

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2226/2009

In the case between:

JOHNSON MAJATAU

Respondent

and

MIKE MATHIBE
GSL CORRECTIONAL SERVICES (PTY) LTD

First Excipient
Second Excipient

JUDGEMENT:

MOOLLA, AJ

HEARD ON:

22 JANUARY 2010

DELIVERED ON:

23 February 2010

- [1] The matter before me is an exception raised by the first and second excipients to the particulars of claim dated the 7th of May 2009 in which the respondent in this application, Johnson Majatau, is the plaintiff. Mr. La Grange appears for excipient. On the day there was no appearance for the respondent, his name having been called out three times both at the public entrance of this court as well as the main entrance of the court

building.

- [2] The Notice of Exception records 4 items of exception; the first relates to the issue of jurisdiction and the remaining three (3) to the averments that the particulars of the claim do not disclose a cause of action. The said notice of exception was preceded by a Notice to Remove the Cause of the complaint dated the 28th of September 2009. As the respondent/plaintiff is suing in person a copy of the Notice of Exception was caused to be served by the deputy sheriff, Bloemfontein by personal service on the 7th of October 2009.
- [3] As there was no response to the said Notice to Remove Cause of Complaint, the excipients filed a Notice of Exception dated the 29th of October 2009 which was served on Johnson Majatau on the 10th of December 2009.
- [4] At the commencement of the hearing of the application the court pointed out to counsel, Mr Le Grange, who appears on behalf of the excipients that the return of service appeared to

be defective in that it made reference to the service of the Notice of Exception on the excipients and the respondent. Counsel gave the court the assurance based on instructions from his instructing attorney that in fact there had been proper service by the sheriff on the respondent; further that the attorney had raised the issue of the defective return of service with the sheriff who undertook to remedy the defective return; in the event he had failed to do so.

[5] At the commencement of the hearing the court raised two points, *in limine* with Mr Le Grange, namely:

1. If the first exception which sought to oust the jurisdiction of the court were to succeed all the other exceptions would fall away;
2. That exceptions number 3 and 4 seemed to have little merit and were essentially part and parcel of the second exception.

At that stage Mr Le Grange indicated to the court that the excipients would not persist with exceptions number 1 as well numbers 3 and 4 and would only seek relief in respect

of exception number 2.

- [6] Secondly the court requested Mr Le Grange to address it on the issue of the Notice of Exception lacking a prayer. Counsel himself alluded to this shortcoming in the papers.
- [7] In view of the fact that the Constitution is underpinned with the precepts of procedural fairness which runs throughout the constitution like a golden thread, the court faced a conundrum whether to order the excipients to amplify the Notice of Exception with a prayer, (which was lacking) and cause service before the matter could be heard once again on the amplified papers.
- [8] As there was no appearance for the respondent on the day the court could have dealt with the application summarily having regard to counsel's submission that the respondent would be given 60 days within which to cure any defect that may have been found to exist. The court accordingly felt that there was no prejudice to be suffered by the respondent were it to deal

with matter summarily. Even if the court ordered service of the amplified papers the matter would once again come before the court for adjudication on essentially the same issues.

- [9] An exception which lacks a prayer in the Notice of Exception is irregular and liable to be struck out; see **KISTENSAMY v BRAMDAW AND OTHERS** 1962 (3) SA 797. However the court has a power to order an amendment to make good the defect provided that no prejudice or injustice is caused to the respondent.
- [10] Based on counsel's submission that the respondent would be given sixty (60) days to amend his summons were the exception to be upheld the court accordingly finds that no prejudice or injustice would be suffered if it condoned the failure to incorporate a prayer. The court accordingly grants the amendment incorporating the prayer.

Legal principles of application

- [11] In **BENSON AND SIMPSON v ROBINSON** 1917 WLD 126 the general principles of pleading were explained by Wessels J –
- “The plaintiff must not set out the evidence upon which he relies,

but he must state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff's allegations."

BECK'S: THEORY AND PRINCIPLES OF PLEADING IN CIVIL ACTIONS at page 46 sets the position as follows:-

"Although pleadings must be carefully drawn and be well turned out, the court ought not to read them pedantically. The rules do not require that pleadings be drawn up in perfect language, but that the allegations of the parties should be clearly cognisable. Thus the court will not hold that a pleading is bad in law provided that such pleading shows the other party what the claim or defence, as the case may be, is, with reasonable clarity even though there may be allegations in such pleading which are unnecessary (though not prejudicial to the opposite party) and even though such pleading may not be elegant."

At page 47:

"The fundamental principles which govern all pleadings can be summarised as follows:

- (a) Pleadings must be brief and concise and couched in summary form. They ...
- (b) Pleadings should state facts and facts only, that is to say they should not contain statements of either law or the evidence required to establish the facts. The inclusion of any other facts is irrelevant and irrelevant facts are liable to be deleted from a pleading if embarrassing to the opposite party. ...

On the other hand an exception to a pleading is not justified merely because it contains some unnecessary words if those words do not embarrass the opposite party, and where unnecessary matter is pleaded in a declaration the defendant is entitled to answer it in his plea."

APPLICATION OF THE AFORESAID LEGAL PRINCIPLES

[12] In essence the averments set out at paragraphs 4, 5, 6 and 7 as well as the prayer to the particulars of claim viewed either individually or as a whole consist of a mixture of allegations, submissions, statements of law, evidence etc. Even if the court were to allow the respondent a wide berth in his pleadings as an unrepresented litigant, the pleadings presently

amount to a near abomination which would make it almost impossible if not wholly impossible for any opposing litigant to discern the nature of the cognizable action and the facts which are to be proved so that they can be adequately met in court and evidence tendered to disprove them.

In the introduction to the prayer the respondent pleads as follows:-

“Wherefore the plaintiff prays for judgment from this Honourable Court in his favour against the defendant(s) for damages which is suffered because of injury and damages equated to patrimonial loss of income due to the unlawful termination of service contract.” (sic)

The introductory portion of the prayer is indicative of a delictual claim based on injury and a possible contractual claim based on an alleged loss of income

[13] Prayer 1 (to the summons) reads as follows:

“And order for the payment of the plaintiff's monthly salary from December 2008 with 15,5% calculated from December 2008 till this matter is brought to final (SIC) and R1,5 million equated to damages for

patrimonial loss for the next 20 years to come due to unlawful termination of the service contract.”(sic)

An analysis of the introduction to and of paragraph (1) of the prayer is clearly indicative of two separate claims based *ex contractu* for loss of income from the date of the determination of the issue and R1, 5 million for damages for patrimonial loss in respect of a delictual claim.

Paragraph 1 of the actual prayer totally abandons the claim based on injuries sustained but is predicated on a claim for past loss of earnings and patrimonial loss for future earnings arising from the alleged unlawful of termination of the service contract.

Even if the court were to find that there has been a proper separation of claims based on contract and delict, there has been a noticeable failure to comply with the peremptory provisions relating to pleadings in a case based on delict and contract. In addition the averments relating to bodily injuries are left hanging in the air and are not carried over to the actual

relief sought.

[14] In the case of delict it is essential to plead the following:-

- (1) Wrongful act or omission;
- (2) A duty of care;
- (3) Omission;
- (4) Negligence;
- (5) Causation;
- (6) Damages.

[15] It is clear from the particulars of claim that the requirements for the proper pleading of a delictual claim have not been met.

In the case of contract it is necessary to state in the pleadings whether the contract relied upon is written or oral and to state when, where and by whom such contract was concluded and breach thereof e.t.c.

See: **VOSTER v HERSELMAN** 1982 4 SA 857(0)

Clearly the respondent has been in breach of the requirements

relating to the pleadings based on contract also.

- [16] In the circumstances the court concludes that the excipients would be significantly prejudiced, in the prosecution of their defence if the pleadings as presently constituted were allowed to stand.
- [17] Accordingly the court is inclined to uphold exception two (2), viz; that the particulars of claim do not disclose a cause of action.
- [18] In addressing the issue of costs, the court finds that the conduct of the excepipients' was not entirely satisfactory in a material respect. The excipients', having had the luxury of legal representation were clearly remiss in coming to court with defective papers (lack of prayer), which could have been fatal to the application had the court not condoned the defect. There must of necessity be an indication of the court's displeasure by an appropriate order of costs... In the opinion of the court it is just that no order been made as to the costs of this application.

[19] It is ordered as follows:

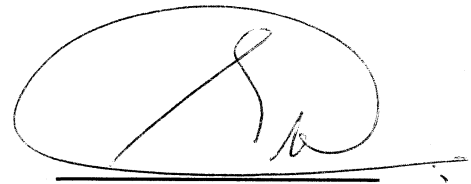
1. The amendment is granted incorporating the following prayer in the notice of exception:

1.1. The second exception raised in the Notice of Exception to the effect that no cause of action is disclosed in the particulars of claim is upheld.

1.2. The respondent/plaintiff is granted leave to amend his particulars of claim dated 7 May 2009 within two months of the date of service of this order on the respondent/plaintiff, failing which the claim is dismissed with costs.

1.2.1 The second exception raised in the Notice of Exception to the effect that no cause of action is disclosed in the particulars of claim is upheld.

1.2.2 The respondent/plaintiff is granted leave to amend his particulars of claim dated 7 May 2009 within two months of the date of service of this order on the respondent/plaintiff, failing which the claim is dismissed with costs.


E. A. MOOLLA, AJ

On behalf of the applicant: Sues in person
(No appearance on the day)

On behalf of the excipients: Adv. W. G. La Grange
Instructed by:
Webbers
BLOEMFONTEIN

/ar