IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 60/2014

In the matter between

WESBANK t/a FIRST NATIONAL LTD
BANK OF SWAZILAND **Plaintiff**

And

SIPHAMANDLA GININDZA **Defendant**

Neutral Citation: ***Wesbank t/a First National Bank of Swaziland Ltd*** v ***Siphamandla Ginindza (60/2014) [2015] SZSC10 (4th February 2015)***

Coram: **Dlamini J**

Heard: **9th December 2014**

Delivered: **4th *February* 2015**

Exception – guiding principle is whether the ground raised by excipient goes to the root of the declaration in that if sustained, it will dispose of the case as a whole or in part.

Summary: The question for determination as raised by defendant is whether the summons is excipiable?

Defendant's contention

[1] The defendant filed a notice to except and pointed out as follows:

> *"1. Whereas the plaintiff having terminated the lease agreement by virtue of an order of the High Court of Swaziland, it could only thereafter pursue a claim for damages as provided for in terms of clause 10.1.2 of the lease agreement;*
>
> *a) The particulars of claim do not state what was the amount due in terms of the lease agreement at the time of termination thereof;*
>
> *b) The particulars of claim further do not state what the value of the rentals for the unexpired term of the lease;*
>
> *c) The particulars of claim further do not state what the determined value of the goods was at the time of repossession of the vehicle;*
>
> *d) The amount claimed in the particulars of claim has not been computed in terms of the lease agreement;*
>
> *e) The particulars of claim further do not state if the appointed appraisers are duly qualified to make such an appraisal or evaluation.*
>
> *Ad Claim 2*
>
> *2. Whereas the plaintiff having terminated the lease agreement and repossessed the vehicle, by virtue of an order of court, it could only have proceeded in terms of clause 10.1.2 of the lease agreement;*
>
> *The particulars of claim do not disclose a cause of action, alternatively, lack necessary averments to establish a cause of action in that;*
>
> *a) They do not state what was the amount due under the lease agreement, at the time of cancellation thereof.*
> *b) They do not state what was the value of the rentals for the unexpired term of the lease agreement.*

c) *They do not state what was the determined value of the goods at the time of repossession thereof.*

d) *The amount claimed has not been computed in terms of the provisions of clause 10.1.2 of the lease agreement."*

Viva voce submissions

[2] Motivating the first ground of exception that the plaintiff ought to have sued in terms of Clause 10.1.2 defendant submitted:

The plaintiff based his claim on the breach of the lease agreement. There was an order for repossession. These two vehicles which were the subject matter were later sold. The said vehicles were not sold at the value determined by the valuator appointed by plaintiff.

[3] Defendant referred the court to page 25 of the book of pleadings and pointed out that the first vehicle was assessed at the value of E198,500. However, they were eventually sold at the amount of E140,000. The outstanding amount owing and due was E241,298.39.

[4] Defendant contended that plaintiff having obtained an order for repossession together with one cancelling or terminating the lease agreement, he ought to have claimed for damages as per clause 10.1.2 of the lease agreement. That would be the value of rentals due at cancellation and at the unexpired time.

[5] Defendant further informed the court that the plaintiff is entitled to a sum of E44,893 under claim 1 and not the sum of E102,893 by reason that it failed to sell the vehicle at the appraised value. This amount is the balance

obtained from the assessed value less the mount at which the first motor vehicle was sold at.

[6] Similarly on claim 2, the assessed value less the value at which vehicle 2 was sold at, gives a balance of E50,000. What was owed as per claim 2 is the sum of E165,237.98. If one deducts this figure from the appraised value there was an excess of E35,000.

[7] It was defendant's further contention that plaintiff ought to have refunded defendant the sum of E35,000. If, therefore, one considers a set off against claim 1 being a sum of E44,893 as due and owing, the sum actually due to plaintiff would be E10,763 and not the sums reflected in the summons.

[8] On ground two, that is, failure to state necessary averments in order to sustain a cause of action, the defendant did not go any further. I guess because all the necessary averments were found in the declaration and attachments thereto. This was clearly demonstrated by defendant's Counsel who referred the court to the declaration and the attachments in arguing its first ground of exception.

Plaintiff

[9] The plaintiff drew the court's attention to the notice before court and implored this court to dismiss it on the basis that the arguments advanced do not support an application for an exception.

Issue

Are the summons serving before this court excipiable?

Adjudication

Rule 23 (1) reads:

> *" 23 (1) When any pleading 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 (4):*

Do the arguments advanced by defendant support the application *in casu*?

Legal Principal

[10] Allowing an application for exception based on the ground for lack of *locus standi*, the **Lord Justice Beadle CJ** held:

> "*The practice in this court is to employ the procedure of excepting for those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all."*

[11] **Herbstein and Van Winsen**, "**The Civil Practice of the Supreme Court of South Africa"** page 489 state similarly:

> "*…the remedy of an exception is available when the objection goes to the root of the opponent's claim or defence. The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception."(*underlined my emphasis*)*

[12] **Davis J** in **Kahn v Stuart and Others 1942 CPD** at 387 highlighted:

> "*When an exception is taken to a pleading it is the duty of the court first to see if there is a point of law to be decided which will dispose of the case as a whole or in part. If there is not, then it must see if there is any embarrassment which is real and such as cannot be met by asking for particulars as the result of the fault in the pleadings to which the exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed*."(my emphasis)

[13] **Colonial Industries Ltd v Provincial Insurance Co. Ltd 1920 CPD 627** held:

> "*Save where an exception is taken for the purposes of making a substantive question of law which may have the effect of settling the dispute between the parties the excipient must make out a very clear and strong case before he will be allowed to succeed.*" **(Benjamin J)**

[14] The conclusion of the above *ratio decidendi* is that in exception notices the guiding principle is whether the ground raised by the excipient goes to the root of the declaration in that if sustained, it will dispose of the case as a whole or in part.

Case *in casu*

[15] Applying the above principle of law *in casu*, it is clear that the excipient has raised a point of law *viz*. that the plaintiff cannot claim under the contract as a whole following an order of this court granted in favour of plaintiff that the contract of lease between the parties be cancelled and that should this point of law be sustained, it might " *dispose of the case as a whole or in part"* as per **Davis J***supra*. For this reason, it is my considered view that the ground raised by defendant is appropriate in exception. What remains for determination however, is whether the declaration is excipiable.

[16] The defendant has submitted that the plaintiff ought to claim under clause 10.1.2 which provides according to the excipient that in the event the lease agreement is cancelled, plaintiff is to appoint an appraiser who would give value to the *merx* for purposes of establishing its selling price.

Clause 10.1.2 reads:

> "*10.1.2* *terminate this agreement and obtain immediate possession and the lessor shall be entitled to claim damages payment of all rentals and other amounts then due in respect to the Goods, and in addition the present value of the rentals for the unexpired term of the hiring, all of which shall be deemed to be due and payable forthwith, less the value of the goods determined in accordance with 10.3."*

[17] It is however, unnecessary in the present application to scrutinize clause 10.1.2 in order to ascertain whether it carries a similar meaning to what has been advanced by the excipient.

[18] However, what is glaring from the declaration as filed by the plaintiff is that:

- The plaintiff did appoint an appraiser;
- The appraiser did give value to the two motor vehicles under issue;
- The plaintiff could not sell the motor vehicles at the appraiser's values but only at a lesser price;
- The plaintiff has approached the court in order to seek for the difference between the appraiser's value and the selling price;
- The plaintiff does not seek to enforce the entire contract.

[19] I must hasten to point out that I do not at this stage of the proceedings find the above to be established fact but point out what the plaintiff's declaration

state. At any rate the excipient relied on the plaintiff's declaration to advance the circumstances of the case. Further, it must be born in mind that it is unnecessary for the plaintiff to specifically aver in the declaration that the summons is sued out in terms of clause so and so. It is sufficient that from the total reading of the declaration and attachments, one can deduce that the plaintiff's claim arises from which portion of the contract.

[20] In the totality of the above, the exception grounded on the point of law is without basis by reason that the plaintiff has based its claim on clause 10.1.2 as can be gleaned from the total reading of the declaration. It follows therefore that the following orders are appropriate:

1. Defendant's exception is dismissed.
2. Defendant is ordered to pay costs.
3. The matter is referred to trial and defendant granted leave to file a plea should he be so inclined.

M. DLAMINI
JUDGE

For Plaintiff : **K. Simelane of Cloete/Henwood - Associated**

For Defendant: **S. Simelane of SC Simelane Attorneys**