

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0009/23

In the matter between

RSMS CONSTRUCTION (PTY) LTD

APPLICANT

And

BAXOLENI (PTY) LTD

1ST RESPONDENT

THE SHERIFF – HIGH COURT

2ND RESPONDENT

BAXOLENI & RSMS CONSTRUCTION

JOINT VENTURE

3RD RESPONDENT

Neutral Citation: RSMS Construction Pty Ltd v Baxoleni (Pty) Ltd & 2 others
[2023] LSHC 102 Comm. (20 February 2023)

CORAM: M. S. KOPO, J

HEARD: 20/02/23

DELIVERED: 20/02/23

SUMMARY

Civil Procedure – Application for attachment to found or confirm jurisdiction – whether it can be taken in any court without pleading the monetary jurisdiction of the court – Held, monetary jurisdiction of the court has to be pleaded and therefore court declined jurisdiction

Annotation

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Cases

South Africa

Hajaree v Ismail 1905 TS 451 at 453

Sackoor v Graaf 1909 TS 22 at 25

Statutes

High Court Rules No. 9 of 1980

Subordinate Courts Order No. 9 of 1988

Books

Cilliers AC et al. **Herbstain and Van Winsen. The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa.** Volume 1. 5th Ed. Juta.2009

JUDGMENT

[A] INTRODUCTION

[1] On the 06th day of February 2023, the Applicant instituted an urgent application for attachment of property to found jurisdiction in terms of **Rule 6 (1) of the High Court Rules**¹. The Notice of Motion was styled AN EX PARTE URGENT APPLICATION and was to be moved on the 07th day of February 2023. However, there is a Return of Service filed of record showing that the 1st and 3rd Respondents were served on the 11th day of February 2023.

[2] On the 14th day of February, the 1st Respondent filed a Notice of Intention to Oppose and as one of its preliminary points, challenged that the Applicant had not pleaded that the court has jurisdiction. The parties then argued this point. On that day I granted the judgment *ex tempore* and promised to provide a written judgment later. This is, therefore, the promised written judgment.

[B] THE 1ST RESPONDENT'S CASE

¹ Legal Notice No. 9 of 1980

[3] Advocate Makara for the 1st Respondent argued that the Applicant has not provided the quantum of its claim and for that reason this court is unable to decide if the application should have been moved in the Subordinate Court or the High Court. He argued that in the absence of such averment, this court does not know how much the Applicant is claiming.

[4] On the other hand, Advocate Mphakoanyane for the Applicant argued that Rule 6 (1) of the High Court Rules does not require that a quantum of the claim be disclosed. He argues that all that the Rule requires is that the Respondent be a peregrinus, the Applicant be an *incola* and that there be a *prima facie* case. Advocate Mphakoanyane went on to argue that the key word in the Rule in question is “Intend”. He argued further that this meant the case that is yet to be instituted or that is intended to be instituted will be the one that will disclose the claim by the Plaintiff.

[5] I posed a question to Advocate Mphakoanyane as to what would differentiate instituting this kind of application in this court and not in the Subordinate Court. He responded by arguing that an application for attachment to found jurisdiction, is to found jurisdiction of the courts of Lesotho and not this court in particular.

[D] ANALYSIS OF THE MATTER

[6] As has been shown, the application was styled an *ex parte* application, but the 1st and 3rd Respondents were served. As to how this came about is not clear *ex facie* the record. Be that as it may it was good that the Respondent was served because even though Rule 6 (3) of the High Court Rules provides that the “application shall be an *ex parte* one”, but where the peregrinus is within the country, service has to be effected. This is the view of the South African Authors **Herbstein and Van Winsen**² of which I am in total agreement with. The learned authors put it thus;

*“These applications are generally made ex parte, without notice to the peregrinus; however, if the peregrinus is in South Africa at the time when the application is brought and there is no danger of notice defeating the purpose of the application, then notice should be given”*³.

It is my considered view that the learned authors are on point since the procedure is meant to found or confirm jurisdiction and not to unfairly deprive the other party of his/her property. If there is no need to move *ex parte*, service has to be effected. It must be recalled that the procedure is meant to found jurisdiction (*ad fundandam jurisdictionem*) or to confirm jurisdiction (*ad confirmandam Jurisdictionem*). The service, therefore, as

² Cilliers AC et al. Herbstain and Van Winsen The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa. Volume 1. 5th Ed. Juta.2009

³ Ibid at page 120

long as it does not defeat justice, can be made if the *peregrinus* is within the country.

[7] The Subordinate Court has jurisdiction to entertain applications of this nature. Section 18 (1) of the **Subordinate Courts Order** as amended provides that,

“Subject to the limits prescribed by this order, the court may grant against persons and things, orders for arrest tanquam suspectus de fuga, attachments, interdicts and mandament van spolie”.

Section 29 lists matters beyond the jurisdiction of subordinate courts. The attachment to found or confirm jurisdiction does not appear among the said listed matters. This clearly says the Subordinate Courts have jurisdiction to preside over applications for attachments to found or confirm jurisdiction.

[8] The procedure for instituting an application for attachment to found or confirm jurisdiction has been particularised under the High Court Rules⁴ as opposed to the Subordinate Courts Order where it is just mentioned. Rule 6 (2) provides that in an application for attachment to found or

⁴ Supra.

confirm jurisdiction the Applicant should satisfy the court that he has a *prima facie* cause of action against the peregrinus, that the property is that of the *peregrinus* and that the Applicant is an *incola* of Lesotho and the Respondent a *peregrinus*.

[9] The importance of pleading the nature of the claim and the amount is important not only for the court to ascertain if the Magistrate Court would not have monetary ceiling jurisdiction as opposed to the High Court but is also to ascertain whether the Applicant has a *prima facie* case. I am indeed aware of the South African case of **Sackoor v Graaf**⁵ in which Mason J recognised that a *prima facie* case had been made immediately he was convinced that some debt was owing to the *incola* even though the amount was not made clear. The court at the time was however not dealing with the issue of jurisdiction and at the time in South Africa, it was generally accepted that the Magistrate's Court had no jurisdiction in this kind of applications. Relevant to the issue at hand, reference can be had to the case of **Hajaree v Ismail**⁶ wherein Mason J (Innes C.J and Solomon J Concurring) was clear that the Rules of the Magistrate court did not provide for attachment to found jurisdiction. The position has since changed in South Africa. In our jurisdiction nonetheless it is trite that an application for attachment to found or confirm jurisdiction can be

⁵ 1909 TS 22 at 25

⁶ 1905 TS 451 at 453.

moved in the magistrate court. Without the amount of the claim being specified this court is unable to ascertain whether the matter is within the competence of the Magistrate Court.

[D] CONCLUSION AND ORDER

[10] The importance of the demarcation of jurisdictions and adherence to it cannot be taken lightly. The efficiency of the courts in dispensing justice depends on it. If this court usurps the jurisdiction of the Magistrate Courts, it will forever over-burden itself and as a result fail to deliver justice efficiently. Parties should therefore be vigilant in identifying the correct forum or be clear in their papers that their dispute can be handled by the court they have approached. Having concluded that the Applicant has not disclosed if the cause of action would fall within the jurisdiction of this court or even the cause of action at all, the following order is made:

ORDER

- a. The court declines jurisdiction
- b. Costs are awarded to the 1st Respondent.

Kopo M.S.
Judge of the High Court

For Applicant: **ADV. MPHAKOANYANE**

For 1st Respondent: **ADV. MAKARA M.G**