IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/558/2018**

In the Matter between:-

SELAE MPHUTLANE LEQELE **PLAINTIFF**

AND

STORM MOUNTAIN DIAMONDS (PTY) LTD **DEFENDANT**

JUDGMENT

CORAM : **MOKHESI J**

DATE OF HEARING : **12th NOVEMBER 2019**

DATE OF JUDGMENT : **12TH DECEMBER 2019**

CASE SUMMARY: *Civil Practice: Exception that the pleadings are vague and embarrassing – Principles pertaining thereto re-stated – exception dismissed with costs.*

ANNOTATIONS:

CASES **:** *Jowell v Bramwell – Jones and Others 1998 (1) SA 836*

Marney v Watson 1978 (4) SA 140 (C)

Kock v Zeeman 1943 OPD 135

Per Mokhesi J

[1] INTRODUCTION

The plaintiff had issued out summons against the defendant claiming damages for the invasion of his privacy. In his Declaration the plaintiff (in relevant parts) averred that:

> " -4-
>
> On or around 2015, the plaintiff together with some of his co-employees instituted an action in the Directorate of Dispute Prevention and Resolution (DDPR) against the defendant in terms of which, inter alia, they were seeking money for overtime.
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> -5-
>
> In the aforementioned case, the defendant unlawfully and without plaintiff's consent tendered as evidence, the plaintiff's pay-slip. In so doing the defendant invaded the plaintiff's right to privacy and this affected the plaintiff's adversely. (Sic)
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> -6-
>
> As a result of the defendant's unlawful conduct the plaintiff's good name has been tarnished much as no other company is willing to hire him as they are of the view that the plaintiff cannot keep company's secrets.
>
> -7-
>
> The plaintiff had been rejected by (sic) many companies as they felt that he cannot be a trusted person as result of the pay-slip which was tendered in the DDPR proceedings by the defendant.
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> -8-

As a result of the defendant's unlawful conduct, the plaintiff has suffered damages in the amount to the tune of M10, 000,000.00 for the invasion of privacy."

[2] The defendant had issued notice in terms of Rule 29(2) that they except to the summons on the basis that it is vague and embarrassing, and gave the plaintiff an opportunity to remove the source of such embarrassment. In terms of Rule 29(2) Notice, the defendant's complaint against the plaintiff's summons is as follows:

"BE PLEASED TO TAKE NOTICE that the defendant herewith files an exceptional and embarrassing summons that it is vague and embarrassing in the following respects:

1. In the summons, the plaintiff seeks payment of M10,000 000.00 from the defendant for damages for 'invasion of privacy', failing to aver whether the claim is for defamation or *injuria*, and failing to set out the elements of either, therefore disclosing no cause of action.

2. From the summons, it is unclear whether the plaintiff is claiming damages under the *lex Aquilia* or under the *Actio injuriarum.*

3. The plaintiff's claim for payment for damages for invasion of privacy is therefore vague and embarrassing."

[3] The plaintiff did not address the concerns raised by the defendant, thereby necessitating the latter to except to the summons for being vague and embarrassing. It will be observed that the defendant had clubbed together the exception on the basis of vagueness of the cause of claim together with the exception that the summons disclose no cause of action. In fact the latter is subsumed under the former. The two exceptions cannot be clubbed together or the one subsumed under the other as they are completely different and attract

different consequences. And this trite. Reference is made to Rule 29 (1) and (2) which provides:

> "29(1) (a) Where any pleading lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party, within the period allowed for the delivery of any subsequent pleading, may deliver an exception thereto.
>
> b) The grounds upon which the exception is founded must be clearly and concisely stated.
>
> (2.) (a) Where any pleading is vague and embarrassing, the opposing party, within the period allowed for the delivery of any subsequent pleading, deliver a notice to the party whose pleading is attacked, stating that the pleading is vague and embarrassing set out the particulars which are alleged makes the pleading so vague and embarrassing, and calling upon him to remove the cause of complaint within seven days and inform him that if he does not do so an exception would be taken to such pleading.
>
> (b) If the cause of complaint is not removed to the satisfaction of the opposing party within the time stated such party may take an exception to the pleading on the ground that it is vague and embarrassing. The grounds upon which this exception is founded must be fully stated."

[4] Clearly, an attack that the summons does not disclose the cause of action cannot be subsumed under the attack that the summons is vague and embarrassing. I will therefore, proceed from the premise that the plaintiff's summons are being attacked on the basis of vagueness and embarrassment, because that is how it is predominately framed. An exception is a pleading, and although the excipient is free to frame it the way of his own choosing, he is, however, as a general rule bound by the way the case for the exception is raised or is made out in the papers ***(Jowell v Bramwell – Jones and Others 1998 (1) SA 836***

at 898E-J). A party is bound by the terms he/she frames the exception and the issues it wishes to have the court adjudicate upon (ibid 899 A – B)

[5] In ***Jowell*** (ibid at 902I- 903E) Heher J summarized the general principles to approaching an exception that the cause of action pleaded is vague and embarrassing, as follows:

a) Minor blemishes are irrelevant as they can be cured by request for further particulars

b) Pleadings must be read as a whole, and not to seek to isolate a particular paragraph for attack. The exception must go to the root of the cause of action. He followed with approval the decision in ***Carelsen v Fairbridge, Ardene and Lawton 1918 TPD 309***, at 309 where it was said:

> "….(I)f we have regard to the nature of an exception, namely that it is a procedure which goes to the root of the action, I think we are entitled to say that, when the legislature speaks of an exception, it does not refer to a case which can be fairly met by particulars, and that the two are mutually exclusive. The rule therefore that this court ought to lay down is that, where a defendant can obtain the desired information by asking for further particulars, he should do so. He can only employ the exception that the summons is vague and embarrassing when it goes to the root of the action, and when the cause of action is not clearly set forth in the declaration, and he is therefore embarrassed in that way."

c) The attack must be directed at the *facta probanda* and not at the *facta probantia* as the latter are matters for particulars of trial

d) Only facts must be pleaded.

e) Implied allegations may be read into the pleadings flowing from certain express allegations.

[6] It is trite that for purposes of adjudicating an exception, factual averments made in the Declaration must be regarded as correct ***(Marney v Watson 1978 (4) SA 140 (C) at 144)***.

I now turn to determine whether the pleadings are vague and embarrassing. For present purposes the pleadings would be vague and embarrassing if it would not be clear whether the plaintiff is suing on contract or deficit **(Kock v Zeeman 1943 OPD 135 at 139**), but that is not the case here. In *casu,* the bases on which the defendant is attacking the pleadings is without merit; it is clear from the Declaration that the plaintiff is suing based on invasion of privacy. Invasion of privacy is an independent personality infringement falling under the genus of rights found under rights relating to *dignitas*. It is also clear that the current matter is an *actio injuriarum* for satisfaction (*solatium*). The plaintiff is not claiming for patrimonial loss consequent to invasion of privacy. The cause of action is not vague and embarrassing as suggested by the defendant. What I find problematic, however, though not raised as part of issues to be determined, is that it is not clear on what basis the production of a pay-slip by the defendant at the DDPR is regarded as an invasion privacy. However, be that as it may, as this can be cleared by way of request for further particulars.

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

a) The exception is dismissed with costs.

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MOKHESI J

FOR THE EXCIPIENT : ADV. P.R. CRONJE INSTRUCTED BY WEBBER NEWDICATE

FOR THE PLAINTIFF : ADV. P.L. MOHAPI INSTRUCTED BY K.D. MABULU ATTORNEYS