

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/ 660/2016

In the matter between

MOHAPI POTSO

PLAINTIFF

AND

LIPHAPANG MOHAPI

1ST DEFENDANT

KHOSI LESOLE

2ND DEFENDANT

RULING ON EXCEPTION

CORAM: BANYANE J

HEARD: 17/08/2020

DELIVERED: 04/06/2021

Summary

Exception - on grounds that summons and declaration disclose no cause of action for a claim based on emotional shock - emotional shock defined - plaintiff pleading that he was brutally assaulted and set alight - the averments disclosing a cause of action - exception dismissed.

ANNOTATIONS

Cases cited

1. Mngomwzulu v Minister of Law and Order [2014] ZAKZDHC 34
2. Mckenzie v Farmers' Co-operatives Meat Industries Ltd 1922 AD 16
3. Andrews v Pillay 1954(2) SA 136
4. Evins v Shield Insurance Co Ltd 1980(2) SA 814 (A)
5. Jowell v Bramwell Jones and Others 1998(1) SA 836
6. Bester v Commercial Union Versekeringsmaatskappy Van SA Bpk 1973(1) SA 769(A)
7. King's Transport v Viljoen 1954(1) SA 133(K)
8. Mount Issa Mines Ltd v Pusey [1970] HCA 60

Subsidiary Legislation

1. The High Court Rules of 1980

Books

1. P.J Visser and P.M Potgieter: The Law of Damages (1993) Juta & Co

BANYANE J

Introduction

[1] The plaintiff sued the defendants claiming compensation in the amount M 150.000.00 plus interest for assault allegedly perpetrated by the defendants in August 2016. This amount is broken down as follows;

- a) Medical expenses M 1 000.00
- b) Pain and suffering M 70 000.00
- c) Emotional shock M 60 000.00
- d) Disfigurement M 10 000.00
- e) Future medical expenses M 5 000.00.00
- f) Destroyed and missing personal belongings M 4 000.00

The exception

[2] The action is opposed by both defendants. The 1st defendant filed his plea on the 16th January 2017. The 2nd defendant excepted to the plaintiff's summons and declaration on grounds that there are no allegations to sustain the claim for emotional shock, in that the plaintiff failed to allege any conduct on the part of the 2nd defendant that resulted in psychological injury to him. He (2nd defendant) is of the view that the pleadings do not disclose a cause of action under this head.

Submissions

[3] Both parties filed their heads of argument, which were augmented by oral arguments on the date appointed for hearing of the exception. On behalf of the excipient, Advocate Nyabela contended that the plaintiff failed to plead psychological injury as an essential element in a claim for emotional shock. He submitted on this basis that the plaintiff's pleadings lack averments to sustain a cause of action for

emotional shock. For this submission, he relied on **Mngomezulu v Minister of Law and Order [2014] ZAKZDHC 34.**

- [4] Relying on **Mount Issa Mines Ltd v Pusey [1970] HCA 60**, and **Bester v Commercial Union Insurance 1973 (1) SA 769 (A)** he submitted further that the plaintiff cannot recover damages for shock which was no more than an immediate emotional response to a distressing experience, but can only successfully claim damages under this head if he suffered some lasting disorder of body and mind.
- [5] On behalf of the plaintiff, Advocate 'Mone contended that the summons and declaration contain sufficient averments that support the plaintiff's claim, and these are that the plaintiff was assaulted, sustained injuries as a result, humiliated and embarrassed, thus suffered emotional shock.
- [6] It was contended in the alternative that the defendant could have requested further particulars or afforded the plaintiff an opportunity to remove the cause of complaint instead of taking the drastic step of excepting to the summons. It was submitted on this basis that the 2nd defendant exception is an irregular step.

Issues

- [7] The issues that arise from the parties' submissions are two-fold. The first is whether the exception amounts to an irregular step by reason that it was not preceded by a notice to the plaintiff to remedy the complaint.
- 7.1** The second is whether the plaintiff's summons and declaration disclose no cause of action for a claim of damages under emotional shock.

The taking of an exception under rule 29

[8] The first issue can quickly be disposed of. Exceptions are governed by Rule 29 of the High Court Rules of 1980. It reads as follows;

- (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 setting 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 informing 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 grounds that it is vague and embarrassing. The grounds upon which this exception is founded must be fully stated.

[9] It is explicit in these provisions that where summons lack averments to sustain a cause of action, the defendant is entitled, without prior notice requesting the plaintiff to remove the cause of the complaint, to except to the summons under Rule 29(1)(a). The notice that the plaintiff's counsel refers to is required under 29(2)(a) where pleadings are alleged to be vague and embarrassing. The taking of the exception is therefore compliant with rule 29(1)(a). I turn now to its merits.

Consideration of the exception

[10] Rule 18(5) of the High Court Rules of 1980 requires the plaintiff's summons to contain a concise statement of the material facts he/she relies upon in support of his/her claim, in sufficient detail to disclose a cause of action. The excipient's argument is that in order to disclose a cause of action under the head, the plaintiff ought to have alleged that he suffered psychological injury as a result of an unlawful conduct perpetrated by the defendants. As stated earlier he relies in **Mgomezulu v Minister of Law and Order** (*supra*) in this regard.

[11] The term cause of action is "ordinarily used to describe the factual basis, the set of material facts that begets the plaintiff's legal right of action". **Evins v Shield Insurance Co Ltd 1980(2) SA 814 A at 825G**. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved by the plaintiff in order to support his right to the judgement. **Mckenzie v Farmers' Co-operatives Meat Industries Ltd 1922 AD 16 at 23**.

[12] It is therefore fundamental that a plaintiff in his summons must allege facts, the proof upon which entitles him to the relief which he claims. **Andrews v Pillay 1954(2) SA 136 at 137 G-H**.

[13] I should add that an exception of no cause of action is justifiably raised when the excipient admits all his opponent's facts but successfully challenges the conclusion based on those facts. **Ramakoro v Peete LAC (1980-84) 94**.

[14] Emotional shock is described as a sudden, painful emotion or fright resulting from the realization or perception of unwelcome or disturbing event which brings about an unpleasant mental condition

such as fear, anxiety or grief. **P.J Visser and J.M Potgieter: The Law of Damages (1993) Juta & Co p400.**

[15] I proceed now to examine the averments contained in the combined summons. The plaintiff avers that on the 11th August 2016 (or thereabout), he was brutally assaulted by the defendants at 704 public Bar situated at Ha Leqele. He states that he was beaten with sticks, punched with fists, hit against the wall and set ablaze with a burning tyre. He avers further that as a result of the assault, he sustained bodily injuries, was injured in his dignity and self-esteem, his clothes were burnt and some personal belongings went missing.

[16] It is undoubtable on the pleaded facts that the plaintiff's life was in danger and he feared for his safety. He could have suffered emotional shock as a result of this. To what extent the shock impacted on his health in order to give rise to a claim of damages under this head is a matter of evidence at trial, because according to **Visser and Potgieter (p90)** if emotional shock is unsubstantial or of a short duration and does not have any real impact on the health of the plaintiff, it is usually disregarded. See also **Bester v Commercial Union Versekeringsmaatskappy Van SA Bpk 1973(1) SA 769(A).**

[17] In **Mgomezulu** case relied on by the 2nd respondent's counsel, the Court there dealt with a secondary victim who claimed inter alia, compensation for emotional shock arising from her daughter's death. Liability was admitted by the defendant so that the only issue before Court was quantum. The case reaffirmed applicable principles stated in the other cases on which the 2nd defendant rely for assessment of damages arising from emotional shock and circumstances under which the sequelae for emotional shock is compensable.

[18] In the instant matter, we are yet to go trial, at the conclusion of which these principles will be relevant for the determination whether on the evidence presented, the plaintiff is entitled to be compensated under this head. For purposes of the exception, the only issue is whether the plaintiff's summons and declaration disclose no cause of action under this head.

[19] A distinction must be drawn between the *facta probanda* or primary factual allegations which the plaintiff must make, and the facts *probantia* (matters of evidence) which the plaintiff will rely in support of his primary factual allegations. See **King's Transport v Viljoen 1954(1) SA 133(K) at 138, Jowell v Bramwell Jones and Others 1998(1) SA 836 at 902-903 (A)**.

[21] Applying these principles in this case, it is difficult to comprehend how the plaintiff's pleading can be said to have disclosed no cause of action under this head. He stated how the defendants perpetrated the assault and tried to kill him. This in my view sufficiently informs the defendant about the nature of the plaintiff's claim. It is not necessary at this stage to state the extent of emotional shock by producing medical reports as this constitutes the *facta probantia* which should be traversed at trial. Here the facts *probanda* are that; the plaintiff was assaulted in the manner described and set alight.

Conclusion

[22] For reasons stated above, I came to the conclusion that the pleading is lucid and logical in that the cause of action appears clearly from the factual allegations made. The exception is therefore without merit and falls to be dismissed. The question whether the plaintiff can sufficiently prove that he is entitled to damages for emotional shock or the extent to which he did suffer emotional shock is an issue of evidence.

Order

[23] In the result, the exception is dismissed with costs.

**P. BANYANE
JUDGE**

For Plaintiff: Advocate 'Mone

For 2nd Defendant: Advocate Nyabela