



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case No: 47072/2021**

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED                             |

05/04/2022  
DATE

  
SIGNATURE

**WESBANK, A DIVISION OF  
FIRSTRAND BANK LIMITED**

Excipient

and

**JOHAN JOSEPH STEIN**

Respondent

In re:

**JOHAN JOSEPH STEIN**

Plaintiff

and

**THE MINISTER OF POLICE OF THE  
REPUBLIC OF SOUTH AFRICA**

1<sup>st</sup> Defendant

**WESBANK, A DIVISION OF  
FIRSTRAND BANK LIMITED**

2<sup>nd</sup> Defendant

Summary: Summons – exception – no cause of action – exception dismissed

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## JUDGMENT

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**PHOOKO AJ:**

### INTRODUCTION

- [1] This matter concerns an averment by the Excipient (Second Defendant in the main action) that the Respondent's (Plaintiff in the main application) summons does not disclose a cause of action.
- [2] The matter came before me sitting in the opposed motion court on 14 March 2022. All the parties were represented. On the same day, I granted an order in favour of the Respondent. This judgment sets out the reasons for my ruling against the Excipient.

### THE PARTIES

- [3] The Excipient/Second Defendant is Wesbank, a division of FirstRand Bank Limited, a bank registered in terms of the company laws of the Republic of South Africa, whose main address of the business is 1 Enterprise Road, Fairland, Randburg.
- [4] The Respondent in the interlocutory application is Johan Joseph Stein who is a businessman residing at 6 Anricke Place, Noordwyk, Midrand, Gauteng.
- [5] The Minister of Police of the Republic of South Africa whose place of business is in Pretoria is the First Defendant in the main application and has not raised an exception to the Respondent's summons.

## **JURISDICTION**

- [6] The main cause of action arose within the jurisdiction of this Court. Therefore, this Court has the power to adjudicate this matter.

## **THE ISSUES**

- [7] The main issue to be decided by this Court is whether the Respondent's summons does disclose a cause of action. If so, does the Excipient's application fall to be dismissed?

## **THE FACTS**

- [8] On 26 May 2021, the Plaintiff was arrested for fraud in one of the busiest places known as Sunnyside in Pretoria by Warrant Officer Motati who is in the employ of the South African Police Service. The Plaintiff was thereafter held in custody for three days at the Sunnyside Police Station whereafter he was released.
- [9] The Plaintiff was arrested due to charges that were "wrongfully and maliciously" instituted by one Angelo Stewart who is a representative of the Excipient/Second Defendant.<sup>1</sup>
- [10] Following his release, the Plaintiff caused summons to be issued claiming general damages for the amount of R750 000.00 against the First Defendant and the Second Defendant (Excipient) for inter alia,<sup>2</sup> unlawful arrest and detention, impairment of dignity, deprivation of freedom of movement, and discomfort among others.

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<sup>1</sup> See Plaintiff's Particulars of Claim para 8.

<sup>2</sup> Plaintiff's Particulars of Claim para 10.

## APPLICABLE LAW

[11] Our law requires an Excipient to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.<sup>3</sup> Furthermore, the onus rests upon the Excipient to persuade the court that no cause of action can be ascertained from a pleading in question amongst others.<sup>4</sup> As was correctly held in *Frank v Premier Hangers CC*<sup>5</sup> where Griesel J said:

“In order to succeed in its exception, the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant’s plea and counter-claim can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld.”

[12] Moreover, in *Vermeulen v Goose Valley Investments (Pty) Ltd* Marais JA, supported by other members of the court, said:

“It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law”.<sup>6</sup>

[13] Considering the above, it is evident that when considering an exception, this Court must consider the allegations contained in the particulars of claim, and

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<sup>3</sup> *Theunissen & andere v Transvaalse Lewendehawe Koöp* BPK 1988 (2) SA 493 (A) at 500E-F; *First National Bank of Southern Africa Limited v Perry N.O. & others* 2001 (3) SA 960 (SCA) at 965C-D.

<sup>4</sup> *Shell Auto Care (Pty) Ltd v Laggar and Others* 2005 (1) SA 162 (D).

<sup>5</sup> 2008 (3) SA 594 (C) at para 22.

<sup>6</sup> *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A) para 11.

then consider the pleadings as a whole. Only the facts contained in the pleadings can be brought into the issue and nothing more. The Excipient must make out his or her case based on the pleadings.

[14] I need to emphasize from the onset that in the present case, the exception is brought on the basis that no cause of action is disclosed on the pleadings.<sup>7</sup> In particular, the Excipient's case is that "the sole ground of exception is that the Plaintiff does not comply with the requirements set for the successful institution for malicious prosecution".<sup>8</sup>

[15] Below, I deal with the submissions of the parties.

### **EXCIPIENT'S SUBMISSIONS**

[16] In its written submissions and during oral proceedings, the Excipient tried, rigorously so, to persuade this Court that no cause of action is disclosed in the pleadings.

[17] The Excipient's case is that in an action for a claim for damages caused by malicious criminal proceedings, the Plaintiff "*bears the onus in respect of all the elements for injuria*".<sup>9</sup> To this end, the Excipient further argued that the Respondent must prove the prescribed four elements to succeed with a claim for malicious prosecution. The said elements are namely:

- a. Defendant set the law in motion;
- b. Defendant acted without reasonable and probable cause;

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<sup>7</sup> Excipient's Heads of Argument paras 3.2 to 3.4, 3.13, 4.1 amongst others.

<sup>8</sup> Excipient's Heads of Argument para 1.

<sup>9</sup> Excipient's Heads of Argument para 3.8.

- c. Defendant acted with malice; and
- d. Prosecution has failed.

[18] The Excipient, therefore, argues that the Respondent has not complied with the aforesaid requirements and “*does not allege of any the other to be successful with a claim for malicious prosecution*”.

[19] The Excipient also relies on the Defendant’s particulars of claim in that:

“the whole of the Plaintiff cause of action against the Excipient is set out in paragraph 8 of the Particulars of Claim wherein it is only alleged that the charges on which the Respondent was allegedly arrested, were wrongfully and maliciously instituted by a representative of the Second Defendant . . . who was at the all material times thereto acting within the course and scope of his employment with the Second Defendant. The Second Defendant is thus vicariously liable”.<sup>10</sup>

[20] Considering this, the Excipient argues that the respondent does not “*allege that the prosecution has failed*”.<sup>11</sup> According to the Excipient, the claim for malicious prosecution cannot be initiated because of the pending proceedings.

## **RESPONDENT’S SUBMISSIONS**

[21] The Respondent argued that the exception falls to be dismissed on the basis that it was never the Respondent’s/Plaintiff’s case to institute a claim for malicious

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<sup>10</sup> Excipient’s Heads of Argument para 3.11.

<sup>11</sup> Excipient’s Heads of Argument para 3.12.

prosecution.

[22] The Respondent further contended that there is nowhere in their particulars of claim where they have pleaded a claim for malicious prosecution.

[23] To this end, the Respondent argued that they have no obligation whatsoever to comply with the requirements for malicious prosecution.

## EVALUATION OF SUBMISSIONS

[24] I now turn to consider the submissions made by counsel for the parties. Before I do so, I need to *inter alia* ask whether the Excipient is aware of the claim that he/she must meet in the circumstances of the main case.<sup>12</sup> In *McKelvey v Cowan NO*<sup>13</sup>, the court stated that:

“It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.”

[25] The Excipient largely focused its case on the claim of malicious prosecution. In my view, they have completely missed the Respondent’s case. The Respondent has correctly pointed out that there is nowhere in its particulars of claim where it had pleaded a claim for malicious prosecution.

[26] In addition, the large parts of the Excipient’s heads of arguments merely describe what an exception entails in general. At no stage, did the Excipient argue that a

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<sup>12</sup> *Jowell v Bramnell Jones and Others* 1998 (1) SA 836 (W) at 905E-H.

<sup>13</sup> 1980 (4) SA 383 (D) at 393F-G.

specific aspect of the pleadings does not show a cause of action and/or that they do not know what case they must meet.

[27] On the contrary, when counsel for the Excipient was asked by this court on what it meant when he on one hand said that it was not clear from the particulars of claim what the Respondent wants but on the other hand said that when one reads the particulars of claim, one can get what the Respondent's cause of action is, counsel's response was that one can partly get what the Respondent's cause of action is. Counsel for the Excipient then proceeded to argue the requirements for a claim for malicious prosecution.

[28] In my view and as partly conceded by the Excipient before this Court, the Excipient can deduce what damages are being claimed for by the Respondent. This was his admission before this Court. I found myself persuaded by Makgoka J in *Living Hands (PTY) Ltd and Another v Ditz and Others*<sup>14</sup> where he said:

**“ . . . An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and unradical embarrassments caused by a pleading can and should be cured**

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<sup>14</sup> 2013 (2) SA 368 (GSJ) para 15.



**by further particulars. . .”.** (Own emphasis added).

[29] In my view, a simple reading of the particulars of claim does not show that the Respondent’s action is based on malicious prosecution but that it is rather a claim for wrongful and malicious institution/laying of charges for fraud at the Police Station. This answers the legal issue in this matter. Accordingly, it cannot be said that the Excipient does not know the case that they are facing.

[30] In my view, the Excipient has failed to persuade this Court that upon every interpretation which the Defendant’s particulars of claim can reasonably bear, it does not disclose a cause of action. The Excipient focused on malicious prosecution something that does not form the Defendant’s case.

## **COSTS**

[31] During oral argument, Counsel for the Excipient submitted that costs should be awarded on a scale between attorney and client. Indeed, it is within the rights of a successful party to recover the necessary costs spent in litigation for any unfounded claim. However, the Excipient has not been successful in this case. Further, there is no justification whatsoever to award costs in their favour.

[32] The Respondent has been a successful party in this matter. It is only just that the costs should follow the result.<sup>15</sup>

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<sup>15</sup> *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1 para 112.

**CONCLUSION**

[33] After reading through the papers and hearing counsel on behalf of the parties, I grant judgment in favour of the Respondent as follows:

- (a) The Excipient's application is dismissed with costs; and
- (b) The Excipient is ordered to pay the costs of this application on a party and party costs on the High Court scale.



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**M R PHOOKO AJ**

**ACTING JUDGE OF THE HIGH  
COURT, GAUTENG DIVISION,  
PRETORIA**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 05 April 2022.

**APPEARANCES:**

Counsel for the Excipient: Adv. HP PSAJ Jacobs

Instructed by : Hack Stuppel & Ross Attorneys

Counsel for the Respondent: Adv. PM Ramoshaba

Instructed by: Calvin Maile Attorneys

Date of Hearing: 14 March 2022

Date of Judgment: 05 April 2022