C of A (CIV) 19/2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

T.A.M. Industries (Pty) Ltd. **Appellant**

and

ALFA Plant Hire (Pty) Ltd. **Respondent**

Held at Maseru: 6, 20 April 2005

CORAM:

Steyn, P
Ramodibedi, JA
Melunsky, JA

Summary:

A point of law alleged to be such taken at the commencement of a civil trial without notice and without observance of the Rules of Court – such practice unacceptable and constitutes ambushing of a litigant. – Matter raised one of evidence and not a point of law – appeal against decision to allow such a procedure and to uphold an exception wrongly made. – Appeal upheld. - Exception dismissed with costs.

Reasons for Judgment

STEYN, P

[1] At the hearing of the appeal the Court made the orders set out below.

[2] When doing so we said that we would give written reasons for our orders. These are the reasons.

[3] Appellant was the Plaintiff in the Court below and is referred to as such in this judgment. It sued the respondent for payment of damages in an amount of M54,116.40. Its cause of action is pleaded as follows:

> " – 4 –
>
> Plaintiff has been appointed as the company responsible for the upgrading of the THETSANE-TIKOE road. As part of its operations Plaintiff erected huge heaps of quarry alongside the aforementioned road.
>
> - 5 -
>
> On or about the 5th May 2002 Defendant's employee acting within the scope of his employment did wrongfully and unlawfully spread the said heaps of quarry which was then wasted as a result thereof.
>
> - 6 -
>
> As a result of the unlawful conduct of Defendant's employee, Plaintiff has suffered great loss and in the result has incurred damages in the sum of M54,116.40."

[4] Respondent ("the defendant") asked for further particulars and *inter alia* asked the following question:

> "which Defendant employee (sic) unlawfully spread the heaps of quarry? Full particulars are required."

To this Plaintiff replied as follows:

> "The full particulars of Defendant's employee are unknown to Plaintiff".

[5] A pre trial conference was held at which it was agreed that the issues to be decided at the trial were the following:

> "1.1 whether defendant's employee was acting within the scope of his employment.
>
> 1.2 Whether the spreading of the quarry caused any loss to the Plaintiff.
>
> 1.3 Quantum".

[6] In spite of this agreement concerning the issues and without notice to the Plaintiff, when the matter was called Defendant's Counsel took what he called "a point of law". This point he formulated as follows in argument.

> "The identify of the servant who was involved in the wrong-doing was unknown. An unknown person could not become a servant of someone. An unknown person is as good as non-existent. In the circumstances the Plaintiff's declaration did not disclose a cause of action".

[7] Despite the objection by Plaintiff to this point being raised without notice, the Court ruled that the taking of what amounted to an exception was permissible in terms of the Rules of Court. It proceeded to hear argument on it and upheld it. The Court subsequently declined to allow an amendment. It also rejected

Plaintiff's contention that the "defect" in the pleadings could be cured by evidence to be led at the trial.

[8] The learned trial judge in my view erred in the respects set out herein. It is correct that the Court had a discretion to allow the defendant to raise a point of law at any time. However it can only do so if "its consideration involves no unfairness to the party against whom it is directed", see Morobane v Bateman, 1918 AD 460 at 464 (cited with approval in this Court in Attorney General and others v Kao, C of A (CIV) No. 26 of 2002, (unreported)). It must be borne in mind that in the present case:

[8.1] The respondent had not raised the exception when and in the form he should have in terms of the Rules of Court. See High Court Rules 29.

[8.2] There was no compliance with the provisions of Rule 32 (7). This Rule reads as follows:

> "If it appears to the Court mero motu or on the application of any party that there is in any pending action a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question the Court may make an order directing the trial of such question in such manner as it may deem fit, and may order that

all further proceedings be stayed until such question is disposed of."

[8.3] There was also no compliance by the defendant with the provisions of Rule 8 (1) which reads as follows:

"every application shall be brought on notice of motion supported by an affidavit setting out the facts upon which the Applicant relies for relief."

[8.4] There is clear authority of this Court that it can be unfair and not permissible to rely on an unpleaded defence to quash a claim initiated by way of summons. See Malebo v Attorney General, C of A (CIV) No. 5/2003. (unreported). See particularly the authorities cited at page 5 of the judgment and the reasoning at pp. 6 and 7.

[8.5] There would clearly be prejudice to the plaintiff if the defendant were to be allowed to raise and argue the matter without any notice to it. It had set the matter down some 18 months previously for the hearing of evidence on the issues as pleaded. The three issues to be tried had been settled by agreement

> between the parties at the pre-trial conference. Moreover, plaintiff was ready to lead evidence on these at the hearing before the trial judge. In the result the court *a quo* had allowed the defendant "to ambush" the plaintiff via a patently unfair process and to its not inconsiderable prejudice.

[9] The Court should therefore not have allowed the respondent to raise the purported point of law when it did. In the result the court also did not have the opportunity to have a considered argument from the plaintiff. This may well have contributed to her coming to a decision which – as will be seen - was clearly wrong. (Own emphasis).

[10] I say the decision was clearly wrong also because the "exception" raised no point of law. The fact that the plaintiff was unable to identify the servant in question may be <u>evidentially</u> relevant, but his name, address and other identifying details are in no way essential for the plaintiff to establish that the person who caused the damage complained of was an employee of the defendant acting in the scope of his employment. If e.g. the plaintiff led evidence that

the person who was seen committing the acts complained of was, during working hours, wearing a uniform with the name of the defendant embossed on it, such evidence would, prima facie, and in the absence of rebutting evidence be sufficient for it to succeed. Plaintiff may also have called another worker employed by the defendant to say that he heard the foreman instructing a group of workers to spread the quarry on the road. Again such evidence could well discharge the onus resting on the plaintiff in this respect. Many other examples spring to mind but it is unnecessary to mention them. All that need to be added is that the defendant might have been able to ascertain the grounds of the plaintiff's allegation by means of a request for particulars for trial in terms of Rule 37.

[11] Support for the approach set out in par. 9 above is to be found in a judgment of this Court in Mokhutle N.O. v MJM (Pty) Ltd. C of A (CIV) No. 15/2000 where at p. 9-10 Friedman JA says the following:

> "For the purposes of deciding whether particulars of claim support a cause of action the allegations contained therein must be accepted as correct. If evidence can be led which can disclose a cause of action alleged in a

pleading, the pleading will only be excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. See The Law of South Africa, First Reissue vol. 3 Part 1 paragraph 186; McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526 D-E".

[12] The point of law was indeed no point of law and should not have been considered as such or upheld. For these reasons this Court after hearing Counsel made the following Order:

"The appeal is upheld with costs. The decision of the court *a quo* upholding the exception is set aside as is the dismissal with costs of the Plaintiff's claim. In its place it is ordered that Defendant's exception is dismissed with costs".

_____
J.H. STEYN
PRESIDENT

I agree: _____
M.M. RAMODIBEDI
JUDGE OF APPEAL

I agree: _____
L. MELUNSKY
JUDGE OF APPEAL

Delivered on 20th day of April 2005

For the Appellant: Mr. M. Ntlhoki
For the Respondent: Mr. T. Matooane