IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 3919/2012

Date Heard: 26 September 2013

Date Delivered: 17 October 2013

In the matter between:

GOODYEAR SA (PTY) LIMITED Excipient/First Defendant

and

RAYMOND STANLEY NEVELING WEITZ Respondent/Plaintiff

and

DANIE GEORGE HOFFMAN Second Defendant

JONAS ZIPHILELE MAPAPU Third Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff instituted action against the defendants herein in which he claimed damages in the sum of R1 923 272,60 for loss of earning capacity. The plaintiff was previously employed by the first defendant. He alleges that malicious disciplinary proceedings were instituted against him without any reasonable or probable cause and that these events had such an impact upon him that they caused him to develop major depression and post traumatic stress disorder. This emotional damage, it is alleged, has rendered him unemployable with the consequent loss of earning capacity.

[2] The first defendant has taken exception to the particulars of the plaintiff's claim on the basis that it is contended that they lack averments necessary to sustain a cause of action. I shall refer to the parties herein as the plaintiff and the first defendant respectively.

[3] The basis of the exception as set out in the first defendant's notice of exception is:

> "2. The Plaintiff's claim is for patrimonial loss. Patrimonial loss is claimable by way of delictual action i.e. an action founded upon the *actio legis aquilia*.
>
> 3. …
>
> 4. The Plaintiff has failed to make the requisite allegations to found a delictual claim. In particular he has not made sufficient allegations in respect of the First Defendant to establish:
>
> 4.1 The existence of a duty of care or a wrongful act by the First Defendant.
>
> 4.2 An allegation of fault on the part of the First Defendant in the form of intention or negligence.
>
> 4.3 The Plaintiff has failed to make sufficient allegations to establish legal or factual causation in respect of the claim.
>
> 5. In the premises, the Plaintiff's Particulars of Claim are excipiable as they do not disclose a cause of action."

[4] The material allegations contained in the plaintiff's Particulars of Claim upon which the plaintiff relies and which are relevant to the present enquiry are that:

4.1 The plaintiff was employed by the first defendant from 1986 until he was medically boarded on 31 October 2011.

4.2 The plaintiff was suspended by the first defendant on 28 June 2010 when a charge of racism was levelled against him.

4.3 On 8 July 2010 the plaintiff was summoned by the first defendant to attend a disciplinary enquiry in order to answer certain specified complainants which are set out in the Particulars of Claim.

4.4 The disciplinary proceedings were referred to arbitration and an enquiry duly held.

4.5 At the commencement of these proceedings two of the charges of which the plaintiff had initially been notified were withdrawn by the first defendant and on the remaining charges the arbitrator found the plaintiff not guilty.

4.6 The complaints underlying the allegations set out in the charges were lodged with the first defendant by the second and third defendants and were without reasonable and probable cause and motivated by malice, with the result that there was no reasonable prospect of any of these false and malicious charges being proved.

4.7 The first defendant acted upon the aforesaid false and malicious complaints without properly investigating them, satisfying itself that the complaints were false and malicious and without merit, and proceeded to bring the charges against the plaintiff without reasonable and probable cause and with malice.

4.8 The first defendant could have had no reasonable belief in the truth of the complaints lodged by the second and third defendants.

4.9 As a result of the charges brought against the plaintiff and his suspension from employment, the plaintiff suffered emotional damage and developed major depression and post-traumatic stress disorder resulting in him being unable to continue with his employment.

4.10 As a result of the emotional distress, major depression and post-traumatic stress disorder, the plaintiff was medically boarded from his employment with the first defendant and has been rendered unemployable.

4.11 In the premises, the plaintiff suffered loss of income, as a result of the unlawful, false and malicious conduct on the part of the defendants, in the amount of R1 923 272,60.

[5] Before I turn my attention to the specific grounds of exception, the Particulars of Claim call for comment. Mr ***Redding***, on behalf of the first defendant, advised me at the outset that the defendant had initially had difficulty in identifying the cause of action which the plaintiff intended to advance, whether it was the *actio iniuriarum* or the *actio legis aquiliae.* Mr ***Scott***, who argued the exception on behalf of the plaintiff, acknowledged that it is now settled law that a claim for special damages is not available under the *actio iniuriarum* but only under the *actio legis aquiliae*. He relied only on the *actio legis aquiliae* and disavowed any intention to rely on the *actio iniuriarum.* The averments made in the Particulars of Claim, however, appear, *prima facie*, to be directed at a claim for malicious proceedings under the *actio iniuriarum*, hence the confusion.

[6] The Particulars of Claim lack both clarity and conciseness and the draftsman thereof appears to have had scant regard to the provisions of Rule 18(4) of the Uniform Rules of Court which requires of the pleader to set out a clear and concise statement of the material facts upon which he relies. The purpose, after all, is to define the issues so as to enable the other side to know what the case is which it has to meet. Pleadings are required to be lucid and logical and to be set out in an

intelligible form so that the cause of action appears clearly from the factual allegations made. (Compare ***Trope v South African Reserve Bank and Another*** 1992 (3) SA 208 (T) at 210H.)

[7] What is to be pleaded are facts, not evidence, and only the material facts should be pleaded. (Compare ***Moaki v Reckitt and Colman (Africa) Ltd and Another*** 1968 (3) SA 98 (A) at 102A-B.) The material facts are the *facta probanda* (the facts which are required to be proved in order to succeed in the cause of action) and not the *facta probantia* (the facts which would serve to prove the *facta probanda)*. (Compare ***Nasionale Aartappel Korporasie Beperk v Price Waterhouse Coopers ING en andere*** 2001 (2) SA 790 (T) at 797G-I and 798C-E; ***Jowell v Bramwell-Jones and Others*** 1998 (1) SA 836 (W) at 903A-B; and ***Makgae v Sentraboer (Koöperatief) Bpk*** 1981 (4) SA 239 (T) at 245D-E.) In the present instance approximately two pages of the Particulars of Claim are devoted to setting out conclusions reached by the arbitrator at the disciplinary arbitration in the process of her reasoning leading up to his ultimate finding that the plaintiff was not guilty. This clearly constitutes evidence and has no place in the pleadings. Moreover, the entire award of the arbitrator, running to some 26 pages has been incorporated into the Particulars of Claim. This, I think, constitutes an abuse of the process and should be avoided.

[8] The present exception, however, proceeds on the basis that the Particulars of Claim lack averments which are necessary to sustain a cause of action. The exception must be considered on this basis alone. Notwithstanding the criticisms which I have set out herein, provided facts are alleged in the pleading which justifies

the relief sought in accordance with the principles of law, a pleading will disclose a cause of action without the particular delict being identified by name. (Compare ***Minister of Finance and Others v EBN Trading (Pty) Ltd*** 1998 (2) SA 319 (N) at 324B-D.) In order to succeed in a claim under the *actio legis aquiliae* the plaintiff is required to allege and prove that the defendants act or omission was:

1.1 unlawful;

1.2 culpable (in the form of intention of negligence);

1.3 the factual and legal cause of the loss; and

1.4 the cause of patrimonial loss.

(Compare ***Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another*** 2000 (1) SA 827 (SCA) at para [19].)

[9] The particulars of the plaintiff's claim appear to set out two distinct causes of action. The first is founded upon the vicarious liability of the first defendant for the conduct of the second and third defendants in making false complaints (paragraphs 11 and 12 of the Particulars of Claim.) The second relates to the conduct or omission on the part of the first defendant itself (paragraph 13 of the Particulars of Claim.) Whilst the notice of exception raises an exception against the Particulars of Claim as a whole, Mr ***Redding***, confined his argument before me to the second cause of action, namely the conduct or omission of the first defendant. He contended that paragraph 13 of the Particulars of Claim were self-contained and amounts in itself to a separate cause of action. Mr ***Scott*** did not argue the contrary. I think that this is correct. (See ***Lampert-Zakiewicz v Marine & Trade Insurance***

Co Ltd 1975 (4) SA 597 (C) at 599G-H and ***Barclays National Bank Ltd v Thompson*** 1989 (1) SA 547 (A) at 553F.)

Wrongfulness (or unlawfulness)

[10] Paragraph 13 of the Particulars of Claim is formulated as follows:

> "13. The First Defendant, in acting upon the aforesaid false and malicious complaints without properly investigating same, and satisfying itself that the complaints were false and malicious, and without merit, brought these charges against the Plaintiff without reasonable and probable cause, and with malice, and could have had no reasonable belief in the truth of the complaints lodged by the Second and Third Defendants against the Plaintiff."

[11] In argument before me there was some debate at the Bar as to whether, *ex facie* the pleadings, the plaintiff intended to rely upon an omission on the part of the first defendant in failing to investigate the complaints lodged, or whether it intended to rely upon a positive act in bringing false and malicious charges against the plaintiff. The significance of this debate is to be found therein that in law, a positive act (coupled with negligence or intent) which causes physical harm to a person or property is considered to be *prima facie* unlawful (see ***Minister of Safety and Security v Van Duivenboden*** 2002 (6) SA 431 (SCA) at 441E-F para [12]). By contrast, where reliance is placed upon an omission, such omission is usually considered to be lawful. (See ***BOE Bank Ltd v Ries*** 2002 (2) SA 39 (SCA) at 46G-H.)

[12] The Particulars of Claim in this regard are not a model of clarity and I have set out my views in that regard earlier herein. At the exception stage, however, the first defendant is required to persuade the court that upon every interpretation which the Particulars of Claim can reasonably bear, no cause of action is disclosed. (See ***Pete's Warehousing and Sales CC v Bowsink Investments CC*** 2000 (3) SA 833 (E) at 839 para [14]; ***First National Bank of Southern African Ltd v Perry NO and Others*** 2001 (3) SA 960 (SCA) at 965D; and ***Vermeulen v Goose Valley Investments (Pty) Ltd*** 2001 (3) SA 986 (SCA) at 997B.) On a consideration of the formulation of paragraph 13 of the Particulars of Claim I think, at best for the first defendant, the paragraph is reasonably open to the interpretation that reliance is placed on the positive act of the first defendant in bringing the charges against the plaintiff. The exception must be considered on this basis.

[13] It has been averred that the institution of these disciplinary proceedings caused the plaintiff's condition (psychological injury) and the act is accordingly *prima facie* wrongful. This ought really to be the end of this debate.

[14] Accepting, however, that the plaintiff has placed reliance on a positive act of the first defendant in bringing the said charges against the him, Mr ***Redding*** argues that on the allegations made in the Particulars of Claim in the present matter, there is no allegation which could render the conduct of the first defendant unlawful or wrongful. The argument is development in the heads of argument filed on behalf of the first defendant. It proceeds from the premise that "South African law does not extend the scope of the aquilian action to new situations unless there are positive policy considerations which favour such an extension". (See Grosskopf AJA in

Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA)(Pty) Ltd 1985 (1) SA 475 (A) at 504G and ***Trustees, for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd*** 2006 (3) SA 138 (SCA) at 147 para [20].) The assessment of these policy considerations, it is argued, must be "not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms". (See ***Van Duivenboden*** *supra* at 446 para [21]; and ***Trustees***, ***Two Oceans Aquarium Trust*** *supra* at p. 145D.) These policy considerations include the reluctance of South African law to extend cases of pure economic loss and take into account the reasonableness of imposing liability in such circumstances on the defendant (see ***Trustees, Two Oceans Aquarium Trust*** *supra* at para [11]) and the availability of other remedies for the claimant (see ***Knop v Johannesburg City Council*** 1995 (2) SA 1 (A) at 33A-E).

[15] The reaction of the first defendant to the complaints lodged by the second and third defendants, the suspension of the plaintiff from work and the conduct of a disciplinary enquiry are, so the argument goes, all *prima facie* lawful and precisely what the law requires of an employer who is faced with complaints against an employee. On this basis it is argued that the defendant's conduct was anything but unlawful and that there is no obligation upon an employer to conduct an investigation prior to a disciplinary enquiry as the disciplinary proceedings are themselves an enquiry. Moreover, in the context of the South African Constitution founded upon values of human dignity, complaints of racism in the workplace must be considered as serious and should be subjected to an enquiry.

[16] I do not think that the argument can succeed for two reasons. Firstly, as set out above, a positive act which causes physical harm (or psychological harm) to a person is *prima facie* unlawful. In dealing with unlawfulness in ***Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*** 2006 (1) SA 461 (SCA) Harms JA stated at para [13] at p. 468:

> "When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not *prima facie* wrongful ('unlawful' is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless it is a case of *prima facie* wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff)."

[17] The reference to Goldstone J is taken from his judgment in ***International Shipping Co (Pty) Ltd v Bentley*** which was subsequently quoted in the Supreme Court of Appeal decision in ***International Shipping Co (Pty) Ltd v Bentley*** 1990 (1) SA 680 (A) at 694E-G. Goldstone J had come to the conclusion that a number of factors, viewed cumulatively, had constituted a legal duty upon the respondent which the respondent had breached. One of the factors considered was that there were "no considerations of public policy which should induce a court to deny liability" in such a case as was being considered. The effect of the comments of Harms J in ***Telematrix (Pty) Ltd***, *supra*, as I understand them, is that where the case under consideration is one of *prima facie* wrongfulness then, unless there are found to be considerations of public policy which should induce a court to deny liability, liability should follow. Where, however, the conduct under consideration is not *prima facie*

wrongful, liability will not follow unless there is a positive finding that there are policy considerations which dictate that the plaintiff should be compensated by the defendant for the loss suffered.

[18] In the present case I have no doubt that Mr ***Redding*** is correct in his submission that allegations of racism in the workplace in South Africa constitute serious charges. Not only should they be taken seriously by the employer but they would, inevitably, also have a serious impact upon the employee. Section 188 of the Labour Relations Act No. 64 of 1995 provides that a dismissal must be for a fair reason and in accordance with a fair procedure. The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure. In this context Grogan, in his work "*Dismissal*" [Juta 2010] at p. 219 states:

> "Disciplinary action may itself be prejudicial to employees. It is only fair, therefore, that an employee should not be subjected to a charge of misconduct unless there are at least *prima facie* grounds for suspecting that the employee actually committed the misconduct alleged. …
>
> A pre-hearing investigation is precisely what its name suggests. During this phase, the employer investigates the offence in order to decide whether formal disciplinary action may be justified."

[19] In these circumstances, particularly where a serious charge which may hold serious consequences is levelled against an employee, the Code of Good Practice: Dismissal requires of an employer to conduct an investigation into the allegations prior to disciplinary proceedings being initiated. His failure to do so would, in my view, constitute a breach of a legal duty. In the absence of such an enquiry I do not

think that there are considerations of public policy which would induce a court to deny liability in an appropriate case.

[20] There is, I think, a second reason why the first defendant's argument in respect of wrongfulness cannot succeed. On behalf of the plaintiff it was alleged, as earlier stated, in paragraph [13] of the Particulars of Claim that the first defendant had acted without reasonable and probable cause and with malice and could not have had any reasonable belief in the truth of the complaints lodged by the second and third defendants when it brought the disciplinary proceedings against the plaintiff. Mr ***Scott*** disavows any reliance on negligence. He argues that the allegation of malice entails an intentional act which was executed *mala fides.* The term "malice" has given rise to considerable debate in the context of the *actio iniuriarum* over the years, however, I think that it can be safely accepted that "malice" strikes at least at the subjective motive of the actor and gives expression to his *animus injurandi*. (Compare ***Rudolph v Minister of Safety and Security*** 2009 (5) SA 94 (SCA) at p. 100A-F) I shall revert to the meaning of the term "malice" below. Suffice it at this stage to say that it includes the intention to injure (*animus injuriandi*). If this is established, I do not think that there can be policy considerations which would induce a court to deny liability.

[21] The allegation of malice in the context of paragraph [13] of the Particulars of Claim accordingly constitutes an allegation that the institution of disciplinary proceedings was unlawful. Evidence in support thereof would accordingly be admissible.

<u>Culpability or Fault</u>

[22] In heads of argument filed on behalf of the first defendant, Mr ***Redding*** contended that the Particulars of Claim failed to contain sufficient allegations necessary to sustain a cause of action by virtue of the absence of an allegation of fault in the sense that the first defendant acted intentionally or negligently. Before me he did not develop this argument further but contented himself with the argument set out in his heads. This argument was briefly formulated as follows:

> "The plaintiff's allegations set out in paragraph 13 (that the first defendant did not properly investigate the complaints, satisfy itself that the complaints were false and malicious and brought the charges against the plaintiff without reasonable and probable cause and with malice) do not satisfy the requisite of fault insofar as the *aquilian* action is concerned – those allegations are allegations directed at sustaining a claim under the *actio iniuriarum* for sentimental damages for malicious proceedings; they do not suffice to satisfy the requirement of fault under the *aquilian* action."

[23] On behalf of the plaintiff Mr ***Scott*** argued that the plaintiff's allegation that the first defendant brought charges against the plaintiff without reasonable and probable cause, and with malice, is sufficient to establish an intentional act on the part of the first defendant aimed at causing harm to the plaintiff which is the fault relied upon by the plaintiff in these proceedings. Mr ***Scott*** places his reliance on the reference to "malice". Although it is customary to allege malice in proceedings under the *actio iniuriarum* the term has caused, as earlier alluded to, great confusion, and indeed even controversy, in our law. ***In Moaki v Reckitt and Colman*** *supra* Wessels JA stated at 103E-G:

> “In Pollock on *Torts*, 15th ed., at p. 18, the learned author, in dealing with 'motive and malice' in English Law, concludes as follows:
>
> > 'The use of such terms as 'malice' and 'maliciously', appears therefore more likely to perplex the law and hinder the study of its true principles than to advance justice in any substantial manner. Unluckily the terms have been freely employed, and without any clear or constant meaning, and this has been the cause of great confusion which is not yet wholly removed.'
>
> Under the influence of English Law the terms in question have (as unluckily) also been freely employed, and without any clear or constant meaning, in South Africa, in the field of both civil and criminal law. That the use of the terms has been the cause of confusion is beyond question, and the possibility that motives (good or bad) may in some actions still constitute a determining element of liability recurs for discussion from time to time.”

[24] The learned Judge continued to draw a clear distinction between “malice” on the one hand and “*animus injuriandi*” on the other. He accordingly held at p. 104D-F:

> “It follows, in my opinion, that, although it became customary to allege 'malice' in pleadings in actions of the type now under consideration, our law has always required a plaintiff to prove only the existence of the requisite legal intention to injure, without requiring him to establish in addition the defendant's motive, i.e., that he acted maliciously.
>
> In the present case, therefore, the appellant was not bound to aver that the respondents had acted maliciously in causing a judgment to be entered against him in the circumstances set out in the particulars annexed to the combined summons. But, on the other hand, it is necessary to aver in the particulars that, in so acting, the respondents intended injuring appellant in his good name and reputation. There is no express averment in the particulars imputing *dolus* to the respondents.”

[25] These developments were widely welcomed in academic circles and the authors NJ van der Merwe and PJJ Olivier in “*Die Onregmatige Daad in die Suid-*

Afrikaansereg", 6th ed, at 431 said, with reference to the decision in ***Moaki v Reckitt and Colman*** *supra*:

> 'Die beginsels daar uiteengesit, is onverminderd by die *iniuria* laster van toepassing. In die besonder moet weer beklemtoon word dat "malice" en *animus iniuriandi* nie sinonieme is nie. "Malice" slaan op motiewe, *animus iniuriandi* op die wil om te benadeel.'

[26] ***Moaki v Reckitt and Colman***, *supra,* did not, however bring an end to the debate arising from the term "malice". The courts continue to require malice to be alleged and proved in the *actio iniuriarum.* See ***Lederman v Moharal Investments (Pty) Ltd*** 1969 (1) SA 190 (A) at 196-197; ***Thompson and Another v The Minister of Police and Another*** 1971 (1) SA 371 (E) and ***Stambolie v Commissioner of Police*** 1990 (2) SA 369 (ZSC) at 376I-377A. The author Harms in *Amler's Precedents and Pleadings*, 4th ed, at 212 declared that in spite of what was said in ***Moaki v Reckitt and Colman*** *supra*, a plaintiff would be well advised to allege and prove not only *animus injuriandi* but also malice. Malice he declared, in the context of the *actio iniuriarum*, was probably an element relating to wrongfulness of the act rather than one relating to *animus injuriandi*. More recently, however, Malan AJA (as he then was) in ***Relyant Trading (Pty) Ltd v Shongwe and Another*** [2007] 1 All SA 375 (SCA) declared at 378 para [5]:

> "*Malicious prosecution* consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with "malice" or *animo iniuriarum*. Although the expression "malice" is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and another* Wessels JA said:

> "Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance."'

[27] It must accordingly now be accepted, notwithstanding the assertion by Van der Merwe and Olivier, to which I referred earlier, in the context of the *actio iniuriarum*, that the reference to the term "malice" strikes at the true intention of the actor and is to be understood as being an synonym for *animus injuriandi*. *Animus injuriandi* encompasses *dolus*, whether *dolus directus* or *dolus indirectus*. Hence in ***Minister van Polisie v Van der Vyver*** (a judgment delivered by the Supreme Court of Appeal on 28 March 2013 in case no. 861/2011) Brand JA stated at para [21]:

> "… Wat betref die tweede vereiste is die terminologie van kwaadwilligheid (of malice) ietwat verwarrend, asof dit 'n vereiste sou wees dat die verweerder met nyd of bose opset teenoor die eiser moes gehandel het. Dit is egter nie so nie. Inteendeel kan dit op hierdie stadium van ons regsontwikkeling met vertroue aanvaar word dat die aksie vir kwaadwillige vervolging, net soos ander aksies wat hulle oorsprong in die *actio injuriarum* het, slegs *animus injuriandi* of te wel opset vereis. Voorts staan dit vas dat hierdie opset nie alleen direkte opset nie, maar ook opset in die regstegniese sin van *dolus eventualis* insluit."

[28] In the circumstances I think that the allegation of "malice" embraces intention in the sense of *dolus* and constitutes an averment of fault.

<u>Causation</u>

[29] The first defendant's complaint is that the plaintiff has failed to make sufficient allegations to establish legal or factual causation in respect of the claim.

[30] The material averments in respect of causation are set out at paragraphs 14 and 15 of the particulars of the plaintiff's claim and are formulated as follows:

> "14. As a result of the aforesaid charges brought against the Plaintiff … the Plaintiff has suffered emotional damage and has developed major depression and a post-traumatic stress disorder resulting in him being unable to continue with his employment with the First Defendant, and unable to take up any other form of employment. The nature and extent of the emotional distress and depression suffered by the Plaintiff … are set out in the medical reports of Dr Ian Taylor ….
>
> 15. As a result of the aforesaid emotional distress, depression and post-traumatic stress disorder suffered by the Plaintiff, the Plaintiff was medically boarded from his employment with the First Defendant …"

[31] In the first report by Dr Taylor annexed to and incorporated into the Particulars of Claim Dr Taylor records:

> "He was suspended on 28/06/2010 when a charge of racism was levelled against him. He consulted with Dr. CJ Smith, his GP on 09/07/2010 and was referred to Ms. I Marais, a psychologist and was then referred to me on 09/09/2010.
> He stayed off on suspension til 24/11/2010 when he was found not guilty.
> He is, however, a broken man after his shoddy treatment and remains ill."

[32] Later, in the same report, under the heading "Precipitating and Perpetuating Factors" Dr Taylor states as follows:

> "He was falsely accused of racism.
> After extensive investigation and a hearing he was found not guilty …
> He discovered that colleagues lied and made false statements.
> He remains ill and obviously cannot return to such a situation."

[33] In his second report annexed to the Particulars of Claim Dr Taylor records as follows:

> "Briefly Mr. Weitz became ill after accusations of racism were levelled at him and he was suspended for 20 months before the hearing occurred and his name was cleared.
> He was severely ill and even though his name was cleared, he was unable to work and he was declared unfit for work."

[34] In respect of the particularity which a plaintiff is required to plead, I have referred earlier herein to the provisions of Rule 18(4) of the Uniform Rules of Court. In ***Makgae v Sentraboer (Koöperatief) Beperk*** *supra* it was held that in order for a pleader to disclose a cause of action he: "moet toesien dat die wesenlike feite (dit wil sê die *facta probanda* en nie die *facta probantia* of getuienis ter bewys van die facta probanda nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit moet word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag tav die regshulp of uitspraak wat hy aanvra" (at p. 245D-E).

[35] The distinction between the *facta probanda* and the *facta probantia* was similarly highlighted in ***Jowell v Bramwell-Jones and Others*** *supra* at 913F-G in which Heher J stated:

> "The plaintiff is required to furnish an outline of its case. That does not mean that the defendant is entitled to a framework like a cross-word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."

[36] It is not contentious that causation involves two distinct enquiries. These were eloquently set out by Corbett CJ in ***International Shipping Company (Pty) Ltd v Bentley*** *supra*. Addressing factual causation at p. 700E-F he stated:

> "The first [enquiry] is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. … The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. …"

[37] Mr ***Redding***, correctly in my view, conceded during argument that the enquiry, being a factual one, must be dependent upon the evidence and cannot be determined at the exception stage. At the exception stage it seems to me that the plaintiff has clearly alleged that his emotional distress, depression and post-traumatic stress disorder was a consequence of the charges being brought against him which in turn was the cause for him being medically boarded. If, after evidence is led these averments are established then, it seems to me, it follows that factual causation is established.

[38] Factual causation, however, is not sufficient. Corbett CJ went on in ***International Shipping***, *supra* at p. 700H to state:

> "… demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[39] Mr ***Redding*** confined his argument in the exception to legal causation. It is argued that it could not have been foreseeable by the first defendant, or anyone on its behalf, that the laying of disciplinary charges against the plaintiff pursuant to complaints made by the second and third defendants would result in the plaintiff suffering emotional trauma to the extent that it would result in him being unemployable either by the first defendant, or any other employer, and that he would remain unemployable for an additional twelve years until the age of 65. In all the circumstances, so the argument goes, such damages would be too remote.

[40] It is true that Corbett CJ stated in International Shipping that this enquiry is basically a juridical problem and that the solution may involve considerations of policy. It has, however, repeatedly, been accepted that the test for determining the remoteness of damages is a flexible one. (See ***International Shipping***, *supra* at 701A-F; ***Smit v Abrahams*** 1994 (4) SA 1 (A) at 15E-G; ***OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd*** 2002 (3) SA 688 (SCA) at 697 para [23] and

Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA) at 164 para [33]-[34].) In ***Fourway Haulage*** *supra* Brand JA traced the essence of the flexible test back to ***S v Mokgethi en andere*** 1990 (1) SA 32 (A) at 40I-41D. Here, he noted, that Van Heerden JA had not stated that the "flexible" or "supple" test supersedes all other tests such as foreseeability, proximity or direct consequences, which were suggested and applied in the past, but merely that none of these tests can be used exclusively and dogmatically as a measure of limitation in all types of factual situations.

[41] I think that the material portions of the Particulars of Claim which I have set out above clearly state that the emotional distress, major depression and post-traumatic stress disorder are a direct result of the institution of the charges in the disciplinary proceedings. It is alleged too that this medical condition gave rise directly to the loss which is claimed. Whether this allegation can be established is a matter for evidence. I do not think that the foreseeability of such harm can be determined at the exception stage and this would depend, at least in part, upon the evidence presented at the trial relating to the history of the relationship between the parties and the first defendant's knowledge, or otherwise, of the plaintiff's psychological make-up and fallibility. This in turn would impact upon the application of policy considerations to the facts of the present matter.

[42] In the circumstances I do not think that the question of legal causation in the present dispute can be determined at the exception stage. I do not mean thereby to suggest that it could never be determined at the exception stage. There may be

circumstances where legal causation could be determined on exception. On the pleadings in the present matter, however, I think that this finding can only be made by the trial court.

[43] In the result the exception is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Excipient/First Defendant:	Adv Redding SC and Adv T Dalrymple instructed by Pagdens, Port Elizabeth
For Respondent/Plaintiff:	Adv P Scott SC instructed by G P van Rhyn, Minaar & Co. Inc., c/o Daniel Saks Inc, Port Elizabeth