

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 41469/2012

31/3/2014

In the matter between:

SIMON NKUBA MOKONE

and

OPLATE WHICH EVER IS NOT APPLICABLE	
FILED: YES/NO.	
PLAINTIFF/APPLICANT	
FILED WITH OTHER JUDGES: YES/NO.	
REVISED.	
31 March 2014	<i>[Signature]</i>
DATE	SIGNATURE

INVESTEC BANK LIMITED

DEFENDANT/RESPONDENT

JUDGEMENT

TLHAPI

[1] For convenience the parties shall be referred to as plaintiff and the defendant. In an action instituted by the defendant under case number 16838/2012 the plaintiff filed an exception to the defendant's particulars of claim, which resulted in the defendant unconditionally withdrawing its action against the plaintiff and tendering the costs of such withdrawal. In this action the plaintiff sued for damages suffered as a result of such action instituted by the defendant, where he alleged that the action was brought for intentional and malicious. For reasons given below I shall only deal with the exception raised in respect defendant's response to paragraph 3 of the

particulars of claim.

[2] Plaintiff's exception reads as follows:

“ 1.

1.1 *Plaintiff's description in the present claim bears similar description in the defendant's description of him in its erstwhile claim under case no. 16838/20124...*

1.2 *Defendant admits having instituted the erstwhile case against the plaintiff under case no. 16838/12;*

1.3 *However, in light of the aforesaid admission and in contradiction thereof, defendant pleads that it has no knowledge of the allegation in relation to the plaintiff's description and accordingly denies them and puts them to the proof thereof;*

1.4 *This denial does not disclose a defence to the plaintiff's claim in that it is incompetent in law and under the circumstance;*

2.

2.1 *Defendant has admitted all of the essential elements of plaintiff's allegation in relation to the delict committed by the former in paragraph 3 of the particulars of claim.*

2.2 *These admissions coupled with the necessary implications flowing therefrom do not disclose a defence to the plaintiff's claim.*

2.3 *The defendant's concomitant denial of the cause of action in paragraph 4 of the plea fails to disclose a defence to the plaintiff's claim as they*

constitute negative pregnant in one of more of all of the following considerations viz:-

It is open to interpretation that the defendant

2.3.1 denies instituting the erstwhile case against the plaintiff;

2.3.2 admits instituting the erstwhile case against the plaintiff but denies animus iniuriandi on its part;

2.3.3 denies the grounds alleged by the plaintiff which inform the foundation of animus iniuriandi.

2.4 Consequently the plea does not disclose a defence because defendant:-

2.4.1 has already admitted institution of the erstwhile case without qualification;

2.4.2 in its unspecified denials in paragraph 4 of its plea does not discount or negative the legal effects of its admissions of plaintiff's allegation and legal conclusions flowing from paragraph 3 of the particulars of claim.

2.5 The defendant's allegation of the marriage between the enormity of the claim amount and the abuse of process has neither legal basis nor foundation in fact and ultimately lacks particularity to disclose any defence to plaintiff's claim"

The plaintiff prayed for the setting aside of the defendant's plea, granting leave to the defendant to amend its plea and costs of the exception.

[3] The defendant pleaded as follows:

“PARAGRAPH 3

3.1 The defendant instituted action against the plaintiff under cased number: 16838/2012

3.2 The plaintiff noted an exception to the defendant's particulars of claim whereafter the defendant withdrew the action and tendered the wasted costs.

3.3 Save as for the aforesaid, the defendant denies each and every allegation herein;

PARAGRAPH 4.1 TO 4.6

The defendant denies each and every allegation herein as if specifically traversed

[4] It was submitted in the Heads of Argument filed on behalf of the plaintiff that the exceptions were brought in terms of Rules 18(5) and 22 (2) of the Rules of Court. During argument I informed counsel that in my view the first exception taken was of no consequence and did not prejudice the plaintiff to such a degree that the plea should be interfered with, and that they deal with the second exception. Rule 22 (2) should be read together with rule Rule22 (3), the rules provide:

Rule 22 (2)

“ *The defendant shall in his plea either admit or deny or confess and*

avoid all material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies”

Rule 22 (3)

“ Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea”

[5] The plaintiff argued that the malicious nature was compounded by the fact that not only did the defendant institute action against the plaintiff but also the sessionary both whom were represented by the same firm of attorneys.

[6] It was submitted for the defendant that while it was intended to argue the exception under Rule 22, the argument for the plaintiff was such that it presented as one where the exception was based purely on grounds that the defendant's pleadings were vague and embarrassing. The applicable rule was that the exception raised was one in terms of Rule 23 which dealt with vague and embarrassing pleadings, and that the plaintiff had failed to seek clarification of defendant's pleadings by way of notice allowing the defendant to remove the cause of complaint before taking the exception as was required by the said rule. At this stage of the proceedings and in addressing the exception it is not appropriate to address issues whether plaintiff's action constitutes an abuse of process.

Rule 23 (1)

“ *Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain a ..defence, the opposing party may....deliver an exception thereto.....Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall ...by notice afford his opponent an opportunity of removing the cause of complaint....*

[7] The main submissions on behalf of the plaintiff appear under point 3 of the Heads of Argument where counsel discusses ‘*legal principles in regard to exceptions*’. It was submitted at paragraph 3:

‘A pleading lacks averments which are necessary to sustain a defence... if a pleading does not justify the conclusions drawn therein.....thus an exception founded upon the contention that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence at the trial’

“an exception founded upon the contention that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence

[8] As I see it the cause of complaint is not only levelled against the failure to make averments necessary to sustain a defence, it is the manner in which the

defendant couched its denial of the required *animus iniuriandi* while in same vain admitting certain elements of what was required to be proved by the plaintiff.

The defendant has admitted it instituted the action, that it withdrew the action after plaintiff had successfully excepted to its particulars of claim on the grounds that it did not have *locus standi*. Another element which the plaintiff has to prove in order to be successful is that the case was initiated for an improper purpose. In my view it is this latter element at which the complaint is levelled which was not satisfactorily pleaded by the defendant.

[7] While a plethora of cases were referred to in the heads of argument for the plaintiff, addressing Rule 22, I am of the view that there are grounds for an exception however, I am inclined to agree with counsel for the defendant that the real cause of complaint was that the defendants plea was vague and embarrassing. I arrive at this conclusion having had regard to the submissions for the plaintiff and according to what was stated paragraph 5 above and the cases referred to therein. In Erasmus's Superior Court Practice a commentary on Rule 22 at B1-148A the following is stated:


"Shall be deemed to be admittedwhere a plaintiff is embarrassed by an apparent contradiction arising from the absence of a precisely targeted denial of a particular averment in the particulars of claim, the plaintiff's remedy lies in a notice to the defendant to cure a vague and embarrassing pleading in terms of rule 23(1)"

In this matter no such notice was given. The requirement to give notice is obligatory. I have not considered the issue whether such notice can still be given since it shall have been made out of time. There is however nothing precluding the plaintiff from

seeking condonation.

[8] In the circumstance the following order is given:

‘The exception is dismissed with costs.



TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	26 MARCH 2014
JUDGMENT RESERVED ON	:	26 MARCH 2014
ATTORNEYS FOR THE APPLICANT	:	MOKONE & MOKONE ATT
ATTORNEYS FOR THE RESPONDENT	:	GILDENHUYS MALATJI INC