



ERICA BEUKES AND ANOTHER v DANIËL PETRUS BOTHA AND 3
OTHERS

CASE NO. (P) I 111/2004

2008/07/15

Maritz, J

PRACTICE

CASE NO. (P) I 111/2004

Practice – pleadings – lay litigants – not to be held to same standard of skill and draughtsmanship as required of legal practitioners – pleadings of lay litigants to be construed generously and in light most favourable to their case

Practice – lay litigants – constitutional notions of fairness and equality – whatever latitude of form or technique may be allowed for lay litigants, courts must ultimately treat litigants equally when adjudicating substance of claims

Practice – administration of justice – bringing it into disrepute - access to courts – lay litigants not to be deprived or discouraged to bring *bona fide* justiciable claims to Court but tyranny of litigation by entertaining claims without legal substance to be avoided

Practice – exceptions – *actio injuriarum* – irrespective of ultimate onus relating to wrongfulness or *animus injuriandi* if publication of defamatory matter be proved, necessary to allege those elements in particulars of claim

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERICA BEUKES

First Plaintiff

HEWAT BEUKES

Second Plaintiff

versus

DANIËL PETRUS BOTHA

First Defendant

HEDWIG ROSE JUNIUS

Second Defendant

HANS PIETERS

Third Defendant

PETER KOEP

Fourth Defendant

CORAM: MARITZ, J.

Heard on: 2004-06-25

Delivered on: 2008-07-15

JUDGMENT

MARITZ, J.:[1] The excipients, who are all trustees of the Peace Trust (and to whom I shall refer to as “the defendants” hereunder), have taken a number of exceptions against the plaintiffs’ particulars of claim in an action instituted against them jointly and severally for payment of - (a) N\$127,000.00 p.a. in respect of the loss and future loss of the first plaintiff’s salary for the period 1st August 2000 to 31st May 2014; (b)

N\$471,773.00 for the loss of first plaintiff's pension and future pension and policy values; (c) N\$500,000.00 for first plaintiff's "defamation internationally"; (d) N\$300,000.00 for each of the plaintiffs for invasion of their privacy and (e) N\$300,000.00 for the second plaintiff in respect of "breach of copyright and gross abuse of intellectual property rights".

[2]Consistent with their attitude that their claims arise from a single cause of action (i.e. first plaintiff's "fraudulent inducement to enter into an employment contract" with the Peace Trust) from which subordinate but inseparable other causes have arisen, the plaintiffs' particulars of claim are a hotchpotch of narrative allegations, inferences, references, comments and claims. They are, however, lay litigants who have appeared in person and deficiencies in form should generally not be allowed to detract from their right to seek justice if they have been injured or their rights have been infringed. In *Xinwa v Volkswagen of SA (Pty) Ltd*, 2003 (4) SA 390 (CC)¹ at 395C-E the Constitutional Court of South Africa held:

"Pleadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance."

¹ Also reported as 2003 (6) BCLR 575

It is a long-standing, well-honoured and eminently desirable attitude of courts not to deprive or discourage those unable to afford legal representation of access to the courts and the opportunity to have their rights and obligations determined in the course of a fair hearing. To facilitate ventilation of the issues which call for judicial determination, courts “will make allowance for the fact that such a person cannot be expected to display the same ability of draughtsmanship and precision of language as is expected by a legally trained and experienced pleader.”²

[3]I shall therefore construe the particulars of claim “generously and in the light most favourable” to the plaintiffs and, whatever the deficiencies in draughtsmanship may be, isolate and extract the substance of their claims in assessing the merits of the defendants’ exceptions thereto. The substance of the claims, generously construed, must however be sufficient to sustain the causes of action and cannot be so vague, conflicting or otherwise embarrassing that the defendants will not know which allegations to plead to or which case they will have to meet. Just as the inaccessibility of Courts for indigent persons or lay litigants may bring the administration of justice into disrepute, so may the tyranny of litigation if every personal grievance without legal substance cloaked as a

² *Per* Steyn AJ in *Viljoen v Federated Trust Ltd*, 1971 (1) SA 750 (O) at 757B – C. See also: *ABSA Bank Ltd v Dlamini*, 2008 (2) SA 262 (T) at 268B.

claim is entertained against defendants - many of whom may eventually end up with judgments in their favour on paper but no real prospect to recover the costs they have been put up to without cause. Whatever latitude of form or technique may therefore be accorded to lay litigants to bring *bona fide* justiciable claims to court, the constitutional notions of fairness and equality³ demand that the courts must ultimately treat all litigants equally when they adjudicate the substance thereof. A lay plaintiff who is unable to make averments sufficient to sustain the elements of a justiciable claim should not be allowed to put a defendant to the emotional and financial (often unrecoverable) costs of a protracted hearing or trial. Steyn AJ (as he then was) continued the passage earlier quoted in *Viljoen's* case with the following moderating reminder:⁴

“On the other hand the Court will not ignore the interests of the excipient and will not allow mere inexperience in matters of pleading to excuse serious non-compliance with the requirements of the Rules of Court which are, after all, based on notions of justice and fair play to both sides in litigation.”

[4]Pleadings, Mr Heathcote emphasised during argument on behalf of the 1st to 3rd defendants –

“... are intended to define the issues between the parties; it enables the litigants to focus their attention during preparations for an at the trial itself on evidence necessary to address those issues and on the legal

³ Compare Articles 10 and 12(1)(a) of the Constitution

⁴ In *Viljoen v Federated Trust Ltd*, *supra* at 757C

principles relevant thereto; it limits the ambit within which the court will allow the trial to be conducted and ultimately, contributes to a more expeditious and cost-effective adjudication of the case. The requirements of a fair trial demand that each party should know the case he or she will be required to meet.”⁵

Drawing on the discussion in *Beck’s* on the same point,⁶ the plaintiffs submitted *in limine* that the defendants’ exceptions should be dismissed because they do not set out the grounds on which they are founded clearly and concisely and, therefore do not allow for “principled and logical disputations” in a “dialectic” discussion thereof. The plaintiffs dismissed the exceptions as “meaningless and obscure” and asked the Court to do the same with costs. The Court instead dismissed the plaintiffs’ *in limine*-objection to the exceptions at the hearing and held that the grounds upon which they are founded have been clearly and concisely stated – as will be apparent from the discussion which follows.

[5]The exceptions of the first to third defendants (represented by Mr Heathcote) and that of the fourth defendant (represented by Mr Smuts) are not identically worded but are substantially the same. They relate only to the last three of the five claims I have referred to earlier, i.e. those based on defamation, invasion of privacy and breach of copyright. In what follows, I shall deal with the exceptions in that order.

⁵ *Erwin Roslia Ludovic Sprangers v FGI Namibia Ltd*, unreported judgement of the High Court dd. 29 January 2002 in Case No. (P) I 678/2000, pp 6-7

⁶ *Beck’s Theory & Principles of Pleading in Civil Actions*, 6th ed., pp 43-44.

[6]The first exception is that particulars of the first plaintiff's claim of N\$500,000.00 for "defamation internationally" do not contain sufficient averments necessary to sustain the action, more particularly because the particulars of claim as amplified by further particulars do not - (i) state essential facts and particulars as to any defamatory statement allegedly made by the defendants or for which they could be liable; (ii) state essential facts and sufficient particulars as regards to the publication of any alleged defamatory statement relied on; (iii) allege the defamatory nature and wrongfulness of any alleged defamatory statement or statements and (iv) allege *animus injuriandi* on the part of the defendants. If one considers that defamation by an individual is the "unlawful, intentional, publication of defamatory matter (by words or conduct) referring to the plaintiff, which causes his reputation to be impaired,"⁷ it is at once clear that the exceptions relate to the first plaintiff's failure to make factual allegations sustaining a number of the delict's elements.

[7]Picking out the pieces of meat from the hopscotch of allegations to give substance to the first plaintiff's claim for defamation (and leaving the citation of the litigants aside for the moment), the most generous

⁷ See: Jonathan M Burchell, *The Law of Defamation in South Africa*, 1985 at p.35

construction allows for the following abstract (with the relevant paragraphs from which the allegations have been extracted appearing in brackets):

- (a) During the course of her employment as Chief Executive Officer of the Peace Trust from September 1999 (13) to June 2000 (19) the defendants defamed the first plaintiff (21) by maintaining a campaign (21) in which they orally and in writing (1.2 of further particulars) created the false impression with the donors of the Trust (19), “Brot für die Welt” and “ICCO” (15), that -
 - (i) first plaintiff had received their donations to the Trust (19) and was responsible to account for them (15 and 22) but expended the funds without a budget (19) and without being able to report on (21) or to account for the funds (19, 21 and 1.2 of further particulars);
 - (ii) first plaintiff had misappropriated the funds of the Trust (1.2 and 1.5 of further particulars);
 - (iii) the first plaintiff was incompetent (21) and by effecting her summary suspension and dismissal on fraudulent grounds, they impressed upon donors, patients and associates of the Trust that the first plaintiff had been dismissed for incompetence and fraud (2 of further particulars).
- (b) In doing so the defendants acted *mala fides*, dishonestly and with ulterior motives (27 and 29), thereby destroying the first plaintiff’s career and good name (27) and impugned her reputation internationally (29) as a result of which she suffered losses in the amount of N\$500 000.00 (29 and 35).

[8] In deciding the exceptions “the Court must remind itself that, having taken the exception, the defendant must satisfy the Court that, on all reasonable constructions of the plaintiff’s particulars of claim as amplified and amended ...and on all possible evidence that may be led on the pleadings ...no cause of action is or can be disclosed”⁸. With this

⁸ *Namibia Breweries Ltd v Seelenbinder, Henning & Partners*, unreported judgment of the High Court dd. 12 February 2002 in Case No. (P) I 1606/1999, pp 7-8. Compare also the judgments in *Kennedy v Steenkamp*, 1936 CPD 113 at 115; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd*, 1948 (2) SA 891 (C) at 893; *Callender-Easby*

approach in mind, I am satisfied that, on the generous construction given to the plaintiff's particulars of claim, it contains sufficient particulars of when the alleged defamatory statements have been made; by whom they have been made; to whom they have been published; what the alleged contents and ordinary meaning of the statements are and that they have been published of and concerning the first plaintiff. It is, in my view, *prima facie* evident from the ordinary meaning of the statements allegedly published by the defendants to the donors that they imputed the character and reputation of the first plaintiff and that it is not necessary for the first plaintiff to rely on any *innuendo* or secondary meaning. The exceptions on these points must therefore fail.

[9]The remainder of the exceptions to this claim relate to the first defendant's failure to allege wrongfulness and *animus injuriandi* on the part of the defendants. Both unlawfulness and *animus injuriandi* are essential elements of the *actio injuriarum*, of which the action for defamation is a species.⁹ In dealing with the requirement that *animus injuriandi* should be pleaded¹⁰ irrespective of any presumptions which may arise during the trial if publication of defamatory matter of and

and Another v Grahamstown Municipality and Others, 1981 (2) SA 810 (E) at 812H-813A); *Theunissen en Andere v Transvaalse Lewendehawe Koop Bpk*, 1988 (2) SA 493 (A) at 500E; *Lewis v Oneanate (Pty) Ltd and Another*, 1992 (4) SA 811 (A) at 817F-G and *McKelvey v Cowan NO*, 1980 (4) SA 525 (Z) at 526D-G referred to therein)

⁹ Burchell, *ibid.* See also *Maisel v Van Naeren*, 1960(4) SA 836 (C)

¹⁰ Other than in instances envisaged in *Pakendorf en Andere v De Flamingh*, 1982 (3) SA 146 (A) involving the public media

concerning the plaintiff has been proven, Wessels JA said in *Moaki v Reckitt & Colman (Africa) Ltd*, 1968 (3) SA 98 (A) at 105G-106D:

“Relying on certain dicta in those judgments, counsel submitted that on the facts alleged in the pleadings the law presumes that the respondents acted *animo injuriandi*, and that it followed, therefore, that an averment to that effect was implicit in the pleadings. The submission is without substance. The authorities cited above clearly indicate not only that *animus injuriandi* is an essential element in defamation, but also that the plaintiff must aver its presence in his pleadings. If this allegation (which is one of fact) is placed in issue in the further pleadings, the onus of proof in respect thereof remains throughout on the plaintiff. In saying that the law presumes the existence of *animus injuriandi* where there is proof of the publication of defamatory matter by the defendant, no more is meant in my opinion than that at the trial the proved fact of the publication of defamatory matter by the defendant itself affords evidence (though not necessarily proof) of the further fact in issue, namely, the defendant's state of mind. A similar 'presumption' might no doubt assist the appellant at the trial if he were to establish the absence of reasonable and probable cause, but it cannot be invoked to rescue him at the pleading stage from the failure to make the requisite averment that the respondents acted *animo injuriandi*. I do not propose to proceed to a detailed analysis of the pleadings. In my opinion they do not furnish any valid basis for the implication of the averment contended for on appellant's behalf. This is not the type of case where proof by the plaintiff of certain facts throws the onus on the defendant to establish certain other facts in order to defeat the plaintiff's claim. The facts in respect of which the onus rests on the defendant need not be averred in the plaintiff's pleadings. See *Commissioner of Customs v Watch Tower Bible & Tract Society*, 1942 AD 203. As I have already indicated, proof of the want of reasonable and probable cause does not cast upon a defendant the onus of proving that he did not act *animo injuriandi*. If that were to have been our law, counsel's submission would no doubt have been one of substance.

The failure to aver either expressly or by necessary implication that the respondents acted *animo injuriandi* renders the appellant's particulars of claim defective in that it fails to disclose a cause of action. The Court a quo rightly upheld the exception.”

[10]By parity of reasoning, the same applies to the element of unlawfulness in the context of defamation. In arriving at this conclusion, I am mindful of authorities to the effect that the allegation of “malice” may suffice to suggest *animus iniuriandi* in the context of the *actio iniuriarum*.¹¹ The meaning of “malice” must, however, be distinguished from the labels attached by the first plaintiff to the defendants’ intentions. The ordinary meaning of the word “malice” conveys “the desire to do harm to someone”¹² whereas the words “*mala fides*, dishonestly and with ulterior motives” used by the first plaintiff convey the intention to deceive – which, I should add, ties up with the first plaintiff’s allegation that it was actually the first defendant who had “received,” “misappropriated and expended the Peace Trust’s funds” and should have accounted for it but, instead, she had been presented to the donors as the scapegoat and her “dismissal was intended or in any event had the effect of barring the (her) to refute and disprove defendant’s in particular first defendants communications in writing and verbally that first plaintiff had misappropriated funds and could not account for it...”(sic). The first plaintiffs allegation of “*mala fides*, dishonestly and with ulterior motives” on the part of the defendants do not, in my view, even on a generous construction, convey the notion that the injurious words have been published either unlawfully or with the “deliberate

¹¹ *Heyns v Venter*, 2004 (3) SA 200 (T) at 208D-H and the authorities referred to.

¹² *Concise Oxford English Dictionary*, 10th ed. (2002)

intention to inflict injury”.¹³ I am therefore of the view that the exception against the claim based on defamation should be upheld on these two grounds.

[11] The exceptions against the plaintiffs’ claims for invasion of their privacy, again, are based on the failure of the plaintiffs to allege unlawfulness and *animus injuriandi* as essential elements of this cause of action. The infringement of their privacy, the plaintiffs allege, follows on the inclusion in evidence by the Board of the Peace Trust of private correspondence of the plaintiffs (being a letter from one Dot Gibson to the plaintiffs) and “intellectual property” of the second plaintiff (being an “Election Report to the Workers International”) during the hearing of the first plaintiff’s complaint that she had been dismissed unfairly in the District Labour Court. It is further alleged that “they” had “invaded and copied (the documents) without the knowledge and permission” of the plaintiffs.

[12]The plaintiffs referred me extensively to laws and principles relating to the protection of their right to privacy. I do not intend them any disrespect if I decline to deal with those arguments. The right to privacy in general and at the workplace in particular, is not in issue. The

¹³ *Neethling v Du Preez; Neethling v The Weekly Mail*, 1994 (1) SA 708 (A) at 769 (A)

exceptions relate to their failure to allege unlawfulness and an intention to cause them injury by the alleged acts of intrusion and disclosure. To constitute a cause of action, the conduct of the defendants must both be wrongful and be with intent to cause injury to the personality of the plaintiffs. In their extensive work on the *Law of Personality*, Neethling, Potgieter and Visser says (at p.276):

“Apart from the wrongfulness of the infringement of privacy, intent or *animus iniuriandi* is also required before liability can be established. This means that the perpetrator must have directed his will to violating the privacy of the prejudiced party (direction of the will), knowing that such violation would (possibly) be wrongful (consciousness of wrongfulness). In the absence of any of these elements, there is no question of intent.”

[13]An action based on infringement of the right to privacy is an incidence of the *actio injuriarum* and the remarks made earlier in this judgement on the need to allege wrongfulness and *animus injuriandi* in defamatory actions apply to these instances with equal force. Harms AJA formulated the general principle as follows in *Jansen van Vuuren & Another NNO v Kruger*:¹⁴

“As a general rule, and irrespective of the ultimate onus, a plaintiff who relies on the *actio injuriarum* must allege *animus iniuriandi* ...- something the plaintiff had failed to do. However, as was pointed out in *Jackson v SA National Institute for Crime Prevention and Rehabilitation of Offenders*, 1976 (3) SA 1 (A) at 13F-H, the averment need not be express if 'the alleged *injuria* is obviously an infringement of personality, or where the facts pleaded allow of an inference of *animus injuriandi*'”.

¹⁴ 1993 (4) SA 842 (A) at 849C-E

Given the allegation that the two documents were handed in as evidence in the course of judicial proceedings and the absence of allegations as to how they had been obtained, the particulars of claim do not contain allegations justifying an inference of *animus injuriandi*. The exceptions against this claim must therefore also succeed on these two grounds.

[14]The fourth defendant's exception raises a further ground: He requested particulars from the plaintiffs "as to when, where and in what manner ... (he) invade(d) the plaintiffs' privacy". The plaintiffs responded as follows:

"The board of the Peace Trust of which the fourth defendant is a member entered correspondence of plaintiffs and submitted same as evidence. A letter from a friend in London addressed to 'Erica and Hewat'; 'election report to workers international'."

Having been cited and apparently sued in his personal capacity, the fourth defendant excepts to the particulars of claim on the basis that they do not contain averments as to any conduct of the fourth defendant, in the capacity sued, invading the privacy of the plaintiffs. Relying on *Jackson v S.A. National Institute for Crime Prevention and Rehabilitation of Offenders*, 1976(3) SA 1(A) at 13-14, I understood Mr Smuts to submit that the dismissal of the first plaintiff and the subsequent legal

proceedings in the District Labour Court fall “within the ambit of the rights of an employer as against his servant” – the employer in this case being the Peace Trust.

[15]It is trite law that, unless action in the name of and against the trust itself is allowed by statute, trustees must be sued in their capacities as such.¹⁵ Whilst the exception may be technically sound because the plaintiffs have failed to make it clear that they are suing the defendants “in their nominal capacities as trustees of the Peace Trust”, it seems to me that it is what they intended. The plaintiffs have expressly referred to each of the defendants in their particulars of claim as “a Board member of the Peace Trust with its place of business at Erf 2936 Rhino Street Windhoek Township” and collectively to them in the Combined Summons as “Board members of the Peace Trust a duly registered trust of erf 2936 Rhino Street ...”. By mentioning the registration of the Trust, referring to the place of business of the Trust and holding the defendants collectively liable, the incorrect citation is the result of ineptness rather than intent. This is, in my view, an example where form must yield to substance. The plaintiffs intended to cite the defendants in their capacities as trustees and the particulars of claim must be so construed. The fourth defendant’s exception on this ground must therefore fail.

¹⁵ See: Cameron *et al.*, *Honore’s South African Law Of Trusts*, 5th ed., p. 419

[16] Finally, the defendants excepted to the second plaintiff's claim for "breach of copyright and gross abuse of intellectual property rights" on the ground that, the letter and report (earlier referred to) having been introduced in evidence during the District Labour Court hearing, the copyright thereof is not infringed in terms of section 15(2) of the Copyright and Neighbouring Rights Protection Act, 1994. The subsection reads as follows:

“(2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.”

“Judicial proceedings”, defined in s.1 of the Act, "means proceedings before a court, tribunal or person having by law power to hear, receive and examine evidence on oath or affirmation”.

[17]It is clear from the particulars of this claim that the second plaintiff's grievance relate to introduction of the two documents in evidence by or on behalf of the board of trustees of the Peace Trust. It is alleged that it was done with the intent “to solicit political prejudice from the Court”. I shall accept for purposes of this judgement in favour of the plaintiffs that, on a beneficial construction, the two documents may be considered “literary works” capable of copyright protection. The copyright in works of

that nature subsists by the provisions of the Act¹⁶ and the protection against infringement accorded to their authors is extensively regulated in Chapter 2 of the Act. Section 15(2) of the Act, however, excludes actionable infringement if the literary work is used for the purposes of judicial proceedings. The subsection does not require, as subsection (1) does, that the infringement must be “by a fair dealing in the use” thereof before protection is excluded – the mere fact that the literary works are used for the purposes of judicial proceedings suffices.

[18]The second plaintiff’s allegation that, in addition to the infringement of his copyright, the defendants’ conduct also constituted a “gross abuse of (his) intellectual property rights” does not take the matter any further. Intellectual property - being the ideas, inventions, technologies, art works, music and literature which by their creation acquired value - is protected by the laws relating to patents, designs, trademarks and copyright. “Literary works” of the nature referred to by the second plaintiff are only protected by the laws relating to copyright – not in any one of the other areas of law pertaining to the protection of intellectual property. The defendants should not be put to the costs of defending this baseless claim and the exception must be upheld.

¹⁶ See: 64(5) “Subject to this section, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other law.”

[19]But for the second defendant's claim for damages based on the latter claim, the lacking averments in all the other claims excepted to may well be supplemented by appropriate amendments. "The object of the Court is to do justice between the parties"¹⁷ and justice in this case require that the lay plaintiffs be accorded an opportunity to supplement the deficiencies in their pleadings by amendments.¹⁸

[20]In the result, the following order is made:

1. The defendants' exceptions to -
 - (a) the first plaintiff's claim referred to in paragraph 35 of the particulars of claim (defamation) and
 - (b) the first and second plaintiffs' claim referred to in paragraph 36 of the particulars of claim (privacy) on the grounds that the averments of unlawfulness and *animus injuriandi* necessary to sustain those claims are lacking and to
 - (c) the second plaintiff's claim referred to in paragraph 37 of the particulars of claim (copyright) on the ground

¹⁷ Per Wessels J in *Whittaker v Roos and Another*, 1911 T.P.D. 1092 at 1102

¹⁸ Compare, for example, *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)*, 1993 (2) SA 593 (A) at 602C-603J.

that the averments which are necessary to sustain that claim are lacking are upheld.

- (2) The second plaintiff's claim of "N\$300 000 for breach of copyright and gross abuse of intellectual property rights", including paragraph 37 and the words "and breached copyright" in paragraph 30 of the plaintiffs' particulars of claim, are struck out with costs to be paid by the second plaintiff, such costs to exclude the costs occasioned by the exception to this claim.
- (3) The plaintiffs are given leave, if so minded or advised, to file amended particulars of claim within a period of 15 days from the date of this judgment.
- (4) The costs occasioned by the proceedings on the exceptions and the costs to be occasioned by the amendment of the plaintiffs' particulars of claim are to be paid jointly and in equal parts by the plaintiffs.

MARITZ, J.

ON BEHALF OF THE PLAINTIFFS:

In person

ON BEHALF OF 1ST TO 3RD DEFENDANTS:

Mr. R Heathcote

Instructed by:

Lorenz Angula Inc

ON BEHALF OF 4TH DEFENDANT:

Mr. D.F. Smuts

Instructed by:

P.F. Koep & Co