



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

30/7/15

CASE NUMBER: 20928 / 2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>30 / 07 / 2015</u>	
DATE	SIGNATURE

In the matter between:

GRAHAM BRUCE STRATON

PLAINTIFF

AND

FIRSTRAND BANK LIMITED

DEFENDANT

JUDGMENT

MAVUNDLA, J.

- [1] The crisp issue to be decided *in casu*, as a preliminary point is one relating to separation in terms of Rule 33(4) and to dispose the matter on the grounds that the plaintiff's particulars of claim do not disclose the cause of action.
- [2] At the commencement of the matter, the defendant beseeched this Court to grant separation in terms of Rule 33(4) and dismiss the action. It was further submitted that, the plaintiff's case as pleaded is that there was noncompliance with rule 19 which is not applicable in motions proceedings and therefore there is no wrongfulness proven on the pleadings.
- [3] The approach to be adopted when dealing with Rule 33(4) application is eloquently stated, with respect, by Bosielo JA in *Molotlegi v Mokwalase*¹ as follows:
- "A Court hearing an application for separation of issues in terms of Rule 33(4) has a duty to satisfy itself (I underline) that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a Court seized with such an application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a Court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition the Court ... is also obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the Court may, in the exercise of its discretion, refuse to order separation. Crucially in deciding whether to grant the order or not the Court has a discretion which must be exercised judiciously. The Court cannot simply grant such an application because it is unopposed."
- [4] In *CNA v MTN*² the Supreme Court of Appeal held that:

¹ 2010 (4) ALL SA 258 (SCA) at 264 par 20.

² 2010 (3) SA 382 (SCA) at 408 par. 89

"Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have issue decided first."

- [5] *In casu*, the reason why the defendant seeks separation is to enable the Court to deal with the question of whether the plaintiff's particulars of claim are exceptable for lack of averments which disclose the cause of action. It is contended that granting the separation and dealing with the exception would be dispositive of the plaintiff's action and curtail the proceedings. The defendant contended that the plaintiff's particulars of claim are exceptable. It was further submitted on behalf of the defendant that the exception raised, if upheld will curtail the leading of evidence and be dispositive of the plaintiff's action because defendant prays for the dismissal of the plaintiff's action; *vide Barclays National Bank Ltd v Thompson*.³
- [6] Rule 18 of the Uniform High Court Rules demands that the pleading must be lucid, logical, and succinct to state and disclose the facts upon which the cause of action is premised; *vide Trope v South African Reserve Bank and Another*.⁴
- [7] The plaintiff sued defendant for alleged damages suffered, in respect of the first claim for financial loss in an amount of R3 190 000. 00 and an alternative claim for damages in an amount of R600 000. 00.
- [8] The plaintiff alleged in his particulars of claim that: he was the owner of immovable property. His purchase of the property was financed by the defendant. The defendant foreclosed on the home loan and obtained judgment against him by way of an unopposed motion proceedings. After the judgment was obtained against him, he sold the property privately and settled the outstanding debt to the defendant. The defendant was not entitled to the judgment because of *dies non* and that the judgment was therefore unlawful. The defendant misled him by not advising him that the judgment was unlawful. The plaintiff did not know the correct position (i.e. the alleged unlawfulness of the judgment) he sold the property and as the result he suffered damages.
- [9] The plaintiff in his particulars of claim further pleaded, *inter alia*, that:

³ 1989 (1) SA 547 (A) at 553H; *Canadian Superior Oil Ltd v Concord Insurance Co Ltd* 1992 (4) SA 263 (W) at 266F-J.

⁴ 1992 (3) SA 208 (TPD) .

"3.8 On the 21 December 2011 the defendant again issued a Notice of Motion [instead of a summons] in case 11 / 48607 in the South Gauteng High Court Johannesburg in this matter against the plaintiff for the outstanding amount due on this property.

3.9 The *dies non* did not expire according to the rules of the... court and on 26 January the defendant obtained a default judgment against the plaintiff for the outstanding amount and the property was declared specially executable. The plaintiff had only been granted 4 days to defend the matter instead of 10 days.

3.10 Defendant obtained default judgment which is unlawful and contrary to the procedures and rules of the.... Court.

3.11-3.25

4. 5.2 The defendant's actions and obtaining the default judgment against the plaintiff pertaining to *dies non* was illegal."

[10] The defendant contended, quite correctly so, in my view, that Rule 19 only provides for *dies non* in respect of the delivery of notice of intention to defend in actions and not to a notice of intention to oppose in motion proceedings. In any event it was open to the plaintiff to bring an application for rescission, which he failed to do.

[11] It is trite that Rule 6(5) in motion proceedings the respondent must file his notice of intention to oppose within 5 days of being served with the application papers. *In casu*, the plaintiff contended that he was given only 4 days. It may well be so, but the fact that default judgment was nonetheless granted against him, does not make the default judgment unlawful or illegal. Such judgment remains valid until set aside.

[12] It was submitted on behalf of the defendant that in essence the plaintiff is alleging that the defendant's conduct in obtaining judgment was wrongful and therefore legally actionable; or that the defendant's failure to advise the plaintiff that it had obtained the allegedly wrongful judgment constitutes a misrepresentation by silence causing the plaintiff to suffer damages. It was submitted that there is no obligation on the part of the defendant to provide legal advice to the plaintiff nor to inform him of the legality or lack thereof of the judgment obtained, which is in any event not illegal.

[13] The grounds upon which the exception is raised are that the plaintiff is relying on an *is delictual*. It is trite that most *delictual* actions arise from acts which are *prima*

facie, clearly wrongful, such as the causing of damage to property or injury to a person; vide of *Lillicrap, Wassenaar and Partners v Pilkington Brothers*⁴. For the plaintiff to succeed with his action against the defendant he must allege and prove facts which establish an act on the part of the defendant, which is wrongful and has caused patrimonial damages. It is contended that the plaintiff's particulars of claim fail in this regard.

[15] In respect of wrongfulness; the conduct is wrongful if it either infringes a legal duty owed by the defendant to the plaintiff. The legal duty may be imposed by statute or by the operation of common law, in which case the imposition of the duty depends on the particular circumstance of the case. The inquiry is whether the plaintiff's right has been infringed or the defendant has contravened a duty which is based on whether the infringement of the plaintiff's interest was in the particular circumstances objectively justifiable or unjustifiable.⁵ A conduct is wrongful or unlawful if it is unreasonable in the light of all the circumstances. The defendant is expected to behave in a manner which will not harm the plaintiff; vide *Administrateur, TVL v Van Der Merwe*.⁶ The question whether the action of the defendant in the circumstances of a case was wrongful or unreasonable is a value judgment call on the part of the trial court.

[16] In the matter of *Carmichele v Minsiter of Safety and Security and Another*⁷ it was held that: " [7] The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of this Court such as *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A - C; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317C - 318I; *C Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27G - I and *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) at 367E - H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court."

[17] The plaintiff seems to be premising his cause of action on the default judgment which was obtained by the defendant. In my view, there is nothing in the particulars

⁴ 1985 (1) SA 475 (AD) at 497.

⁵ LAWSA, Vol 8, Part 1, 2nd Edition, para 59.

⁶ 1994 (4) SA 3457 (A) AT 361.

⁷ 2001 (1) SA 489 (SCA) at 494 par 7

of claim which demonstrate that the obtaining of the default judgment is *per se* wrongful or illegal as alleged. Therefore there could never have existed a duty on the part of the defendant to inform the plaintiff that the judgment was obtained wrongfully or illegally when there was no such wrongfulness or illegality. From the particulars of claim, one has difficulty in discerning in what manner the defendant was negligent in obtaining the default judgment. I deem it not necessary to traverse every issue raised by the plaintiff because, in my view, the particulars of claim as a whole do not disclose any cause of action and remain excepiable.

- [18] The plaintiff in his particulars of claim in the main and alternative claim alleged, *inter alia*, damages for pain and suffering. As pleaded, the plaintiff is enjoined by Rule 18(10) to specify, *inter alia*, the nature and extent of the bodily injuries suffered. A careful reading of the particulars of claim does not disclose any facts upon which this claim is premised. In so far as the claim for pain and suffering is concerned, it needs to be borne in mind that "whereas physical injury to a person or to corporeal property is *prima facie* unlawful, causing pure economic loss is not. Similarly, loss caused by an omission may be actionable where there is a legal duty to act positively, but where the conduct complained of takes the form of an omission, such conduct is *prima facie* lawful." *vide BOE Bank Ltd v Ries*⁸. The plaintiff must allege facts and prove that there was a legal duty, not a moral duty, on the part of the defendant to avert any suffering or financial loss; *vide Minister of Police v Ewels*.⁹ In my view, the particulars of claim are lacking in disclosing any duty on the part of the defendant, obliging him to avert such alleged financial loss. Neither are any facts alleged showing any negligence on the part of the defendant.
- [19] In my view, the particulars of claim fail to disclose any cause of action. The defendant will be prejudiced were he to be subjected to a trial where evidence has to be led, when there is no cause of action founded on the papers.
- [20] Where the pleadings are vague and embarrassing, or fail to disclose a cause of action, the party complaining thereof may take steps to raise such complaint either in terms of rule 23 or rule 30; *vide MN v AJ*.¹⁰ *In casu*, it is common cause that the defendant had in fact brought an application seeking an order that: (i) the question of whether the plaintiff's particulars of claim are excepiable and be dealt with separately in terms of Rule 33(4); and (ii) that the particulars of claim be declared

⁸ 2002 (2) SA 39 at 46E-G/H.

⁹ 1975 (3) SA 590 (AD) at 596h.

¹⁰ 2013 (3) SA 26 (WCC) at 32-33 paragraphs [20]-[25].

excepiable and struck out. That particular application came before the Court on the 8 October 2015, however inexplicably, the defendant's counsel appeared before Ledwaba DJP and the matter was removed from the roll and costs were reserved; while on the other hand the plaintiff's counsel appeared before Louw J and the matter was removed from the roll and defendant was ordered to pay the costs. Both matters bore the same case number. In my view, under such circumstances, it cannot be said that the plaintiff was caught by surprise when the defendant at the commencement of this matter moved that the issue of separation and excepiability of the particulars of claim be argued before this Court. On the other hand, in view of the fact that this Court holds the view that the particulars of claim do not disclose a cause of action, it is in the interest of both parties that the separation of the issues in terms of rule 33(4) be granted. Further, in the light of the finding herein above that the particulars of claim do not disclose a cause of action, this goes directly against the root of the action and therefore warrants that this Court should dismiss the action with costs.

[21] It is trite that the costs follow the event. It would therefore be proper and fair that the plaintiff should be mulcted with the costs which must invariable include the reserved costs.

[22] In the result, the following order is made:

1. That the issues of excepiability of the particulars of claim is separated from the merits in terms of Rule 33(4);
2. That the particulars of claim do not disclose a cause of action;
3. That the plaintiff's action is dismissed with costs.



N .M. MAVUNDLA

JUDGE OF THE COURT

DATE OF HEARING	:	28 / 07 / 2015	DATE OF JUDGEMENT :	30 / 07 / 2015
APPLICANT'S ADV	:	ADV S J VAN RENSBURG		
INSTRUCTED BY	:	LAMPRECHT ATTORNEYS		
DEFENDANT'S ADV	:	ADV. R. H. WILSON		
RESPONDENTS' ATT	:	GLOVER INCORPORATED		