

Reportable/Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

**Case No: 1619/2020**

In the matter between:

**CUROSCORE (PTY) LTD**

Applicant (Respondent herein)

and

**NQOBILE MOFFAT NXUMALO**

Respondent (Applicant herein)

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**JUDGMENT**

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**MAKAULA J:**

**A. Background:**

[1] This is an application purportedly in terms of Rule 23 of the Uniform Rules of Court. The plaintiff (Respondent herein) issued summons against the defendant (Applicant herein) on 24 July 2020 seeking an order for payment of arrear rentals, damages and an order ejecting the defendant from a certain property. The defendant filed a Notice of Intention to defend and subsequently thereto an application excepting to the particulars of claim. I should mention upfront that the defendant is in person.

**B. The Exception:**

[2] For purposes of completion and clarity I shall refer to the grounds of exception (long as they are) as they appear on the Notice of Exception.

**“EXCEPTION – UNCLEAN HANDS**

1. Curoscore (Pty) Ltd (Curoscore) approaches this Honourable Court with unclean hands for having:
  - a. Served on the Defendant, based on this same claim, a fraudulent eviction Court Order via the sheriff of the Court under case 1238/19 of this Honourable Court.
  - b. Engaged in self-help on numerous occasions as fully described in the spoliation application under case number 2703/19 of the Honourable Court.

**EXCEPTION – DOCTRINE OF ELECTION**

2. What Curoscore has done in instituting afresh their action that was initially instituted at the Magistrate Court, based on the term of the alleged contract on which Curoscore seeks to stand on, is impermissible in terms of the doctrine of the right of election, in that the Plaintiff initially instituted this action at the Magistrate Court and the matter is *lis pendis*. (*Sic*)

**EXCEPTION – COURT OF FIRST INSTANCE**

3. It is accepted that the High Court has concurrent jurisdiction with the Magistrate Court but only unusual, extraordinary, difficult and complicated cases may force a party to approach the High Court as the Court of first instance. Curoscore's particulars of claim do not show that this is such a case and, the derogation of choice of forum is not explained by Curoscore in their papers.
4. Curoscore issued papers in the High Court in violation of the very alleged lease agreement which they seek to stand on, there is further no reasons provided why

Curoscore should not be held to the bargain contained in the alleged lease agreement to which they seek to sustain their claim, this cannot be right or fair and will lead to an injustice.

5. Curoscore is hauling the Defendant to the High Court at considerable higher cost when the matter can be resolved by the Magistrate Court at considerable lower cost, in circumstances where the alleged lease agreement Curoscore seeks to sustain its claim specifically provides that such matters should be resolved under the jurisdiction of the Magistrate Court.

#### **EXCEPTION – THE MAGISTRATE COURT BAR AGAINST CUROSCORE**

6. The withdrawal of the same action, based on the same facts, at the Magistrate Court under case after Plaintiff's summary judgment application was dismissed and a bar on further pleadings on the part of Curoscore makes this current action which is the same action as was withdrawn under case 281/19 bad in law seeing as the particulars of claim have now been amended in the face of the bar.

#### **EXCEPTION – *lis alibi pendens***

1. An exception is based on the ground of *lis alibi pendens* because the courts are a public resource under severe pressure with congested court rolls prejudiced by repeated litigation involving the same parties in this matter and the Defendant respectfully avers that this Honourable Court ought not to decide the merits because the last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.
2. The Defendant contends that all the proceedings by Curoscore both at the Magistrate Court under case 281/19 and this Honourable Court under case 1238/19 and 2703/19 including the current cases under case 1619/20 and 1620/20 of this Honourable Court are between the same parties based on the same cause of action and related to the same subject matter.
3. The claim for cancellation in the application that is the subject matter of the present application is based on non-payment of rental for a period that overlaps with the

period on which the claim for cancellation was based in both the Magistrate and previous High Court proceedings.

#### **EXCEPTION – LAWFUL IMPEDIMENT EXISTS**

4. The fraudulent Court Order served on me through the sheriff of the Court by Curoscore under case 1238/19 of this Honourable Court presents a number of legal difficulties:
  - a. The order which is based on the same claim as this current one has not been set aside and therefore remains alive and therefore is a hurdle before this current action.
  - b. This order further emphasis further that Curoscore does not approach this Honourable Court with clean hands. (*Sic*)

#### **EXCEPTION – MAGISTRATE COURT CASE 281/19 IS STILL EXTANT THROUGH COUNTER CLAIM**

5. The Magistrate Court matter under case 281/19 on the same claim is still extant; regardless that Curoscore decided to withdraw their claim after a failed Summary Judgment application and bar on further pleadings, the Defendant's counter claim was not withdrawn and this Honourable Court ought to reject Curoscore's attempt to institute proceedings relating to an action that is incomplete at the Magistrate Court.

#### **EXCEPTION – ABUSE OF PROCESS & DECEPTION**

6. The current application amounts to an abuse of process through the proliferation of litigation by Curoscore concerning/based on the same cause of action and related to the same subject matter of cancellation of a lease on account of alleged non-rental payment based on the same cause of action as this current action in this Honourable Court.

#### **EXCEPTION – SPOILATION**

1. Curoscore having engaged in several acts of self-help as stated above, having now partly admitted; in their application under case 1620/20 of this Honourable Court, to

one act of unlawfully breaking into the property using a grinder and there further being an extant spoliation application in relation to further and multiple acts of Curoscore's continued self-help, the Defendant is entitled to be restored to possession before all else.

2. The principle is that illicit deprivation must be remedied before Curoscore places before the courts for decision any alleged competing claims to the alleged object or property.

**KINDLY FURTHER TAKE NOTICE** that unless the cause of complaint is removed within 15 days from receipt of this notice, defendant will approach the abovementioned Honourable court and raise the above and action as a whole.

**ALSO FURTHER TAKE NOTICE** that the defendant; as soon thereafter as he may be heard, will request at the hearing of the exception, that the exception be upheld with costs together with and application that plaintiff's particulars of claim be struck out and the action dismissed with costs".

[3] Again on 1 September 2020 the defendant filed a Notice of Motion seeking the following order:

- "1. That the Applicant's exception is upheld.
2. That the Respondent's (Plaintiff) Particulars of Claim and dismissal of the action with costs (*Sic*).
3. Further and alternative relief".

[4] The Notice of Motion is supported by an affidavit which is titled "FOUNDING AFFIDAVIT IN SUPPORT OF APPLICATION TO STRIKE OUT". Part of the affidavit reads as follows:

- “3. I am the Applicant in this matter and I am not represented in legal terms but according to my faith I believe I am represented by the Advocate of all advocates The Holy Spirit in my Lord and Saviour’s name, Jesus Christ.
4. . . .
5. I depose hereto in support of my application to strike out and dismiss Curoscore’s action in terms of their summons and particulars of claim.
- 5.1 The essence of my case is captured in the Exception Notice Attached and labelled “**EXP01**”.
- 5.2 The essence of my case is further supported by the averments contained in the affidavit I deposed to in my counter-application to Curoscore’s application under case 1620/20. The said affidavit is attached and labelled “**AC001**”.
6. Averments made or Submissions raised should not be construed to be exhaustive, I only highlight those issues which I deem appropriate in relation to my opposition of Curoscore’s application and in support of my counter application.
7. Any submissions that I may make of a legal nature are not to be misconstrued as a claim of me being an expert in the legal field.

#### **MY CASE**

8. I refer the Honourable Court to my Notice of Exception, Annexure “**Exp01**”.
9. I refer the Honourable Court to my affidavit herein attached, Annexure “**AC001**”.
10. I include the facts, evidence, averments and arguments contained in Annexure “**AC001**” as being incorporated into this affidavit and therefore forming part of facts, evidence, averments and points of law of this affidavit.
11. I therefore present Annexure “**AC001**” as forming the factual matrix upon which I rely in support of my grounds for this application.

#### **CONCLUSION**

108. It is my respectful averment that I have made out a case for the relief as stated below.

## RELIEF IN COUNTER APPLICATION

109. Relief as reflected in my notice of motion.

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DEPONENT”

[5] On 2 November 2020, the defendant filed a Notice titled “APPLICANT’S NOTICE OF COMPLAINT IN TERMS OF RULE 30 and RULE 30A”. The relevant portion of the Notice reads as follows:

“**KINDLY TAKE NOTICE** that the Defendant/Applicant hereby gives notice that the following aspects of the Plaintiff/Respondent’s (Curoscore) Notice of Set Down served on him by the Curoscore and dated **20 October 2020** comprises an irregular step and/or a failure to comply with the Rules of Court:

1. **WHEREAS:**

- a. According to Plaintiff/Respondent, *Curoscore* approached and/or was in contact with the Deputy Judge President on the basis of Applicant/Defendant’s cause of complaint in the form of “Notice” of Exception dated 11 August 2020.
- b. Applicant/Defendant’s notice of exception clearly afforded Curoscore 15 days to remove cause of complaint, failing which he would then approach the Honourable Court to raise his exception and further apply that the Honourable Court strike out Curoscore’s claim as a whole.
- c. On the 14<sup>th</sup> of August 2020, Curoscore filed a notice to oppose Applicant/Defendant’s “Notice”, which I aver is neither here or there given that all the Applicant/Defendant had filed is a mere “notice”, as he is doing now, and the proper response ought to have been to remove cause of complaint or chose not to.

- d. The cause of complaint not having been removed, Applicant/Defendant then therefore filed his application via notice of motion and founding affidavit on the 1<sup>st</sup> of September 2020.
  - e. Curoscore never filed a notice to oppose the application and therefore the application remains unopposed.
2. In light of the above the notice of set down served on Applicant/Defendant by Curoscore, that further does not bear the Court stamp, is an irregular step and/or does not comply with the rules because it sets down an exception on the basis of a mere “notice” which in fact was calling upon them to remove cause of complaint.
3. It would appear further again that Curoscore yet again proceeded in a manner that flies in the face the *audi alteram partem* rule which is considered to be a fundamental principle of justice or equity of the principal of natural justice. Curoscore, according to them, approached/contacted the Deputy Judge President in Applicant/Defendant’s absence to obtain set down of a matter that in fact does not exist. What ought to have been set down, albeit it on the unopposed roll, **is the application dated 1<sup>st</sup> September 2020 to which Curoscore however did not file notice to oppose.**
4. Curoscore is in fact seeking to have the Court commit an injustice which has been their *modus operandi* in the course of this litigation because in every instance where Applicant/Defendant has been given an opportunity to respond, which right he exercised, Curoscore has withdrawn their action or application and then commence new proceedings on the same cause of action but under a different case number”.



[6] The plaintiff avers in the POC that the contract was entered into with Khato Consulting Engineers (Pty) Ltd (Khato) and the defendant. In clauses 9 and 10 of the POC the plaintiff's averments are the following:

"9. On the 30<sup>th</sup> November 2018 the Property was registered in Plaintiff's name by virtue of a valid sale agreement concluded between the Plaintiff and Khato.

10. In law, and by virtue of the alienation of the Property by Khato and the registration thereof in the name of the Plaintiff, the Plaintiff stepped into the shoes of Khato as lessor and as a matter of law became entitled to the rent and all the other rights flowing from the Agreement of Lease, Annexure "POC1".

[7] Rule 23 of the Uniform Rules of Court deals with Exceptions and Applications to strike out. Rule 23(1) stipulates that where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action (in this instance) the opposing party may deliver an exception thereto and may set the matter down for hearing. There are two provisos to section 23(1) which are not relevant for the purposes hereof because there was compliance or no party contended otherwise.

[8] An exception (in part) is a legal objection to the plaintiff's pleading. It complains of a defect inherent in a pleading. Admitting for the moment that all the allegations in a summons are true, it asserts that even with such admission the pleading does not disclose a cause of action. An exception may only be taken when the defect in the pleadings appears *ex facie* the pleading, since no facts may be adduced to show that the pleading is excipiable<sup>1</sup>. It should be noted further that a

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<sup>1</sup> Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, Fifth Edition, Volume 1, Cilliers Loots Nel at (page 633).

declaratory order may not be sought under the guise of an exception<sup>2</sup>. It is permissible however, that where it is apparent *ex facie* the particulars of claim that the court lacks jurisdiction, or that the plaintiff does not have *locus standi*, the defendant may take an exception rather than file a special plea<sup>3</sup>.

[9] In the instant matter the defendant does not plead that the particulars are vague and embarrassing or lack the necessary averments to sustain a cause of action as is required by the Uniform Rules of Court and as is required by the law<sup>4</sup>. Furthermore, having regard to the Notice of Exception and the grounds referred to in paragraph 2 above, I am at loss as to what the grounds purport to be. Certainly as one reads them, they do not either constitute an exception in the legal sense or speak to a defence that this court has no jurisdiction or the plaintiff lacks *locus standi* to bring this application. For example under the heading Court of First instance, the defendant accepts that this court has jurisdiction to hear the matter. The plaintiff's registered address and the defendant residence are within the jurisdiction of this court. The property which is the subject of the *lis* between the parties is within the jurisdiction of this court. Furthermore, clause 21.2 of the Lease Agreement between the parties (attached to the summons) reads"

"The Landlord reserves the right to institute proceedings in the High Court where permitted to do so in law".

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<sup>2</sup> Barclays National Bank v Thompson 1989(1) SA 547 (A) at 555.

<sup>3</sup> Herbstein Van Winsen (pages 633 to 634).

<sup>4</sup> Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere 2001(2) SA 790 T; and Trope and Others v SA Reserve Bank 1993(3) SA 264(A).

[10] The argument raised that this court has no jurisdiction lacks merit. Furthermore, in a veiled manner<sup>5</sup> the defendant refers to a summary judgment application and a “bar of further pleading on the part of Curoscore” in the Magistrate Court under case 281/19 “bad in law seeing as the particulars of claim have been amended in the face of the bar”. This averment is confusing and the defendant has not annexed or referred to the record of the proceedings which lay the allegations bare. There are numerous other case numbers before this court which are merely referred to without substance and proof of such proceedings. These unsubstantiated allegations should be viewed, I surmise, under the *lis pendens* defence raised vaguely. I suppose referral to High Court case numbers 1238/19, 2703/19, 1619/20 and 1620/20 was an attempt to substantiate that defence. No basis has been laid for such a defence and no cases were incorporated herein to establish such a defence. On the issue of *locus standi*. By virtue of paragraph 10 of the POC, the plaintiff has *locus standi* to bring the action. I am lost as to what kind of exception the defendant is raising against the POC in paragraph 2 of the exception above. I do not want to overburden this judgment by dealing with each and every issue raised in his purported exception. The last paragraph of the Notice of Exception notifies the plaintiff that unless the cause of complaint is removed, within 15 days, the defendant will approach this court and “raise the above and action as a whole”. In the light of the grounds of exception that have been raised and dealt with above, I do not wish to assume that this is a typographical error or anything related to that. The kind of notice by the defendant is as unintelligible as the grounds of exceptions are. The grounds of exception are incomprehensible to say the least. I spelt them out as they

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<sup>5</sup> Presumably under clause. (Court of First instance).

appear on the exception itself to illustrate this fact. Rule 18(4) of the Uniform Rules of Court provides that:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto”. (Emphasis added)

[11] As it can be observed from the except above<sup>6</sup> little can be doubted that the defendant has not complied with Rule 18(4). It was difficult for me to even begin to summarise or paraphrase the grounds relied upon, because I could not discern what was actually pleaded by the defendant. It is the duty of the defendant to persuade this court that upon every interpretation the POC can bear no cause of action, is disclosed.<sup>7</sup> The defendant has failed to establish that.

[12] I agree with the submission by Mr Beyleveld for the plaintiff that the defendant in his exception seeks to resolve the factual disputes he has against the plaintiff which are not based on the POC as they stand. Even the special pleas raised under the guise of an exception, should not have been raised as such because of their nature. I say so because it is in the nature and the manner in which such special pleas are raised that the plaintiff should have been allowed to replicate. Herbstein and Van Winsen<sup>8</sup> deals with the difference between a special plea and exception amply as follows:

“The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the pleading. The defence raised on

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<sup>6</sup> Notice of Exception and the founding affidavit in support of the application to strike out.

<sup>7</sup> Herbstein and Van Winsen page 636.

<sup>8</sup> Pages 599 to 600.

exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised by way of special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption".

[13] In the instant matter, the purported exception is a conglomeration of various defences and processes. As can be gleaned from the founding affidavit referred to in paragraph 4 above, it speaks to an application to strike out which also, as the papers stand, is in support of the exception raised. Rule 6(15) of the Uniform Rules deals with the striking out from the affidavit of any matter that is scandalous, vexatious or irrelevant. This has nothing to do with exceptions and no such averments are made by the defendant. Furthermore, the defendant as reflected in paragraph 5 above also launched a Notice in terms of Rule 30 and Rule 30A. The averments as can be read from the notice deal with the issues raised in the exception. It is further to be noted that even that which is raised as an application was not proper and was not pursued by the defendant. No application in terms of Rule 30 was set down. It remains forming part of this application.

[14] Based on the above, the defendant has failed to raise any grounds for an exception and the application stands to be dismissed with costs.

[15] Consequently, I make the following order.

The application is dismissed with costs.

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**M MAKAULA**  
**Judge of the High Court**  
Appearances:

Applicant in person:  
Contact No:

Mr NM Nxumalo  
064 5755 151

Counsel for the Respondent:

Adv A Beyleveld (SC)  
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Instructed by:

Leon Keyter Attorneys  
Port Elizabeth

Date judgment reserved:

12 November 2020

Date judgment delivered:

23 March 2021