



**IN THE HIGH COURT OF ESWATINI
RULING ON EXCEPTION**

HELD AT MBABANE

CASE NO: 298/22

In the matter between:

VUSANI RODWELL NSIBANDZE

PLAINTIFF

And

**ESTATE LATE BENJAMINI MSHANDANE
NSIBANDZE**

FIRST DEFENDANT

PHUMZILE ESTHER MDLADLA N.O.

SECOND DEFENDANT

BUSISIWE MAVIS SIMELANE N.O.

THIRD DEFENDANT

THE MASTER OF THE HIGH COURT

FOURTH DEFENDANT

THE ATTORNEY GENERAL

FIFTH RESPONDENT

Neutral citation: *Vusani Rodwell Nsibandze and Estate Late Benjamin Mshandane Nsibandze and 4 Others [298/22] [2023] SZHC 66 (29 March 2023)*

Coram: LANGWENYA J

Heard: 22 April 2022

Delivered: 29 March 2023

Summary: *Practice-Exception-that particulars of claim do not sustain cause of action-court to determine whether or not particulars of claim lack the necessary averments required to sustain a cause of action-settled law that in adjudicating exceptions, averments alleged by the plaintiff are accepted as correct-excipient bears onus of persuading the court that particulars of claim are excipiable.*

JUDGMENT

Introduction

[1] This is an exception raised by the defendants against the particulars of claim where the plaintiff seeks a declaration that the joint Will of his parents is *pro non scripto* and that the deceased died intestate. The first, second and third defendants (defendants) contend that the particulars of claim do not disclose or sustain a cause of action. The exception is opposed.

The parties

- [2] The plaintiff is Vusani Rodwell Nsibandze, an adult LiSwati male from eLwandle in the district of Manzini, a pensioner and a beneficiary in the estate of the late Benjamin Mshamndane Nsibandze.
- [3] The first defendant is the estate of the late Benjamin Mshamndane Nsibandze, reference number EM 47/21.
- [4] The second defendant is Phumzile Esther Mdladla cited in her capacity as a co-executor with the third defendant in the first defendant.
- [5] The third defendant is Busisiwe Mavis Simelane cited in her capacity as a co-executor with the second defendant in the first defendant.
- [6] The fourth defendant is the office of The Master of the High Court cited in its capacity of custodian of deceased persons' estates.
- [7] The fifth defendant is the Attorney General cited in his capacity as a legal representative of the fourth defendant in legal proceedings.

Background

- [8] In February 2022, the plaintiff instituted an action for the joint Will of his parents to be declared invalid and that his parents be declared to have died intestate. Attached to plaintiff's particulars of claim is a document with the title: 'Last Will and Testament' of Benjamin Mshamndane Nsibandze and Glory Nsibandze. In his terse particulars of claim, the plaintiff states as follows:

'7. The plaintiff observed that the purported joint Will of the deceased hereto annexed) is invalid because it was not signed by the testatrix, the signature of the testatrix having been

noticeably forged. The signature of the testatrix is different in two documents referred to as copies of the Will. Also, the witnesses did not attest and sign the Will in the presence of the testatrix and of each other.

8. *These circumstances render the Will invalid and it ought to be set aside and the estate be distributed through the intestate succession process.*
9. *The plaintiff recently obtained documents purported to be a joint Will by the deceased Benjamin Mshamdane Nsibandze and Glory Nsibandze. The deceased were married in community of property.*
10. *Wherefore, the plaintiff prays for an order as follows:*
 - 10.1 *Declaring the Will of the deceased pro non scripto and that the deceased be declared to have died intestate;*
 - 10.2 *Costs where unsuccessfully defended;*
 - 10.3 *Further and alternative relief.'*

[9] The defendants filed an exception where they claim that plaintiff's particulars of claim are defective for lack of averments necessary to sustain a cause of action. The basis of the exception is that the particulars of claim do not make averments why the objection was not raised in 2008 when the estate of Glory Nsibandze was being wound up through the office of the Master of the High Court.

- [10] At the outset it should be clarified that the defendants do not argue that the particulars of claim are vague and embarrassing but rather that the particulars of claim do not disclose or sustain a cause of action.
- [11] The defendants' case for the exception is heavily reliant on the lack of averments indicating why the objection being raised in the present proceedings was not raised in 2008 when the joint Will complained of was invoked in the distribution and winding up of the estate of Glory Nsibandze. Defendants contend that failure to provide the said averments renders the particulars of claim excipiable on that basis. Consequently, the defendants submit that the exception should be upheld with costs.
- [12] The plaintiff attempts to repel the exception by submitting that the exception is not sustainable because the defendants do not deny that the purported Will was forged and does not comply with the validity provisions of the Wills Act¹. Plaintiff contends that he could not have raised the objection during the process of liquidation and distribution of the estate of Glory Nsibandze because he had no notice of the said proceedings and only got notice through the exception raised by defendants. It is palaintiff's contention that because he did not see the newspaper or gazette notices winding up Glory Nsibandze's estate, he is entitled to condonation for raising the objection in the present proceedings. According to the plaintiff, the time he raises the objection is of no moment because the Will complained of is invalid for not complying with the requirements of the validity provision of the Wills Act. Plaintiff contends further that no prejudice will be suffered by the defendants if his objection is entertained because the exception has no basis except to further delay the matter without good cause.

¹ Section 3(1)(a)(b) and (c) of the Wills Act, 1955.

[13] The task that this court is therefore seized with is to determine as to which of the parties is on the correct side of the law and who is offside, so to speak.

Defendants' exception

[14] The defendants list five different grounds on which they except to the particulars of claim. The gist of the exceptions can be summarized as follows:

- a) *First exception*: the plaintiff did not object to the validity of the joint Will of his parents and neither did he give reasons for failure to do so when the liquidation and distribution account of the estate of his mother was processed in 2008.
- b) *Second exception*: the plaintiff did not file the objection with the Master of the High Court while the liquidation and distribution account of the estate of his mother lay for inspection in terms of section 51*bis* of the Administration of Estates Act, 1902.
- c) *Third exception*: the plaintiff's mother's estate was wound up in 2008, the period of objecting to the joint Will and the period of condoning late objection based on exceptional circumstances has long lapsed.
- d) *Fourth exception*: the plaintiff has cited no exceptional circumstances in particulars of claim that would justify condonation for failure to make his objection within the statutory period.
- e) *Fifth exception*: the defendants will suffer prejudice if the exception is not upheld as the value of the estate is depleted due to the maintenance costs incurred to keep the property of the estate in good shape.

[15] It is evident from the five grounds listed by the defendants that they allege that the plaintiff's particulars of claim are defective and do not disclose a cause of action.

[16] I now proceed to briefly consider the legal principles that are applicable to exceptions.

The law on Exceptions

[17] Rule 23(1) which regulates exceptions provide that:

'Where a 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(14):

Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall, within a 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.'

[18] The Supreme Court in Namibia in *Van Straten NO and Another v Namibian Financial Supervisory Authority and Another*² laid down the following regarding exceptions based on the ground that no cause of action can be sustained on the particulars of claim:

'[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasized. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct³. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed⁴. Stated otherwise, only if no possible evidence led on the pleadings

² 2016 (3) NR 747 (SC).

³ *Marney v Watson & Another* 1978 (4) SA 140 (C) at 144F.

⁴ *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G.

can disclose a cause of action, will the particulars of claim be found to be excipiable⁵.’

- [19] The excipient bears the *onus* of establishing that a pleading is excipiable⁶. The general approach to exceptions was articulated in *Colonial Industries Ltd v Provincial Insurance Co Ltd*⁷ as follows:

Now the form of pleading known as an exception is a valuable part of our legal system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. Under the name of ‘demurrer’ it grew under the old English practice into a most pernicious evil: the Courts of Law abnegating their functions as Courts of Justice directly countenanced and encouraged the ingenuity of counsel in drafting fine ‘demurrers’ which ignored the rights on which they were called to adjudicate. I think that the possibility of such abuse of legal proceedings should be jealously watched and that save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.’

- [20] A cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have occurred which are material to be proved to entitle the applicant to succeed⁸. In the matter of *McKenzie v Farmers’ Cooperative Meat Industries Ltd*⁹ the phrase ‘cause of action’ was defined to be:

‘Every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’

⁵ *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-G.

⁶ *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395.

⁷ 1920 CPD 627 at 630

⁸ Per Gardiner JP adopting s 64 of *Halsbury*, xix, in *Coetzee v SAR&H* 1933 CPD 570

⁹ 1922 AD 16 at par 23; see also *Erasmus Superior Court Practice*, pp D1-302

- [21] The plaintiff must ensure that the material facts (*facta probanda*) in support of his claim is pleaded with sufficient particularity, that it supports his contention or conclusion in law and, if accepted, will let it succeed in the relief that he is seeking¹⁰.
- [22] It is a basic principle when dealing with exception that if evidence which disclose a cause of action alleged in the pleading can be led, that particular pleading is not excipiable. Consequently, a pleading is excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action¹¹. An exception is restricted to pure matters of law and facts alleged are taken to be admitted¹². Put differently, for the purposes of exception, the facts pleaded must be accepted as correct¹³. This is the position of the law unless the facts pleaded are plainly false and so clearly baseless that it cannot possibly be proved.
- [23] Having set out the legal principles, I will now proceed to apply the legal principles as set out in the preceding paragraphs to the facts.
- [24] I will begin my application of the legal principles by addressing the third and fourth exception namely that the plaintiff failed to apply for condonation for late institution of the present proceeding. Defendants argue that the Will complained of was invoked during the winding up of the estate of their mother in 2008 and that the plaintiff did not contest it nor did he object that it was forged at the time. Defendants argue that the plaintiff should have lodged his objection with the fourth defendant within the stipulated statutory period as set out in section 51*bis* of the Administration of Estates Act 1902.

¹⁰ Erasmus, *Superior Court Practice*, pp D1-302.

¹¹ *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526C-F.

¹² Isaacs Beck's *Theory and Principles of Pleading in Civil Actions* at 982 para 62.

¹³ *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144F-G.

He did not. Defendants contend that the plaintiff should have applied for condonation before instituting the present proceeding.

[25] The factors which this court should consider in an application for condonation are clearly set out by the Van Winsen *et al*¹⁴ as follows:

‘Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from non-compliance, and the fact that the respondent has no objection, although irrelevant, is by no means an overriding consideration. The court’s power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all facts and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will bring the best interests of justice.

The factors usually weighed by the court in considering applications for condonation include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent’s interests in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice...’

[26] Condonation for the non-observance of rules of procedure in legal proceedings is not there for the taking. The plaintiff ought to have applied for condonation for late institution of the action proceeding. He did not. His reasons for not doing so are flippant if disingenuous in his consideration of defendants’ exception. In applying these principles to the factual basis of the matter, the degree of non-compliance is inordinate. For this reason, the third and fourth exceptions are upheld.

[27] The nub of the first and second exception is that the plaintiff did not file his objection to the validity of his parents’ Will with the office of the Master when the estate of his mother was processed and finally wound up in 2008.

¹⁴ Van Winsen, Cilliers & Loots ‘Civil Practice of the Supreme Court of South Africa’ 4th edition at page 897-898

The office of the Master of the High Court is pivotal in the administration of deceased persons' estates and must be allowed through its reports to impart relevant information to the court and offer whatever assistance or guidance to the court that it can for the speedy resolution of matters pertaining to deceased estates. The plaintiff did not approach the Master in this regard and only contends himself with saying at the time the estate of Glory Nsibandze was wound up through the Master of the High Court's office he had no notice that his mother's ^{estate} Will was being wound up. This explanation is unreasonable for two reasons: first, as a beneficiary of his parents' estate it is unlikely he was not informed to attend the next of kin meeting where the beneficiaries would have been informed of the Will; second, the plaintiff's particulars of claim are silent on facts about how the plaintiff came to be in possession of the Will he alleges is forged. The first and second exception is not without merit and it is accordingly upheld.

[28] In the result, the following order is made:

1. The exception succeeds and the plaintiff's particulars of claim and summons are set aside with costs


M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Plaintiff:

Mr B. M. Dlamini

For the Defendants:

Mr Hlandze