IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 5508/2015

In the matter between:-

DIKOTSI J THATHENG t/a SHERIFF OF WITSIESHOEK **PLAINTIFF**

and

BALDEN VOGEL & VENNOTE INC. ATTORNEYS **1ST DEFENDANT**

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY **2ND DEFENDANT**

CORAM: MOLOI, ADJP

HEARD ON: 06 MAY 2016

DELIVERED ON: 12 MAY 2016

MOLOI, ADJP

[1] In this matter the plaintiff, a sheriff for the district of Witsieshoek, issued summons against the defendants. The first defendant is a law firm that acted for and on behalf of the second defendant in the matter of eviction of a number of unlawful occupiers of the land belonging to the Second defendant, a municipality. The summons was a claim for payment of an amount of R453 185-00 allegedly being fees and charges owing to the plaintiff for services rendered in connection with the eviction of the unlawful occupiers.

[2] The defendants took exception to the summons in terms of Rule 23(1) of the Uniform Rules of court in the following terms:

> "*1. According to the Plaintiff the Plaintiff submitted original returns of service in the amount of R453 185-00 to the first Defendant on 24 July 2015.*
>
> *2. Plaintiff does not allege that the amount as claimed was agreed upon or taxed.*
>
> *3. Whereas the amount as claimed has not been agreed or taxed the Plaintiff was not entitled to proceed with the action against Defendants.*
>
> *4. In the premises Plaintiff's Particulars of claim lacks averments in order to sustain any cause of action."*

[3] In argument before me and in terms of the heads of argument the same was argued. Par.1.3 of the heads of argument state:

> *"Defendants raised the exception against the Plaintiff's Particulars of Claim on the basis that the Plaintiff does not allege that the amount as claimed was agreed upon or taxed. Whereas the amount as claimed has not been agreed upon or taxed the Plaintiff was, according to the Defendants, not entitled to proceed with the action against the Defendants. Therefore the Plaintiff's Particulars of Claim lacks averments in order to sustain a cause of action."*

[4] Rule 23(1) provides for a mechanism of filing an exception where a pleading, a summons or a plea, is vague and embarrassing or where it lacks averments which are necessary to sustain an action or defence. The latter is normally said to be showing no cause of action or defence. "An exception provides a useful mechanism for weeding out cases without legal merits" Erasmus, Superior Court Practice, 2nd edition Vol. 2 D1-294. H v Fetal Assessment Centre 2015(2) SA 193 (CC) at 1998; Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)at 465H. A summons that does not disclose a cause of action or lacks averments necessary to sustain it goes to the decision on a point of law without which the whole cause or part thereof may be disposed of without leading unnecessary evidence at the trial. Santos v Standard General Insurance Co Ltd. 1971 (3) SA 434 (O) at 437B;

Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706E

[5] The cause of action in this matter is aptly captured in the introduction to the heads of argument by the defendants where defendants state as follows:

> "*1.1 Plaintiff instituted action against the Defendants for the payment of the amount of R453 185,00 in regards to the eviction of numerous illegal occupiers in the HARRISMITH region pursuant to a High Court order."*

That to my mind is sufficient cause of action and contains all the elements of a claim and no further averments are required to sustain the cause of action. The defendants' requirement that the claim further state that *"as agreed upon or taxed"* misses the point by a long distance. What became obvious to the court is the boiling animosity between the plaintiff, who represented himself and is not a legal practitioner, and Adv Hefer, who represented the defendants on the one hand and which spilled over to taint the court itself when it endeavoured to solve the dispute in chambers, on the other, does not lend itself to any agreement on the fees and charges payable to the plaintiff for services rendered. What remains, surprisingly, is the insistence of Adv Hefer to the second part of taxation of the plaintiff's return of service where he himself in the heads of argument refers and quotes from Chapman Dyer Miles Moorehead Inc v Hymark Investments, 1998 (3) SA 603 (D) at 610 D-E where it was categorically stated that taxation is not a prerequisite for the institution of the action on a bill of costs where such costs have not been agreed. Adv Hefer further referred to Santam v Ethwar 1999(2) SA 244 (SCA) at 253 D-E where it was stated that:

> *"Any summons claiming payment of costs not agreed upon or not taxed would have been met by a successful exception."*

Adv Hefer, however, failed to appreciate the context of that quotation and distinguish it from the present case. In Santam v Ethwar the claim for costs was based on an offer of settlement providing that the plaintiff's costs would be payable "*as taxed or agreed between the parties"* which offer was accepted and thus formed the basis of any claim of costs. In Santam v Ethwar at 253 B-C the following was said:

> *"Whether the respondent could have enforced compliance with clause (c) in the absence of an agreement or taxation depends on whether, on the one hand, agreement or taxation simply formed the formal method of liquidating and quantifying the amount of the indebtedness or whether, on the other, it was an agreed condition for payment or that payment was contingent thereon. Put differently, was agreement or taxation a simple procedural step to or was it of the essence of liability."*

Clearly this was not the case here. It was never agreed that only the sum agreed upon or determined by taxation could be recovered by way of summons. If such agreement existed, it would be a prerequisite to state that in the particulars of claim failing which an exception could validly be taken.

[6] The fees and charges payable to sheriffs are tariff–based in terms of Rule 68 of the Uniform Rules of Courts. From the particulars of claim, however, it is clear much more was done by the plaintiff at the instance of the defendants than what the Rule provide for e.g. be called to urgent meetings and briefing sessions, engagement of security firms, putting up sign boards etc. for which no tariff is set. According to Rule 68 where there is a dispute regarding the validity or amount of any fees or charges or where necessary work is done and necessary expenditure is incurred the taxing officer of the count shall determine the reasonableness thereof. There has been no dispute raised in this matter as the plea has not been filed yet. However, on 18 August 2014 after receipt of the returns, the first defendant wrote as follows to the plaintiff:

> *"We refer to the above matter and confirm that we forwarded your returns to our client for payments.*
>
> *Client however requested that these accounts should be taxed to satisfy the Auditor General, considering the huge amount involved.*
>
> *We do appreciate and acknowledge that your offices went out of your way to assist us in this matter. However we have to act on our client's instructions.*

Kindly as a matter of urgency set these accounts down for taxation to enable us to finalise this matter."

The letter was written on 18 August 2014 referring to a return of service dated 24 July 2014 well within the prescribed ninety (90) days period within which to require taxation. The letter also clearly stated that the amount claimed was high and the Auditor General may question the amount if not taxed. It is therefore feasible, fair and just that the plaintiff tax his fees or charges before the action can proceed.

[7] In the result, the following orders are made:

7.1 The exception is dismissed

7.2 All the further proceedings are suspended until the plaintiff has taxed his fees and charges.

7.3 The costs of the exception shall be costs in the course.

____

MOLOI, ADJP

On behalf of the plaintiff:	Mr DJ Thateng Sheriff of Witsieshoek PHUTHADITJHABA
On behalf of the defendant:	Adv Hefer Instructed by **MCINTYRE VAN DER POST** BLOEMFONTEIN