cause of action. Rather the defendants’ attack is that the notice of set down for mediation process is excipiable in that this court does not have jurisdiction to entertain this matter. Curiously, the defendants admit in their plea that this Court has jurisdiction to entertain this matter.

[15] Be that as it may, this Court derives its jurisdiction from the Commercial Court Rules of 2011. In terms of rule 10 (1) “The business of the commercial court shall comprises of all actions arising out of or connected with any relationship of a commercial or business nature whether contractual or not...”.

[16] Disputes arising out of sales transaction or contracts fall within the jurisdiction of this Court. Undoubtedly, the cause of action in *casu* is about cancellation of sale agreement. It is therefore difficult for me to discern why the defendants except that this court does not have jurisdiction.

[17] Although the genesis of the matter concerns land, the cause of action is primarily concerned with cancellation of the agreement for sale of land, hence the matter is properly before this court. The defendants rely on **Thabiso Makepe v Lebohang Thotanyana** CCA/0070/15 [2017] LSHC 31 to substantiate their contention that this is not a commercial matter. I do not find how this case is of any assistances to the defendant. In fact, it is a sword that pierces the defendants’ case. In that case *Molete* J cited with approval the dispositions of the court in **Mafube Investment Holdings (Pty) Ltd** (LC/APN/137/2014) [2015] LSHC 20 where *Sakoane* J, as he then was, had the following to say;

“The sale agreement; I consider, a business contract containing the suspensive statutory condition of consent from the Commissioner of Lands. And like any alike contract, it is enforceable immediately upon conclusion by specific performance or cancellation against either party for breach of contract.”

[18] In **Mafube Investment** *supra* the parties had entered into a sale agreement of immovable property and upon failure to transfer the plaintiff had sued for specific performance. The court therefore concluded that it did not have jurisdiction to entertain the matter because the inquiry related to enforcement of plaintiff’s common law right to demand specific performance of contractual obligations and not the enforcement of a claim of grant of title to land, derogation from such a title or overriding of same. The court found the argument that it did not have jurisdiction over the matter because there was no consent to transfer the property untenable. Likewise, the present matter involves sale agreement of immovable property. The only difference is that the plaintiffs in *casu* wants cancellation of the agreement which is a remedy for breach of contract. The suggestion that this Court does not have jurisdiction over the matter is bizarre and far-fetched.

[19] When everything is considered, the exception is misguided. It is clear in my view that in *casu*, the absence of jurisdiction is not apparent *ex facie* the pleading as a result of which exception raised by the defendants has to be dismissed.

[20] As a consequence, I make the following order:

20.1 the exception is dismissed with costs.

A.R. MATHABA J
Judge of the High Court

For Plaintiffs: Advocate M. Tlapana

For 1st and 2nd Defendants: Advocate K. Thabane