IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO: 3148/2008

In the matter between:

FARM CHEMICALS LIMITED **Plaintiff**

And

NEW MIDWAY WHOLESALERS (PTY) LTD **1st Defendant**

DUMISA MADUMA MAHLAMBI **2nd Defendant**

NORMAN VUSI DLAMINI **3rd Defendant**

Date of hearing: 22 April, 2009 Date of judgment: 28 April, 2009

Mr. Attorney E.J. Henwood for the Plaintiff No appearance for the Defendant

JUDGMENT

MASUKU J.

[1] Presently serving before Court is an exception taken by the Defendant, to the Plaintiffs particulars of claim. I shall henceforth refer to the Defendants as such or simply as "the Excepients".

[2] It is worth pointing out even at this nascent stage of the judgment that the Excipients appear to have run out of the steam necessary to prosecute this exception. I say so because the book of pleadings was prepared by the Plaintiff and there are a number of notices of set-down prepared by the Plaintiff, which is otherwise, not the *dominis litis.* To compound matters, the Excipients' attorneys did not turn up for the hearing of the exception despite the fact that notice of the hearing was duly communicated by the Court Staff to the Excipients' attorneys of record. This serves to cast the seriousness of the Excipients in pursuing this matter in an unfavourable light. I was nonetheless compelled to hear argument relating to the exception in the absence of the *dominis litis.*

[3] After listening to argument by Mr. Henwood for the Plaintiff, I dismissed the exception with costs and indicated that the reasons therefor would follow in due course. Following below are the reasons:

[4] The Plaintiff is a company duly incorporated in consonance with the company laws of this Kingdom, with its principal place of business situate at Malkerns, District of Manzini. The 1st Defendant is also a company with limited liability having its principal place of business situate at Bhunu Mall, District of Manzini. The 2nd and 3rd Defendants are Swazi male adults residing in the Manzini District, cited in their capacities as sureties and co-principal debtors with the 1st Defendant.

[5] The Plaintiffs claim is for payment of a sum of E440, 726.22, being in respect of fertilizer and feed-related products which were sold by the Plaintiff to the 1st Defendant at the latter's instance and on terms that I need not refer to for present purposes. It is the Plaintiffs case that the 1st Defendant and its co-Defendants have, notwithstanding demand failed and/or refused to pay the aforesaid amount which is now due and payable by the Defendants jointly and severally.

To its particulars of claim, the Plaintiff attached statements and invoices appertaining to its claim. It further caused to be attached thereto copies of the suretyship agreements allegedly signed by the 2nd and 3rd Defendants. In response to the combined summons served on them, the 1st and 3rd Defendants, represented by Messrs. P.K. Msibi & Associates filed a notice of exception, dated 26 August, 2008, in which the said Defendants alleged that the said particulars of claim are bad in law.

The grounds upon which the Defendants attacked the said particulars, stripped to the bare bones, are two and they may be summarized in the following manner:

1. the said particulars contain evidence yet these are combined summons that could only be annexed on applications for summary judgment. The inclusion of that evidence to the summons of purported evidence is bad in law; and

2. the Plaintiff in the summons alleges that the 2nd Defendant is carrying on business at D & M Carriers Service, without stating whether the said entity is a private and or public limited liability company.

[8] The question to be determined is whether the exception, particularly having regard to the complaints it raises, is sustainable at law. The first issue to point out is that exceptions

in this Court are governed by the provisions of Rule 23 (1), the

contents of which I reproduce below:

> "Where any proceeding is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of Rule 6(14):
>
> Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall, within the period allowed under this Sub-Rule, by notice afford his opponent an opportunity of removing the cause of complaint within fourteen days.
>
> Provided further that the party excepting shall within seven days from the date on which a reply to such notice is received or from the date on which such reply is due deliver his exception".

[9] Commenting on the above Rule, Sapire A.J. (as he then was) stated

as follows in *Dumisa Dlamini v Swaziland Development and*

Savings Bank 1987-95 (4) S.L.R. 248 at 251 *g - i :*

> "In terms of rule 23, pleadings may be attacked in three ways. Sub-rule 1 provides that where any pleading is vague and embarrassing the opposing party may except thereto. Before doing so, he is required to give the other side an opportunity to remove the cause of embarrassment. The same sub-rule provides that exception (sic) may be taken that the pleading lacks averments which are necessary to sustain an action or defence. In this case, the affording of an opportunity to remove the cause of complaint is not required. These exceptions are directed at the pleading as a whole, and generally speaking it is not appropriate to except to a portion of a pleading. Subsection 2 (sic) for the same subsection which provides for the striking out of portions of a pleading where the matter complained of is scandalous, and irrelevant, is appropriate where only a portion of a pleading gives rise to the objection. A pleading may also be set aside in terms of rule 30 where its

deficiencies may make it irregular as contemplated in that rule."

[10] It then becomes clear from the foregoing that a party may except to a pleading on two accounts. First, that it is vague and embarrassing and secondly, if it is contended that it lacks averments necessary to sustain an action or defence, as the case may be. There is, on a proper reading of the Rule in question, no other basis upon which a party may except to a pleading. When one has regard to the exception filed by the Excipients in the present matter, one has lingering doubts as to whether their complaints, if at all justified, are a matter for exception at all.

[11] I say so for the reason that in the first place, there is no indication given as to which of the two classes of exceptions mentioned above the present matter falls. There is no allegation that the particulars lack averments necessary to sustain an action and a reading of the body of the exception does not admit of such a contention as there is nothing that is alleged to be lacking in order for the Plaintiff to sustain an action against the Defendants. On my reading of the pleadings, a cause of action against all three defendants is ineluctably set out. For that reason, it is my considered opinion that the particulars of claim cannot properly be the subject of the first part of the exception.

Secondly, it cannot be said that the pleading complained of is vague and/or embarrassing in any manner. Had that been the case, the

cause of embarrassment or vagueness would, as stated in the *Dumisa Dlamini* case *{op cit)* have had to be pointed out and the Plaintiff given an opportunity before the exception is filed, to remove the cause of complaint. There is neither contention nor step taken by the Defendants in that line in the present matter.

Writing about circumstances in which a pleading is said to be vague and embarrassing, McReath J. had the following to say in *Trope v South African Reserve Bank and Another* 1992 (3) S.A. 298 (T.P.D.) at B-C:

> "An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excepient is prejudiced. . . As to whether there is prejudice, the ability of the excepient to produce an exception-proof plea is not the only, nor indeed the most important test. . . If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not to be taken by surprise may well be defeated."

[14] It is clear to my mind, from reading the particulars of claim, that there is no embarrassment or vagueness that could be said to be faced by the Defendants in pleading thereto. Furthermore, a reading of the exception itself does not indicate that there is any embarrassment, vagueness or even prejudice that can reasonably be said to be caused to the Defendants in their bid to plead to the particulars of claim. I must mention that it must be clear from the notice of exception even before the particulars of the complaint can be stated, what the nature of the complaint is

and which of the two classes of exceptions it is contended that the pleading offends. This must be so for the reason that the opposite party has to know and appreciate the nature of the complaint and must be placed in a position where he is ready to deal with it in a manner he deems meet.

[15] When one has regard to the first complaint raised by the Defendants herein, it immediately dawns that the complaint is, if at all justified, not one that can properly be sought to be addressed by moving an exception. It would appear that the complaint is with regards to the attachment of the statement and invoices to the particulars of claim. That is, in my view, a matter that could be properly tackled with a motion to strike out rather than an exception. I am in any event not even convinced, based on the requirements for pleading under the Rules, that the Defendants are correct in alleging that there is anything wrong with the course adopted by the Plaintiff in that regard. I say so because Mr. Msibi did not present himself to Court to argue the exception. The first complaint, in my view does not have merit, particularly as I hold the firm view that it cannot under any circumstance found an exception.

[16] Turning to the second complaint that the name of the company D
85 M Carriers has not been recorded in full, i.e. it is not stated

whether it is a private or public company, I must say that I am totally at sea. That entity is not a party to these proceedings and has clearly not been cited nor is it alleged, let alone proved that it has any interest in these proceedings at all, whether direct or contiguous. A reading of the particulars of claim clearly shows that mention of that entity was made in relation to the address at which the Defendants could be located and probably served and nothing more. Why the address of service of the Defendants should be the basis for an exception, when it does not purport to or go to the root of the claim beats reason. Even if that complaint was justified, which is clearly not the case, an exception was clearly an inappropriate route by which to raise a complaint of this nature.

In the premises, it is clear that this exception on both accounts is totally ill-conceived. No wonder both Mr. Henwood and the Court had considerable difficulty in appreciating what exactly the complaints were during the hearing. Without Mr. Msibi, the author of the document to clarify and expatiate thereon, we were left to surmise what it is the exactly that the Defendants complaints were about. Whatever the case may be, it is clear that the complaints, even if justified (and I hold that they are not), did not warrant that an exception be taken.

For the foregoing reasons, I hereby dismiss the exception with costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 28th DAY OF APRIL, 2009.

T.S. MASUKU

JUDGE

Messrs. Cloete/Henwood/Dlamini/Magagula Associated for the Plaintiff-No appearance for the Excepient