



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA**

28/3/2014
Case No: 34196/2014

In the matter between:

DAVID BHENGU & 52 OTHERS

Plaintiffs

and

G4S CASH SOLUTIONS (SA) (PTY) LTD

Defendant

Case Summary: Exception - against summons that particulars of claim lacked averments necessary to sustain an action - delictual claim based on a novel legal duty not to act negligently – objection that the legal duty relied upon, which amounts to a duty on the part of an employer to act fairly in dealing with its employees, does not exist in our law and that the common law should not be developed to recognise such duty - a decision on the existence of the novel legal duty asserted entails a policy decision and value judgment and should not be taken without evidence and only on the allegations in the particulars of claim, which only reflect the facts on which the plaintiffs rely. Exception dismissed with costs.

JUDGMENT

[1] This is an exception, raised by the defendant, G4S Cash Solutions (Pty) Ltd, against the summons of the plaintiffs, David Bhengu and 52 others, asserting that the particulars of claim lacked averments necessary to sustain an action.

[2] By the nature of exception proceedings the correctness of the facts averred in the particulars of claim must be assumed (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) para 4). And as was said by Brand JA in *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11-

Because the respondents chose the exception procedure - instead of having the matter decided after the hearing of evidence at the trial - they had to show that the appellants' claim is (not may be) bad in law.'

[3] According to the particulars of claim the defendant conducts business in the security services industry and renders, *inter alia*, cash handling services to its clients. The plaintiffs were all employed by the defendant at its Cleveland branch and they were members of the Motor Transport Workers Union of South Africa, a trade union registered in terms of the Labour Relations Act 66 of 1995 (the union). On 16 January 2009, the union issued a strike notice to the defendant advising it that the union's members would embark on a strike action, which would commence at 6.00 am on 20 January 2009 (the planned strike action). On 17 January 2009, the defendant obtained an interim interdict from the Labour Court interdicting the planned strike action pending the finalisation of the interdict proceedings. The union provided the defendant with such an undertaking and issued a notice to its members advising them that the planned strike action would be postponed. On 20 January 2009, the defendant obtained a final interdict from the Labour Court declaring the planned strike action unprotected and interdicting the union from encouraging and inciting the defendant's employees to participate in the strike action. In compliance with the

interim and final interdicts, and the undertaking given by the union, the plaintiffs returned to work on 20 January 2009.

[4] However, on 20 January 2009, as a result of certain unrelated events that were the source of grievances and fears on the part of the plaintiffs, they refused to commence work. In response to the plaintiff's refusal to commence work, the defendant's Mr Jiggs de Wet issued an ultimatum (the first ultimatum) to the plaintiffs, which reads as follows:

'RE PROCEDURAL AND UNPROTECTED INDUSTRIAL ACTION

This is to confirm that you have embarked on an unprocedural and unprotected industrial action in terms of the Labour Relations Act No 66 of 1995.

Such action is detrimental to the company's operations.

Any employee involved in this unprocedural and unprotected industrial action and failing to report for duty by 08h30 will be subject to disciplinary action, which may result in their dismissal.

An employee wishing to make representations prior to the expiry of this ultimatum may do so by contacting Carl Delport/Jiggs de Wet.'

Mr de Wet thereafter issued another ultimatum (the second ultimatum) extending the deadline for the plaintiffs to return to work to 9.00 am.

[5] Prior to the expiry of the second ultimatum, at approximately 8.45 am, the plaintiffs nominated two intermediaries, Messrs Gys and Saunders (the plaintiffs' intermediaries), to make representations to the defendant's Mr de Wet to explain the reason for their refusal to commence work. The plaintiffs' intermediaries made representations to Mr de Wet, who made a proposal to them, which included the condition that they return to work. The plaintiffs' intermediaries communicated Mr de Wet's proposal to the plaintiffs who, according to the particulars of claims, accepted

his proposal. When the plaintiffs' intermediaries returned to Mr de Wet to inform him that they had accepted his proposal and would return to work, he advised them that the ultimatum had expired and that they had been suspended pending a disciplinary enquiry at the instruction of the defendant's operations director, Mr Jack Rode.

[6] On 8 July 2009, all the plaintiffs were dismissed following a disciplinary enquiry during January and February 2009. The misconduct with which they were charged related to their refusal to commence work on 20 January 2009 and their failure to timeously comply with the defendant's ultimatums. The plaintiffs appealed the findings of the disciplinary enquiry, but the appeal was dismissed during October 2009. They then launched applications for their reinstatement and for compensation in the Labour Court. On 26 October 2012, the Labour Court dismissed their applications and upheld their dismissals as procedurally and substantively fair. It is alleged that because of their dismissals, all the plaintiffs have been unemployed since 8 July 2009.

[7] The plaintiffs then instituted the present delictual claim against the defendant in which they seek to hold the defendant vicariously liable for the pure economic loss that they allege they had suffered as a result of the alleged negligent conduct of the defendant's employees, Messrs De Wet and Rhode, in their dealings with the plaintiffs and their intermediaries on 20 January 2009. Based on s 10 of the Constitution of the Republic of South Africa, 1996, which provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected', and the common law, the plaintiffs assert a novel legal duty not to act negligently, which they allege Messrs De Wet and Rhode owed them.

[8] The exception with which the defendant persisted at the hearing of this matter is that the legal duty relied upon by the plaintiffs - which the defendant contends

amounts to a duty on the part of an employer to act fairly in dealing with its employees - does not exist in our law and that the common law should not be developed to recognise such a duty. I am, however, of the view that a decision on the existence of the novel legal duty asserted by the plaintiffs entails a policy decision and value judgment and should only be decided after the hearing of evidence at the trial, and not without evidence and on the allegations in the particulars of claim alone, which only reflect the facts on which the plaintiffs rely.

[9] In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), para 37, Wallis JA said the following:

'... Take a delictual claim based on a novel legal duty not to act negligently. The existence of such a duty depends on the facts of the case and a range of policy issues. The need for the court to be fully informed in regard to the policy elements of the enquiry militates against that decision being taken without evidence. As Hefer JA said [*Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E-I:

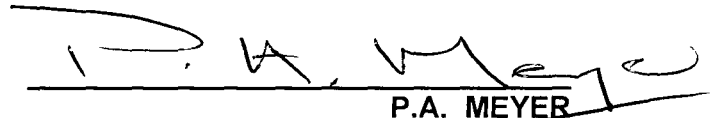
"As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which shape and, at times, refashion the common-law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people (*per* MM Corbett in a lecture reported *sub nom* Aspects of the Role of Policy in the Evolution of the Common Law in (1997) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se* but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (*Corbett (op cit* at 68); JC van der Walt *Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak* 1993 (56) *THRHR* AT 563-4.) Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited

earlier *Fleming* rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and of every other relevant factor.'

[10] Finally, the matter of costs. The plaintiffs seek a punitive costs order against the defendant. I am, however, in all the circumstances not satisfied that this is one of those 'rare' occasions where a deviation from the ordinary rule that the successful party is awarded costs as between party and party, is justified. (See *LAWSA* Vol 3 Part 2 2nd Ed para 320.)

[11] In the result the following order is made:

The exception is dismissed with costs.


P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	7 September 2016
Date of judgment:	28 March 2017
Excipient's counsel:	RG Beaton SC
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