IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION)

CASE NO: 05023/14

In the matter between:

LINDY OXLEY Plaintiff

And

GEBERIT SOUTHERN AFRICA Defendant

JUDGMENT

FRANCIS J

Introduction

1. The plaintiff instituted an action for damages for R3 054 682.50 against the defendant Geberit Southern Africa for wrongful and malicious prosecution. It is alleged in the particulars of claim that the plaintiff was arrested at her place of her employment in the presence of several co-employees, without a warrant on a charge of theft by members of the South African Police. She was thereafter formally charged with such offence and prosecuted in the Wynberg Regional Court. She remained in custody on 6 May 2013 and on 7 May 2013 she was released on bail. On 4 October 2013 the prosecution against her was terminated when the matter was struck from the criminal court roll in the Wynberg Regional Court.

The background facts

2. The plaintiff pleaded that her arrest occurred after employees of the defendant wrongfully and maliciously set the law in motion by laying a false charge, wrongfully

and negligently, instigating and setting the law in motion by laying such charge against the plaintiff, giving false information, alternatively, unreliable information, implicating the plaintiff in the commission of the alleged offence. Alternatively, such employee/s initiated and instigated the said charge without reasonable and/or probable cause. At all material times, the said employee/s were employed by the defendant, and were acting within the course and scope of his/her/their employment with the defendant.

3. The defendant has delivered exceptions to the plaintiff's particulars of claim in terms of rule 23(1) of the Uniform Court Rules (the Rules) on the basis that they are vague and embarrassing. In the fourth exception, the defendant pleads that the particulars of claim lack the necessary averments to sustain a cause of action based on malicious prosecution in that she has failed to plead that she was either acquitted or that *a nolle prosequi* certificate was issued.

4. The exceptions were set down for a hearing on 31 July 2014. The plaintiff caused a notice to amend to be filed which dealt with some of the complaints raised in the exception. The defendant is only persisting with two exceptions.

The relevant principles

5. It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the abolition of requests for further particulars of pleading and the further requirement that the object of pleadings is to enable each side to come to trial

prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made.

6. The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision.

7. A party may except to a pleading on the grounds that it is vague and embarrassing. Where an exception to a pleading is brought on the ground that it is vague and embarrassing, it involves a two-fold consideration, the first being whether the pleading lacks particularity to the extent that it is vague and the second whether the vagueness causes embarrassment of such a nature that one is prejudiced. This prejudice lies in the excipient's inability properly to prepare to meet the opponent's case.

8. Where a pleading lacks particularity, it is either meaningless or capable of more than one meaning or can be read in any one of a number of ways. Where a court upholds an exception which alleges that the pleading is vague and embarrassing, leave to amend is generally granted to the party which produced the excipiable pleading.

9. The approach to be adopted where a matter involves a complaint that a pleading is vague or embarrassing and hence is excipiable or is in non-compliance with rule 18(4)

was identified in *Jowell v Bramwell – Jones & Others* 1998(1) SA 836 (W) at 905 H – I as follows:

9.1 the question must firstly be asked whether the exception goes to the heart of the claim, and

9.2 if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet, and

9.3 should he find that an exception on any ground fails, to then ascertain in the second place whether the particulars identified by the defendant are strictly necessary in order to plead and, if so, whether the material facts are unequivocally set out.

10. The purpose of an exception that a pleading does not disclose a cause of action is to dispose of the case, as pleaded, in whole or in part. In order to disclose a cause of action, a pleading must set out every fact (material fact) which it would be necessary for the party to prove, if traversed, in order to support his right to judgment of the court. A pleading which fails to meet this standard is therefore excipiable. The excipient has the duty to persuade the court that upon every interpretation which the pleading can reasonable bear, no cause of action is disclosed.

The first exception

11. The plaintiff has pleaded the following in paragraph 9 and 10 of her particulars of claim:

"9. As a result of the aforementioned wrongful and unlawful conduct the Plaintiff has suffered damages in the following amounts:-

9.1 R54 682.50 being the costs reasonably expended by the Plaintiff in defending

herself against the aforesaid charge;

9.2 R270 000.00 being loss of income to date;

9.3 R750 000.00 being loss of employment prospects;

9.4 R1 980 000.00 being damages for contumelia, deprivation of freedom, and discomfort suffered by the plaintiff as result of her arrest and detention, and prosecution as aforementioned.

R 3054 682.50 TOTAL

10. On the 25th of November 2013, the Plaintiff made written demand to the Defendant claiming such damages. A copy of such letter dated 25th November 2013 is annexed marked annexure "B"."

12. The defendant contended that the damages referred to in paragraph 10 of the particulars of claim are those damages referred to in paragraph 9 of the Plaintiff's Particulars of Claim. It is clear from paragraph 4 of Annexure "B" of the particulars of claim that the plaintiff made demand on the defendant in the amounts of R56 682.50 being the costs reasonably expended by the plaintiff in defending herself against the criminal proceedings; and R3 500 000.00 being damages for *contumelia,* deprivation of freedom and discomfort suffered by the plaintiff. No demand and/or an incorrect demand was made for the amounts as pleaded by plaintiff in paragraph 9.2 and 9.3 of the particulars of claim. Moreover, paragraph 4.2 of Annexure "B" is a demand by the plaintiff for payment from the defendant in the amount of R3 500 000.00 in respect of *contumelia*, deprivation of freedom and discomfort suffered by the plaintiff, albeit that the plaintiff claims R1 980 000.00 in paragraph 9.4 of the particulars of claim. It was contended that the plaintiff pleads contradictory allegations.

13. The complaint in the first exception is that the amounts claimed in the letter of

demand is different to the amount claimed in the particulars of claim. This exception is baseless. The letter of demand is not a pleading but is a letter informing the defendant that the plaintiff will be instituting legal proceedings and what amount will be claimed. It is not a statutory notice that must be given. The plaintiff is not bound to the amount claimed in the letter of demand. There is nothing vague or embarrassing in the plaintiff's particulars of claim on the amount claimed. This ground of exception stands to be dismissed.

The second exception

14. The plaintiff pleads the following in paragraph 6 of his particulars of claim:

> *"On or about the 4th day of October 2013, the prosecution against the Plaintiff in the Wynberg Regional Court, was terminated when the said matter was struck from the criminal court's roll."*

15. The defendant pleads that in order to succeed in a claim for malicious prosecution, the plaintiff must *inter alia* allege and prove that the proceedings were terminated in her favour. The aforementioned pleading is bad in law, in that the striking of a matter from the criminal court's roll is not, in and of itself, a termination of the matter in favour of the plaintiff. In order for the matter to be terminated in favour of the plaintiff, the plaintiff is required to allege and prove that she has either been acquitted of the charge or she has received a *nolle prosequi* certificate. In the absence of the aforegoing, the prosecution against the plaintiff has not been fianlised, as same may be replaced on the roll at any time by effecting, either and arrest (warrant) or by issuing of a summons to appear at court. The plaintiff particulars of claim do not contain averments essential to sustain a cause of action in delict for malicious prosecution in that the plaintiff has failed to plead that she was either acquitted or that

a certificate was issued in terms of a *nolle prosequi.* It was contended that the particulars of claim do not disclose a cause of action on the grounds that a striking off of the criminal charges is not akin to either an acquittal or a refusal to prosecute. The question then for determination if whether the pleadings as they stand disclosed a cause of action.

16. The plaintiff's claim against the defendant is for malicious prosecution. It is trite that to succeed with a claim for malicious prosecution, a claimant must allege and prove that:

16.1 the defendants set the law in motion – they instigated or instituted the proceedings;

16.2 the defendants acted without reasonable and probable cause;

16.3 the defendants acted with 'malice' (or *animo iniuriandi) and*

16.4 the prosecution has failed

In this regard see *Minister of Justice and Constitutional Development vs Moleko* 2009 (2) SACR 585 (SCA).

17. The following was stated in *Thompson & Another v Minister of Police & Another* 1971 (1) SA 371 ECD at 375 A – C:

"In an action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated un favour of the plaintiff. This is so because of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actual pending its result cannot be allowed to the prejudged by the civil action (Lemue v Zwartbooi, supra at p 407). The action therefore only arises after the criminal proceedings against the plaintiff have terminated in his favour or where the Attorney-General has declined to prosecute. To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceedings from arrest to acquittal

must be regarded as continuous, and no action personal injury done to the accused person will arise until the prosecution has been determined by his discharge. (Bacon v Nettleton, 1906 T.H. 138 at pp 142-3).

18. The criminal proceedings that were instituted against the plaintiff in the criminal courts were not terminated in her favour. All that happened was that the matter was struck from the roll. This is not akin to an acquittal or the termination of the matter against her. The particulars of claim therefore do not disclose a cause of action. This exception is in the circumstances upheld.

19. There is no reason why costs should not follow the result.

20. In the circumstances I make the following order:

20.1 The first exception filed by the defendant is dismissed.

20.2 The second exception filed by the defendant is upheld.

20.3 The plaintiff is to pay the costs of the application.

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FRANCIS J

HIGH COURT JUDGE

FOR PLAINTIFF	:	L PILLAY INSTRUCTED BY SHAFIQUE SARLIE & ISMAIL INC
FOR DEFENDNT	:	V VERGANO INSTRUCTED BY SCHINDLERS ATTORNEYS
DATE OF HEARING	:	31 JULY 2014
DATE OF JUDGMENT	:	8 AUGUST 2014