



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2682/2009

In the matter between:

**P. M. D. FORESTRY TOTAL SERVICES
(PTY) LTD.**

Applicant

And

PHOLILE SIBANDZE

1st Respondent

SIFISO SIBANDZE

2nd Respondent

Neutral Citation: P. M. D. Forestry Total Services (Pty) Ltd. v Pholile Sibandze
2682/2009) [2012] SZHC 211 (14th September 2012)

Coram: Dlamini J.

Heard: 21st June 2012

Delivered: 14th September 2012

*Application for absolution from the instance – requirements thereof
evidence upon which a reasonable man might find for the plaintiff.*

Summary: The matter before court commenced by motion proceedings where the plaintiff sought for orders restraining or freezing various accounts held by respondent in two financial institutions. An interim order was granted in favour of applicant pending the action proceedings. I am now seized with the action proceedings.

[1] Pleadings having closed, the matter was referred to trial. At the close of plaintiff's case, respondent applied for absolution from instance.

[2] I am called to decide whether:

“there was evidence at the close of applicant's case, evidence on which a reasonable man might hold that the respondent was liable”
as per **Schriener J. A.** in **Gafoor v Unie Versekeringsadviseurs (EDMS) BPK 1961(1) S.A. 335** at 340.

[3] At the same time, I am mindful as propounded in **Gafoor supra** that in so deciding I should:

“...avoid, as far as possible the expression of views that may prematurely curb the free exercise by the trial court of its judgment on the facts when the defendant's case (if need be) has been closed.”
(words in brackets my own)

[4] Adopting the process of reasoning as laid down in **Myburgh v Kelly 1942 EDL 202 AT 206** the evidence presented by the plaintiff is as follows:

- [5] Mr. Petros Mangwane Mnisi as the Manager of applicant informed the court that the respondent was employed by applicant as Secretary and responsible, inter alia, for preparation of the pay roll.
- [6] Around May 2009 he received information from another company with similar services, that is, supplying Peak Timber, to be on the alert on fraud against employees' wages. He responded by calling applicant's bank manager, First National Bank, Pigg's Peak branch to monitor applicant's account. On the first week of July, the bank manager called and informed him of irregularities in the applicant's business account. He proceeded to the bank where he retrieved a pay sheet, among other documents.
- [7] On scrutiny of the pay sheet, a number of inconsistencies were discovered. The company had permanent and casual employees. Glaring was the fluctuating salary of respondent. Respondent's salary was fixed at E2,488.50 by applicant. However, when respondent prepared payments, she increased her salary to E6,488.50 without prior approval of applicant. There were a number of fictitious employees created by respondent. There was also one Sifiso Sibandze who was said to be a brother to the respondent. His salary was increased by the respondent from E2,538.50 to E4, 538.50. This fraud at the hand of the respondent, Mnisi submitted, commenced in December 2007 to the date of discovery which was June 2009.
- [8] Upon discovering the malpractice, Mnisi then drew up disciplinary charges against respondent and served her with the same. Respondent was due to appear on a specific date for a hearing. However, respondent resigned and never turned up for the disciplinary hearing.

- [9] The total amount lost at the hands of respondent and claimed by applicant was E620,674.69 according to the evidence of Mnisi.
- [10] Mr. Glen John Silindza was second applicant's witness. He is an employee of applicant's bank. He spotted the irregularities in applicant's payroll and sounded the alarm to the applicant. His evidence was that the account of Phila Dlamini reflected that an amount was credited to his account with a debit from applicant's account as a form of salary. As soon as the salary went in, it was transferred by means of ATM into the account of respondent. The said Phila Dlamini was an employee of Truworths according to the bank's data and not applicant.
- [11] The third witness was Mr. Thomas Augustus Stevens who analysed the company accounts against the payroll as prepared by the respondent and confirmed the irregularities and the amount lost.
- [12] The respondent does not dispute the allegations. She seeks under cross-examination to justify her actions.
- [13] During the trial, it turned out when Mr. Mnisi was giving *viva voce* evidence that the registered name of applicant was not PMD Forestry Total Services but PMD Forestry Total Harvesting Services (Pty) Ltd and that the total amount lost as a result of the irregularities committed was not as reflected in the particulars of claim viz., E622,762.00 but actually E620,674.69.
- [14] It is upon the basis of the two technical points that the respondent moved for absolution from the instance.

[15] I must hasten to point out that during the *viva voce* evidence applicant's counsel moved an application to amend the particulars of claim to read:

“PMD Forestry Total Harvesting Services (Pty) Ltd and the amount to E620, 674.69.”

Respondent strenuously opposed the application on the basis that was not moved in accordance with rule 28 (2) (3) and (4).

[16] On respondent's objection, I postponed the matter in order to give notice to the respondent as per Rule 28 and ordered respondent to file his ground for the objection. However, respondent took up the grounds and used them to move an application for absolution from the instance.

[17] It is trite that the grounds for objecting to an amendment are not the same for an application of absolution from the instance.

[18] A party may object to an amendment to a pleading on the basis of showing in a balance of probabilities that the amendment would be prejudicial to his case.

[19] **Ramsbottom J. in *Stolz v Pretoria North Town Council 1953 (1) S.A. 884 at 886 G* stated:**

“The general rule, as I understand it, is that an amendment to pleadings ought to be allowed if that can be done without prejudice to the other side or without prejudice which could be remedied by an appropriate order as to costs.”

[20] **Henocheberg J. in Zarug v Parvathie N.O. 1962 (3) S.A. 872 at 884 C** clarifies the position further:

“The fact that the effect of allowing an amendment might be to defeat the respondent’s claim is not what is meant by prejudice or injury.”

[21] **Erasmus, “Superior Courts Practice”** page B1-179 put the above position more succinctly:

“The fact that an amendment may cause the other party to lose his case against the party seeking the amendment is not of itself ‘prejudice’ of the sort which will dissuade the court from granting it.”

[22] Respondent bases her application on misdescription of applicant’s and arithmetic error of the amount claimed.

[23] I juxtapose the case *in casu* with that decided by **Trollip J. in Schnell v Rondalia Assurance Corporation of S.A. 1969 (1) S.A. 517** where the court allowed an amendment where the plaintiff intended to add to the initial claim medical and hospital expenses. The court in allowing the amendment reasoned as follows at 521:

“In my view, therefore, the plaintiff, by the amendment is not seeking to introduce a new cause of action which has become prescribed; he is merely seeking to expand or extend his original cause of action which, because of the interruption of prescription, is not prescribed.”

[24] **Trollip J.** further stated in a much clearer terms:

“a party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry.”

[25] The position of applicant is completely different as in the cases cited above in that *in casu* the applicant’s application to amend the summons from the sum of E622, 762.69 to E620,674.69 results in the sum claimed to be lesser than that which appears in the summons. It is therefore completely ill-conceived to object to such amendment as the respondent has a lesser charge than previous.

[26] On the question of misdescription, I draw an analogy from the case of **Boland Bank Ltd v Roup, Wacks, Kanner & Kriger 1989 (3) S.A. 912** where the appellate court upheld an application to amend. The appellant had in the court *a quo* sought for an amendment of the party to the action by replacing the party who ought to have instituted the proceedings with one who mistakenly believed he could institute the proceedings on behalf of the actual plaintiff.

[27] The court held that there was no prejudice or injustice to be suffered by the respondent in amendment.

[28] *In casu*, we are not faced with a completely different applicant. In fact documents such as payroll sheet prepared and filed by the respondent during the cause of her employment which were admitted as evidence in court and appear in the bundle of documents reflect that the applicant was P.M.D. Forestry Total Services (Pty) Ltd. while some of the same category of payroll sheet read P.M.D. Forestry Total Harvesting Services (Pty) Ltd.

I see no prejudice or injustice suffered by respondent in the circumstances and neither has respondent shown any prejudice or injustice as required of her in such matters.

[29] I must register the court's disapproval of the step taken by respondent in dealing with the applicant's application for amendment. Respondent who insisted that applicant should move a formal application for amendment in terms of rule 28 failed however to respond in terms of the said rule. Instead respondent decided to move an application for absolution from the instance.

[30] This was an irregular step by applicant. In the application for absolution from the instance, one is called upon to show that applicant has failed to establish a *prima facie* case and not to state grounds for objection as *in casu*.

[31] However, that as it may, I am still duty bound to ascertain whether applicant has adduced evidence upon which a reasonable man might and not should find in its favour.

[32] I have already alluded to the fact that the respondent has not disputed that she prepared the monthly payrolls which were subsequently found to have a number of irregularities and fictitious employees and therefore resulting in the loss of the sum of E620,674.69 by applicant. In fact in her own showing, respondent stated in her heads of argument.

4. *"In terms of the summons, respondent wrongfully and intentionally misappropriated the applicant's funds for her personal gain;*

4.1 *This is no sufficient evidence to substantiate this claim, if anything the amount attributed to the respondent is the sum of E119,664.38 (presumably the sum which went direct to her account) (words in brackets my own).*

[33] From this submission it is not clear as to the reason for respondent to move the present application when on the other hand she admits misappropriation of a substantial sum of E119,664.38

[34] For the above reasons, respondent's application for absolution from the instance is dismissed with costs. Applicant's application to amend is granted.

M. DLAMINI
JUDGE

For Applicant : M. Manyathi

For Respondent : Madau