



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1266/2023

In the matter between:

THE FIRST NATIONAL BANK OF ESWATINI

PLAINTIFF

And

NKOSIVILE MABILISA

DEFENDANT

***NEUTRAL CITATION: THE FIRST NATIONAL BANK OF ESWATINI v
NKOSIVILE MABILISA (1266/2023) [2024] SZHC –
115 (04/06/2024)***

CORAM:

BW MAGAGULA J

DATE HEARD:

05/04/2024

DATE DELIVERED:

04/06/2024

SUMMARY: *Exception based on Rule 23 (1) Plaintiff moved a Rule 30 Application alleging that exception is irregular in so far as it is based on non-compliance with Rule 18 – The Defendant argues that it did not specifically aver in the exception that the grounds of exception is that it offends Rule 18 - It only stated that the particulars of claim lack averments which are necessary to sustain the cause of action.*

HELD: *The Notice in terms of Rule 30 (1) fails.*

JUDGMENT

BW MAGAGULA J

[1] Serving before Court is an exception filed by the Defendant in terms of Rule 23 (1) of the High Court Rules. In response thereto the Plaintiff has filed a notice of Rule 30 basically arguing that the act of the Defendant to file an exception is on its own irregular as it should have voiced out its compliant via a notice in terms of Rule 30.

Plaintiff's Arguments:

Rule 30 Application:

[2] The Plaintiff argues that the Defendant's filing of an exception under Rule 23(1) is irregular because it should have been addressed under Rule 30, as the complaint pertains to non-compliance with Rule 18. The Plaintiff cites **Sikhumbuzo Makhaza Maziya v Swaziland Electricity Company and Another (1238/12) [2014] SZHC 188**, where it was held that non-compliance with Rule 18 should be addressed through Rule 30, not Rule 23 (1).

[3] The Plaintiff has also buttressed its argument by relying on another decision of this Court **Swazi Truck and Bus (Pty) Limited v Feedmaster Swaziland (806/2013) [2020] SZHC 55 (2nd April 2020)** citing with approval the case of **Tilana Alida v Dr Stephen Paul Grabbler and Another Case No. 3074/2016 (FSCH)** stated as follows:

"[18] The purpose of the Uniform Court Rules is to regulate the litigation process, procedures and exchange of pleadings. The entire process of litigation has to be driven according to the rules. The Rules set the parameters within the course of litigation has to proceed. The Rules of engagement, must therefore, be obeyed by litigants".

- [4] The Plaintiff further argues that it is only in the event where the particulars of claim lack particulars which go to the root of the cause of action where the lack of particularity prevents the opposing party from reasonably ascertaining the case to be answered. In that situation, as the Plaintiff argues that exception can be taken on the grounds of vagueness and embarrassment¹ has been cited by the Plaintiff to buttress its argument.
- [5] The Plaintiff further argues that the Defendant's exception does not demonstrate any prejudice or complaint that can infer that the Defendant cannot be reasonable expected to plead thereto. This is because the agreements relied upon were signed and concluded by the Defendant and have been attached to the Plaintiff's particulars of claim.
- [6] The Plaintiff has also made another argument to support its case where it has been argued that the Defendant is aware of the debt and has gone further to make a proposal and undertaking to pay which request has also not been honored. The court will pose here and express its disapproval on the Plaintiff's conduct.
- [7] The Plaintiff has decided to attach its heads of argument letter from the Defendant's attorneys to the Plaintiff attorneys which has been clearly marked "*without prejudice*". I need not to even cite authorities in terms of the law of evidence that correspondence that are exchange between attorneys in an attempt to settle and ongoing matter which are clearly marked without

¹ The case of Joel v Bramwell – Jones 1988 (1) SA E 36 (W)

prejudice are in admissible as to why the Plaintiff has decided to deal with this issue especially at the heads of the argument stage because clearly heads of argument are not pleadings. So, if the Plaintiff intended to bring this letter as evidence and then probably that should have been an independence argument made but to simple attach a letter in head is clearly mischievous act, as it contravenes the law of evidence it is just an inadmissible matter. Because what the Plaintiff is doing now is to force the Court to read into contents of communication that were exchanged between the attorneys and are marked clearly without prejudice. This should not be allowed and it is clearly unacceptable I will discard and expunge this letter in any reference thereto.

- [8] I proceed again to traverse on the other arguments made by the Plaintiff in support of its argument. The Plaintiff further contend that the particulars of claim are neither vague nor embarrassing or lack the necessary averments to sustain a cause of action that the Defendant cannot plead to. If any particularity has not been met the Plaintiff argues same can be cured by request for further particulars, and the Court as it has been argued can also exercise its discretion and grant leave to amend the particulars to comply with Rule 18 (6).
- [9] The Plaintiff argues that the particulars of claim are neither vague nor embarrassing, suggesting that any deficiencies could be addressed by requesting further particulars or through amendments, not by filing an exception.

Defendant's Arguments:

[10] The Defendant argues that the filing of an exception is provided for under Rule 22 (1) and that their exception does not specifically invoke Rule 18, but rather alleges that the Plaintiff's particulars of claim lack necessary averments to sustain an action.

[11] The Defendant cites **SASOL Industries (Pty) Ltd v Electrical Repair Engineering (Pty) Ltd (1992 (4) SA 466 (W)**, which held that a Defendant is not confined to Rule 30 proceedings for non-compliance with Rule 18 but can also file an exception under Rule 23 (1). The Defendant argues that the Plaintiff has not demonstrated any prejudice resulting from the filing of the exception, which is necessary for a successful Rule 30 application.

[12] The Defendant maintains that the particulars of claim lack specificity necessary to sustain a cause of action, which justifies the filing of an exception.

THE LAW

[13] The case **Sikhumbuzo Makhaza Maziya v Swaziland Electricity Company** emphasizes that non-compliance with Rule 18 should typically be addressed via Rule 30. However, the SASOL Industries case provides that a Defendant has the option to choose between Rule 30 and filing an exception

under Rule 23 (1) if the particulars of claim are vague and embarrassing. This gives the Defendant a legitimate basis for their choice. This case is cited to argue that non-compliance with Rule 18 should be addressed through Rule 30, not by filing an exception under Rule 23(1).

- [14] In *Sikhumbuzo Makhaza Maziya*, the court dealt with a situation where the pleadings explicitly lacked compliance with Rule 18 and it was clear that the issue could be addressed as an irregular step under Rule 30.
- [15] The defendant here does not explicitly base their exception on Rule 18 non-compliance. Instead, the defendant claims that the particulars of claim lack necessary averments to sustain a cause of action under Rule 23(1). This approach is different from simply addressing a procedural irregularity; it challenges the substantive sufficiency of the pleadings.
- [16] The *SASOL Industries* case provides that exceptions can be filed under Rule 23 (1) even if there is non-compliance with Rule 18, giving the defendant flexibility in addressing perceived deficiencies in the pleadings.
- [17] *Swazi Truck and Bus (Pty) Limited v Feedmaster Swaziland* (806/2013) [2020] SZHC 55. This case is cited to emphasize that litigation must strictly adhere to procedural rules, implying that the defendant should have used Rule 30 for addressing Rule 18 non-compliance.

[18] Swazi Truck and Bus focused on maintaining procedural integrity and ensuring that litigation follows the set rules to avoid procedural chaos.

ADJUDICATION

[19] As noted in the **SASOL Industries and SP Nengovhela** cases, a Defendant has the option to use either Rule 30 or an exception under Rule 23 (1) when dealing with pleadings that do not meet required standards. This flexibility allows the Defendant to choose the most appropriate procedural tool.

[20] The Defendant's exception is based on the argument that the particulars of claim lack necessary averments to sustain a cause of action, a substantive issue that Rule 23 (1) directly addresses. Rule 30 is typically used for procedural irregularities, not substantive deficiencies.

[21] The defendant is not contravening procedural integrity but is exercising a valid procedural option by filing an exception under Rule 23(1) to address the alleged lack of necessary averments in the plaintiff's particulars of claim. This choice is within the bounds of procedural rules as established by **SASOL Industries**, which permits such action.

[22] The procedural rules must be interpreted flexibly to allow parties to address substantive issues effectively, and the Plaintiff's strict interpretation limits the defendant's ability to challenge deficient pleadings.

- [23] The plaintiff generally argues that the Defendant should have used Rule 30 because the complaint concerns non-compliance with Rule 18, aiming to establish a strict procedural pathway.
- [24] The Plaintiff's cited cases primarily argue for procedural compliance via Rule 30 in instances of Rule 18 non-compliance. However, these cases do not preclude the use of Rule 23 (1) for exceptions based on substantive deficiencies in the pleadings. The SASOL Industries case affirms that a Defendant can choose to file an exception under Rule 23 (1) when the pleadings are vague or lack necessary averments, even if there is an underlying issue of Rule 18 non-compliance. Additionally, the lack of demonstrated prejudice by the Plaintiff weakens their Rule 30 application.
- [25] Both the Plaintiff and Defendant have presented compelling arguments in this case. The Plaintiff contends that the Defendant's exception, filed under Rule 23 (1), should have been pursued under Rule 30, as it raises a complaint regarding Rule 18. They support this argument by referencing previous court decisions and emphasizing the need for compliance with procedural rules to ensure a fair and orderly litigation process.
- [26] On the other hand, the Defendant argues that there is no irregularity in filing the exception under Rule 23 (1) and that the merits of the exception should

be determined separately. They assert that the Plaintiff's Rule 30 application is based on an assumption about the defendant's reliance on Rule 18 and that the exception merely points out the lack of necessary averments in the Plaintiff's particulars of claim.

[27] In analyzing the arguments and applying the relevant law, it's essential to consider Rule 22 (1), which allows the defendant to file an exception after delivering a Notice of Intention to Defend. Additionally, Rule 30 provides a mechanism for addressing irregular steps or proceedings, with proof of prejudice being a prerequisite for its success.

[28] Based on the arguments and the law cited, the Defendant's exception, although it could have been pursued under Rule 30, does not appear to be irregular per se. The lack of specific reference to Rule 18 in the exception does not invalidate its filing under Rule 23 (1). Furthermore, the Plaintiff's attempt to introduce inadmissible evidence marked "without prejudice" is questionable and may not contribute to their case.

[29] The Swazi Truck and Bus case underscores the importance of adhering to procedural rules to ensure the proper conduct of litigation. However, as per **SP Nengovhela v Mbele A.M and Another (Case No. 2364/19)**, mere non-compliance with Rule 18 does not automatically ground for an exception, but rather can be an irregular step addressed under Rule 30, if prejudice is shown.

[30] The Plaintiff has failed to establish any prejudice caused by the Defendant's filing of the exception, a necessary requirement for a Rule 30 application as cited in **Erasmus H.R. et al. "SUPERIOR COURT PRACTICE"** and the **SASOL Industries** case.

[31] The Plaintiff's inclusion of a "without prejudice" letter in their heads of argument is inadmissible. This aligns with the standard rules of evidence, further undermining the Plaintiff's position.

CONCLUSION

[32] Given the cited cases and their application: The **Sikhumbuzo Makhaza Maziya VS Swaziland Electricity Company** case *Supra*, suggest that Rule 18 non-compliance should be addressed via Rule 30, but this is not exclusive, especially where vagueness and embarrassment are concerned. The **SASOL Industries** judgment, affirms that a Defendant may file an exception under Rule 23 (1) even if there is non-compliance with Rule 18. The Plaintiff has not demonstrated prejudice, a critical element for a Rule 30 application. Therefore, the court finds that the Defendant's filing of an exception under Rule 23 (1) is procedurally sound and not an irregular step. The Plaintiff's Rule 30 application is dismissed, and the merits of the exception will be considered separately. The court deems it necessary for completeness of this judgment to distinguish why the cases cited by the Plaintiff should not be applied to the current case based on their specific contexts and the facts at hand.

[33] Cases Cited by the Plaintiff; **Sikhumbuzo Makhaza Maziya v Swaziland Electricity Company and Another (1238/12) [2014] SZHC 188**. The Plaintiff has used this case to argue that non-compliance with Rule 18 should be addressed through Rule 30, not by filing an exception under Rule 23 (1). In the **Sikhumbuzo Makhaza Maziya**, the court dealt with a situation where the pleadings explicitly lacked compliance with Rule 18 and it was clear that the issue could be addressed as an irregular step under Rule 30. Yet in the current case the Defendant does not explicitly base their exception on Rule 18 non-compliance. Instead, the Defendant claims that the particulars of claim lack necessary averments to sustain a cause of action under Rule 23 (1). This approach is different from simply addressing a procedural irregularity; it challenges the substantive sufficiency of the pleadings. The **SASOL Industries** case provides that exceptions can be filed under Rule 23 (1) even if there is non-compliance with Rule 18, giving the Defendant flexibility in addressing perceived deficiencies in the pleadings. Pertaining to the **Swazi Truck and Bus (Pty) Limited v Feedmaster Swaziland (806/2013) [2020] SZHC 55**.

[34] This case is cited to emphasize that litigation must strictly adhere to procedural rules, implying that the Defendant should have used Rule 30 for addressing Rule 18 non-compliance. The **Swazi Truck and Bus** judgment, focused on maintaining procedural integrity and ensuring that litigation follows the set rules to avoid procedural chaos. Yet in the current case, Defendant is not contravening procedural integrity but is exercising a valid procedural option by filing an exception under Rule 23(1) to address the

alleged lack of necessary averments in the Plaintiff's particulars of claim. This choice is within the bounds of procedural rules as established by **SASOL Industries**, which permits such action. There is a Different Procedural Context: The procedural rules must be interpreted flexibly to allow parties to address substantive issues effectively, and the Plaintiff's strict interpretation limits the Defendant's ability to challenge deficient pleadings.

[35] The Plaintiff generally argues that the Defendant should have used Rule 30 because the complaint concerns non-compliance with Rule 18, aiming to establish a strict procedural pathway. As noted in the **SASOL Industries** and **SP Nengovhela** cases, a Defendant has the option to use either Rule 30 or an exception under Rule 23 (1) when dealing with pleadings that do not meet required standards. This flexibility allows the Defendant to choose the most appropriate procedural tool.

[36] The Defendant's exception is based on the argument that the particulars of claim lack necessary averments to sustain a cause of action, a substantive issue that Rule 23 (1) directly addresses. Rule 30 is typically used for procedural irregularities, not substantive deficiencies.

[37] The Plaintiff's cited cases primarily argue for procedural compliance via Rule 30 in instances of Rule 18 non-compliance. However, these cases do not preclude the use of Rule 23 (1) for exceptions based on substantive deficiencies in the pleadings. The **SASOL Industries** case, affirms that a

Defendant can choose to file an exception under Rule 23 (1) when the pleadings are vague or lack necessary averments, even if there is an underlying issue of Rule 18 non-compliance. Additionally, the lack of demonstrated prejudice by the Plaintiff weakens their Rule 30 application.

[38] Thus, the cited cases by the Plaintiff do not strictly apply to the facts at hand, where the Defendant is addressing a substantive deficiency in the particulars of claim rather than a mere procedural irregularity. This justification supports the court's decision to dismiss the Plaintiff's Rule 30 application.

ORDER

- 1) The Plaintiff's application under Rule 30 is hereby dismissed.
- 2) Costs to follow the event.



BW MAGAGULA J

THE HIGH COURT OF ESWATINI

For The Plaintiff:

B. Gama (C.J. Littler & CO.)

For the Defendant:

Z. Shabangu (Magagula & Hlophe Attorneys)