



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.503/2013

In the matter between:

**COMFORT HLATJWAYO**

**Plaintiff**

**and**

**LIDWALA INSURANCE COMPANY LTD**

**Defendant**

**Neutral citation:** *Comfort Hlatjwayo and Lidwala Insurance Company LTD*

*(503/2013) [2014] SZHC 30 (14<sup>th</sup> March 2014)*

**Coram:** Hlophe J

**For Applicant:** Mr. S. C. Dlamini

**For Respondent:** Mr. Mabuza

**Date Heard:** 12<sup>th</sup> July 2013

**Date Delivered:** 14<sup>th</sup> March 2014

## Summary

*Civil Procedure – Summons issued for the recovery of a sum of E2000, 000.00 in terms of an insurance policy between the parties following the destruction of Plaintiff’s Cane Loader by fire – Defendant failing to file plea within stipulated period resulting in a Notice of bar being filed – Defendant filing what he called an exception inter alia contending that Plaintiff’s claim lacks averments necessary to sustain a course of action as there was no allegation as to jurisdiction; there were no particulars of the amount claimed; Place of contract not pleaded; no demand issued prior so as to place Defendant in mora and lastly that the Plaintiff had not pleaded that the sum claimed was owing, due and payable. Notice of irregular proceedings - Rule 30 Notice - Issued by Plaintiff challenging exception – Contended that exception filed out of time as it was filed after Notice of Bar – Objections raised allegedly do not go to the root cause of the action – Exception declared an irregular step and is set aside.*

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## JUDGMENT

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[1] The Plaintiff issued a combined summons against the Defendant in terms of which he claimed payment of a sum of E2000 000.00 arising from an

Insurance Policy, the Plaintiff had obtained from the Defendant who comprehensively covered the Plaintiff's Cameo Cane Loader.

[2] It is alleged that the Cameo Cane Loader was completely destroyed by fire on or about the 13<sup>th</sup> November 2012, after it had been insured with the Defendant to a sum or cover of E2000 000.00.

[3] The agreement or insurance policy covering the said Cane Loader was in writing and is annexed to the Plaintiff's papers or particulars of claim.

[4] It is contended by the Plaintiff in terms of his particulars of claim, that after the insured item was destroyed by fire he filed a claim with the Defendant who however refused to honor it, prompting Plaintiff to institute the present proceedings.

[5] After filing a notice of intention to defend the Defendant failed to file a plea within the stipulated period which prompted the Plaintiff to file and serve a Notice of Bar, on the Defendant calling upon him to file the said plea within 72 hours. Instead of filing the plea as directed or as was required in terms of the Notice of Bar the defendant filed what it termed a Notice of Exception, contending thereof inter alia that the Plaintiff's particulars of claim lacked averments necessary to sustain a course of action. This it was alleged was because:-

- “1. *There is no allegation of the Honourable Court’s jurisdiction in the particulars of claim.*
2. *The Plaintiff is claiming globular figures without motivating how these are arrived at, thus the Defendant is unable to plead thereto.*
3. *The Plaintiff has not pleaded the place where the contract was concluded.*
4. *Plaintiff has not placed the Defendant in mora in that the Plaintiff has not demanded payment of the sum claimed.*
5. *Plaintiff has not pleaded that the sum or any amount, is owing due and payable to the Plaintiff by the Defendant”.*

[6] In answer to the Notice of Exception the Plaintiff filed a Notice in terms of Rule 30 – that is a Notice of Irregular proceedings as envisaged by Rule 30 of the Rules of this court, contending that the Defendant’s Notice of Exception be struck out with costs as an irregular step.

[7] The Notice of Exception was said to be irregular as per the Notice of Irregular Proceedings because:

- “1. *The exception is out of time as it was filed after service of a Notice of Bar;*
2. *The objections raised are bad in law as they do not go to the root of the action, for example;*

- 2.1. *There is no substance in the point about jurisdiction as it is clear from the particulars of claim that the cause of action arose in Swaziland, such an objection should in any event be raised by way of a special plea;*
- 2.2 *The statement of claim is clear that the value of the insured Cane Loader as (at) the date of its destruction was E200 000.00. So the allegation that there are globular figures in the claim lacks substance;*
- 2.3 *The place of the contract is clear from the particulars of claim and the policy itself that it was in Swaziland more specifically at Lidlelantfongeni Building, Manzini.*
- 2.4 *Plaintiff states clearly that despite complying with all its obligations under the policy and notifying the Defendant of the claim, no payment has been made. Moreover service of the summons is itself a demand.”*

[8] From the nature of the pleadings and on the papers exchanged between the parties, it is apparent that the first point for determination of what is contended per the Notice of Irregular proceedings often referred to as the Rule 30 Notice. The starting point in this regard is whether or not it can be said that the filing of the Notice of Exception was bad in law as it was filed out of time by being filed after a Notice of Bar.

[9] A Notice of bar is filed in a case where a party has failed to file a required or specific pleading within the stipulated time. According to their book, Fundamental Principles of Civil Procedure Second Edition, 2012 Lexis Nexus, at page 231, C. Theophilopoulos and others put the legal position as regards a Notice of bar in the following words;

*“If a party fails to deliver a pleading...within the prescribed time period, the opposing party, must serve a Notice of Bar on the defaulting party directing the defaulter to deliver the specified pleading within five days of receipt of the Notice.”*

It must be clarified that although this except is referring to the South African, position, save for that as regards the period for filing the Notice of bar that should be afforded the opposing side, (in our case it is three days according to Rule 26) the general position is otherwise similar. Otherwise the Local rule specifically provides as follows:

*“Failure to Deliver Pleadings Barring*

*Any party who fails to deliver a replication or subsequent pleading within the time stated in Rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him, require him to deliver such pleading within 3 days after the day upon which the notice is delivered.*

*Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties; shall be in default of filing such pleading, and ipso facto barred”. (emphasis have been added).*

[10] Clearly a Notice of Bar follows upon a party’s failure to file a specific pleading. A strict reading of the rule in question therefore enjoins the defaulting parties to file a specific document demanded in terms of the Notice of Bar and not any other document. Clearly the Notice of bar called upon the Defendant to file a plea specifically and not any other as Defendant seems to have done by filing an exception. It was, in my view, and on the clear reading of the Act, no longer open to it to do so and the exception it purported to file in answer to the Notice of Bar ought to be dismissed on this ground alone.

[11] Whereas I should be dismissing the exception on this ground and upholding the objection in terms of rule 30 as contended by the Plaintiff, it seems to me that I should go ahead and deal with the exception by the defendant if anything just to deal with the matter conclusively in case a higher court were to come to a different conclusion as regards the fate of the exception filed pursuant to a Notice of Bar that called for the filing of a plea.

[12] It was contended that the exception by the Defendant was not valid because the objections raised were bad in law as they did not go to the root of the action. This contention was as stated above, premised on the contention among others that the objection on jurisdiction not having been pleaded has no substance. This it was argued was because it was apparent from the particulars of claim that the cause of action arose in Swaziland. I agree with the Plaintiff in this regard. It is clear from the particulars and all the papers filed of record that the cause of action arose within Swaziland. In any event, it is also clear from the pleadings that both parties are resident and or operate business in Swaziland. I therefore cannot agree that the failure by the Plaintiff to allege specifically that this court had jurisdiction to hear and determine the matter was fatal to the Plaintiff's particulars of claim.

[13] I however hasten to clarify that I do not agree with the Plaintiff that an objection to jurisdiction should only be raised by way of a special plea. I am fortified on the position I have taken of the matter by what is stated at page 222 of the book referred to above – **Fundamental Principles of Civil Procedure** – where the position is expressed as follows at paragraph 2 of the said page:



*“It is possible to raise the defence of lack of jurisdiction by way of exception rather than by filing a special plea. This is because jurisdiction is an essential component of a cause of action, and if it appears from the pleading that the court does not have jurisdiction, the pleading lacks the averments necessary to sustain a cause of action and a party may except to the pleading.”*

[14] On the contention that the particulars of claim lacked averments necessary to sustain a cause of action because the Plaintiff was claiming globular figures, the Plaintiff contended there was no merit on this objection because the statement of claim was clear that the value of the insured cane loader was E2000 000.00 on the date of its destruction. I agree that there is no merit on this objection as well. Furthermore what exactly is the value of the insured item is a matter for evidence to be addressed during trial which need not be proved exfacie the particulars of claim. In any event the claim as it stands does not prejudice Plaintiff in any way. The position is now settled that an exception:-

*“Based on a mere technical ground will not succeed unless the excipient can show prejudice. The object of an exception is not to take advantage of a technical flaw but to dispose of a case, or a portion thereof, in an expeditious manner or to protect the excipient*

*against an embarrassment which is serious enough to merit the costs of an exception.”*

As stated at page 222 of the book titled, **Fundamental Principles of Civil Procedure**. See also *Levitan vs Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298 A*, as well as *Lobo Properties (PTY) LTD v Express Lift Co. (SA) (PTY) LTD 1961 (1) SA 704*.

[15] It is also contended by the Plaintiff that there is no merit on the objection to the effect that there is no mention of the place where the contract was concluded supposedly because such a fact was easily discernable from the facts. I agree one can easily conclude that from the papers but more fundamentally even if it was not so, there is no doubt that leaving out such an allegation does not occur the Defendant any prejudice. In what I have already stated above, an exception may not succeed if based on a mere technicality unless the court is satisfied the Defendant is prejudiced. At page 158 of the Book referred to above, that is, **Theophilopoulos’ Fundamental Principles of Civil Procedure (Supra)** – the position is expressed as follows with which I agree fully and find to be apposite in this matter:-

*“The application procedure for striking out and for an exception cannot be used for raising mere technical objections and may be granted only once the court is satisfied that the applicant will be prejudiced in the conduct of the claim or defence”.*

[16] The same position applies in my view to the contention that no mention had been made of the amount claimed being due, owing and payable by the Defendant. I agree that the fact that the Plaintiff claims payment against the Defendant of the amount claimed of which the Defendant has not paid despite demand being made is sufficient in a case like this one where no prejudice is suffered by the Defendant in its defence.

[17] For the foregoing reasons I am convinced that the Plaintiff's objection in terms of Rule 30 against the Defendant's exception taken together with the grounds of exception themselves should succeed. Accordingly the Defendant's exception be and is hereby dismissed with the Defendant being given three days within which to file a plea failing which it is to be ipso facto barred from filing a plea. This I order because Defendant was entitled to file the pleading it did for determination by this court which upon determination would have accorded the Defendant an opportunity to file such a process.

[18] For the removal of doubt I order as follows:

1. The Plaintiff's application that the Defendant's exception be declared an irregular step and be set aside be and is hereby granted.

2. The Defendant be and is hereby given an opportunity to file a plea within 3 days from the date of service of this order upon its attorneys of record.
  
3. The Defendant be and is hereby ordered to pay the costs occasioned by the Notice of Exception and the Notice of Irregular proceedings.

**Delivered in open Court on this the 14<sup>th</sup> day of March 2014.**

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**N. J. HLOPHE**  
**HIGH COURT JUDGE**