

IN THE HIGH COURT OF ESWATINI

RULING

HELD AT MBABANE

CASE NO. 2297/2020

In the matter between

**PHOENIX OF SWAZILAND ASSURANCE
COMPANY LIMITED**

PLAINTIFF

AND

SELINA CHAUKE

DEFENDANT

Neutral Citation: *PHOENIX OF SWAZILAND COMPANY LIMITED v SELINA CHAUKE (2297/2020) [2023] SZHC 98 (21 APRIL, 2023)*

Coram : MASEKO J

Heard : 29/07/2021

Delivered : 21 APRIL 2023

Preamble : *Civil law- Civil Procedure- Exception- Whether the defendant's Plea lacks the necessary averments to sustain a defence.*

Held : *That the Defendant's Plea clearly and concisely articulate the Defendant's case which the Plaintiff has to meet, consequently the exception is dismissed with costs.*

RULING ON EXCEPTION

- [1] On the 20th November 2020 the Plaintiff issued a Combined Summons against the Defendant for payment of the sum of E50 755.00 (Emalangeni Fifty Thousand Seven Hundred and Fifty-Five), interest at 9% per annum and costs of suit.
- [2] The claim arose out of a collision between a motor vehicle VSD 052 AH insured by the Plaintiff and three herd of cattle allegedly owned by the Defendant.
- [3] The Combined Summons was served personally at Defendant's place of residence in Dvokolwako area in the Manzini Region, by the Deputy Sheriff Musa Mavuso on the 11th January 2021.

[4] The Defendant filed its Plea on the 4th March 2021 and thereafter on the 23rd March 2021 the Plaintiff filed a Notice of Exception to the Defendant's Plea on the following grounds:

- I. *The Defendant's Plea lacks averments which are necessary to sustain a defence in terms of Rule 23 (1).*
- II. *The Defendant's Plea acknowledges that the Defendant is the owner of the three cows with ear tags 401-01645, 401-01735 and 401-01637.*
- III. *The Defendant's Plea lacks averments to substantiate the allegation that the motor vehicle accident did not occur and her three cows, in particular those with ear tags 401-01645 and 401-01735 were not involved in the collision of the 3rd March 2019 in the face of a police report confirming same which is prima facie proof that the collision occurred and her cattle were involved.*
- IV. *The Defendant's Plea therefore fails to clearly and concisely state all material allegation upon*

which Defendant relies in her defence in terms of Rule 23 (2).

- v. *The Defendant's Plea is a bare denial in that it does not disclose the cause of defence in terms of Rule 23 (1) with regards to the involvement of her cattle in the motor vehicle accident.*

- [5] Mr B. Gama Counsel for the Plaintiff argued primarily that the Defendant has not advanced a substantial defence to the Plaintiff's claim, and that the Defendant has made a bare denial which is contrary to Rule 23 (1) and Rule 18 (4).
- [6] On the other hand Mr S. Jele Counsel for the Defendant submitted that the Defendant has advanced sufficient defence to the Plaintiff's claim. He argued that the Defendant has complied with Rule 23 (1) and Rule 18 (4) contrary to the submissions of Mr Gama.
- [7] Mr Jele submitted further that the Plaintiff has filed these 'exception proceedings' as a disguised summary judgment proceedings seeking to obtain judgment by all means. Mr Jele elaborated that the matter is still going to trial where oral evidence is going to be led by the Plaintiff and Defendant to plead their respective cases. He argued that the defence raised

in the Defendant's Plea goes into the root of the matter in terms of Rule 18 (4) and 18 (5).

ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:

[8] I must caution at the first instance that it is the practice in this jurisdiction that action proceedings can never be adjudicated upon in the same manner as motion proceedings more particularly because in the latter proceedings affidavits are relied upon, i.e. sworn evidence. I state this because I have noticed that the Defendant's Plea has advanced a defence sufficient to inform the Plaintiff that the Plaintiff's claim is vigorously contested. This court cannot then be expected at this stage to compel the Defendant to plead in the manner preferred by the Plaintiff. I have no doubt in my mind that the contentious issues of which cows were involved in the accident, and whether the accident itself occurred is a case that has to be proved by the Plaintiff during the trial before the trial court and not before this court. A Defendant's plea is a framework providing the Plaintiff with information that the Defendant will deny the Plaintiff's claim, it is not an affidavit which should contain all the averments which are to be placed before court.

[9] In action proceedings evidence is proven through oral evidence wherein all forms of evidence e.g. electronic and documentary are produced before court by those testifying for the parties. During the pre-trial stages each

party may request further particulars to be furnished as well as the discovery of all documentary and/or electronic evidence sought to be utilised during the proceedings. It is for that reason that almost all evidence that is led during the trial is discovered by both parties to enable each party to appreciate the case each party is expected to meet during the trial.

[10] In the circumstances it would be difficult for this court to compel the Defendant to plead in the manner desired by the Plaintiff. Instead each party shall prove its case during the trial and not at this stage of the proceedings.

[11] Herbstein and Van Winsen in their master work titled The Civil Practice of the High Courts of South Africa 5th Edition Juta 2012 deals with the subject of exception as follows at pgs 630-631:

“An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon.

The taking of an exception is a procedure which is interposed before the delivery of a plea on the merits by a defendant or before the delivery of a replication or the joinder of issue by a plaintiff. It is designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence.

The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost- effective manner.

Thus pleadings whose contents are so vague that it is impossible to determine the nature of the claim or the defence and pleadings which are bad in law in that their contents do not support a discernible and legally recognized cause of action or defence are struck out”.

- [12] In *casu* I have not found any vague and embarrassing averments by the Defendant entitling the Plaintiff to take an exception as the Plaintiff has done. It appears from the Plaintiff's papers that the claim arise out of a

collision between an insured motor vehicle and the Defendant's three herd of cattle. This fact is denied by the Defendant in its Plea and therefore the merits and demerits of the case should be canvassed at the trial before the trial court.

[13] In his submissions Mr S Jeje for the Defendant has summarised the issues as follows:

- i. That Defendant's cattle were never involved in the alleged accident.*
- ii. That Defendant's cattle were never injured or taken to the veterinary to be treated for injuries sustained as a result of the alleged accident.*
- iii. That Defendant's cattle with ear tag 401-01637 was slaughtered months before the alleged accident. It is therefore improbable that same was involved in the accident as alleged by the Plaintiff.*

[14] In my view there is nothing which can be characterised as vague in the Defendant's Plea causing an embarrassment to the Plaintiff. The defence is well articulated in the Defendant's Plea, and there is no way by which this court can prescribe how it should be framed. What is clear though is

that the denial by the Defendant is not a bare denial, and as I said herein earlier all the merits and demerits of the parties' evidence shall be dealt with before the trial court when each party leads its evidence to prove its case. Equally the defence in the Defendant's Plea does not lack any averments which are necessary to sustain her defence instead the averments clearly and unambiguously outline the defence which the Defendant raises in her defence to the Plaintiff's claim.

[15] In the case of *General Commercial & Industrial Finance Corporation Ltd v Pretoria Portland Cement Co. Ltd 1944 AD 444 at 454*, the Court stated as follows:

“It seems to me impossible to say that a defence is not vague and embarrassing in terms of the rule if it can be read in any one number of ways, and I cannot say that the embarrassment is other than substantial. After all, we have to look at the matter from the point of view of the party who is faced with a pleading of this nature. How is he to know what case he is called upon to meet?”

[16] In *casu*, I do not believe that the Defendant's Plea can be read in any one number of ways which leaves the Plaintiff embarrassed and not knowing

what case to answer as per the sentiments of the Court in the *General Commercial & Industrial Finance Corporation (Supra)*. In *Casu* the Defendant says her cattle were not involved in any collision, that's the case that the Plaintiff has to prove, i.e. whether these cattle mentioned in the particulars of claim are the ones that were involved in the accident, and this must be done during the trial before the trial court.

- [17] At page 634 the learned Authors Hebshtein et al, refer to the Case of *Trope v South African Reserve Bank 1992 (3) SA (T) 208 at 210-211* where McCreath J stated the following when dealing with the issue of a pleading which is said to be vague and embarrassing:

“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 excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393 E-H). As to whether there is prejudice the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC

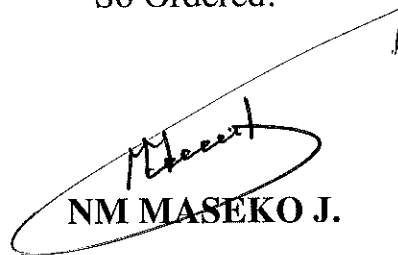
1991(2) SA 297(C) at 298 G-H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing- see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152 F-G and the authorities there cited. It follows that averments in the pleadings which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing: one can but be left guessing as to the actual meaning (if any) conveyed by the pleading”.

- [18] In *casu* I have not seen any vagueness in the Defendant's Plea which has caused or has the potential to cause the embarrassment to the Plaintiff. The Defendant's Plea does in my view provide sufficient averments aimed at sustaining her defence during the trial of this matter before the trial court.

[19] In the circumstances, I therefore hand down the following judgment;

1. The exception is hereby dismissed with costs.

So Ordered!



NM MASEKO J.

FOR THE PLAINTIFF : MR B GAMA

FOR THE DEFENDANT: MR S JELE