



IN THE HIGH COURT OF SWAZILAND  
JUDGMENT

Reportable  
Civil Case No. 1504/2011

In the matter between:

GEORGE EDWARD GREEN

PLAINTIFF

and

SWAZILAND ROYAL INSURANCE CORPORATION

1<sup>ST</sup> RESPONDENT

SWAZILAND RAILWAY

2<sup>ND</sup> RESPONDENT

Neutral citation : George Edward Green and Swaziland Royal Insurance Corporation &  
Swaziland Railway (1504/11) [2014] SZHC 173 (01 AUGUST 2014)

Coram : Q.M. MABUZA - JUDGE

Heard : 3/10/2013

Delivered : 1/08/2014

**Summary:** **Practice – Pleadings – Exception – Plaintiffs particulars of claim not disclosing cause of action – Plaintiff failed to allege a *stipulatio alteri* – No *privity* or *vinculum juris* between the parties – Exception upheld.**

**Practice – Pleading – Rule 30 – Notice of bar – Irregular proceeding – Where exception taken no pleading over shall be necessary – Rule 23 (4).**

**Practice – Pleadings – Notice to strike out information obtained per Anton Pillar Order – Anton Pillar order subsequently set aside – Notice to strike out upheld.**

JUDGMENT

## **MABUZA -J**

- [1] The Plaintiff hereto was employed by the 2<sup>nd</sup> Defendant as a Mechanical Engineer being a managerial position in terms of a fixed two year contract which was consecutively renewed and the material one hereto was renewed on the 1<sup>st</sup> June 2003 and expired on the 31<sup>st</sup> May 2005.
- [2] It was during the extended period that the Plaintiff was injured on site during working hours. On the 8<sup>th</sup> May 2005 he was inspecting a derailed carriage train and wagons when he fell and landed on his bottom and was seriously injured. It is alleged that the injury persisted and he was later diagnosed with lumber osteoarthritis.
- [3] During March 2011 he issued summons against the 1<sup>st</sup> Defendant for payment of various benefits set out in paragraph 13, 14 and 15 of his particulars of claim amounting to a total E1,616,340.00 (One million six hundred and sixteen thousand three hundred and forty Emalangeni). The Plaintiff says that the 2<sup>nd</sup> Defendant has been joined as a necessary party to the action by virtue of the fact that it concluded an insurance policy with the 1<sup>st</sup> Defendant for the benefit of the Plaintiff and because it has been paying the premiums in respect of the policy and as such has an interest in the outcome of the action.
- [4] In his particulars of claim the Plaintiff states that during 1997, the 2<sup>nd</sup> Defendant took out from the 1<sup>st</sup> Defendant an insurance policy or insurance cover for its managerial staff or supervisory staff which included the Plaintiff. The Policy number is MBMMA 0014816.
- [5] It is against this insurance policy or cover by the 1<sup>st</sup> Defendant that the Plaintiff seeks payment of his claim of E1,616,340.00 that appears in his particulars of claim together with interest and costs of suit.

## **Notice of Exception**

[6] The Defendants have defended the action; and to that end the 1<sup>st</sup> Defendant has filed a notice of exception to the particulars of claim and a Rule 30 Notice in respect of a Notice of Bar filed by the Plaintiff against it on the 14 February 2013. The 2<sup>nd</sup> Defendant has filed a notice to strike out certain paragraphs contained in the Plaintiff's particulars of claim per Rule 23 (2).

***The Stipulatio Alteri***

[7] The 1<sup>st</sup> Defendants' exception is on the grounds that the particulars of claim are bad in law in that the Plaintiff's claim under the contract of insurance between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants does not disclose a cause of action against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant set out several grounds for excepting to the particulars of claim in its notice. I set out hereunder the pertinent ones which Advocate Francois Joubert for the 1<sup>st</sup> Defendant confined himself to in argument namely that:

- (a) there was no contractual nexus between the Plaintiff and the 1<sup>st</sup> Defendant entitling the Plaintiff to claim directly from the 1<sup>st</sup> Defendant any benefit arising from the contract of Insurance. That no contractual nexus between the Plaintiff and the 1<sup>st</sup> Defendant is apparent from the contract of Insurance.
- (b) In order to found a claim under the contract of Insurance, the Plaintiff has to allege and prove that a contract exists between the Plaintiff and the 1<sup>st</sup> Defendant.
- (c) *A stipulatio alteri* in which the Plaintiff has to allege and prove that the contract upon which the Plaintiff wishes to rely on shows a clear intention to benefit the Plaintiff not in the sense that there will be an advantage to him but in the sense that the Plaintiff will be brought in as a party to the contract thereby obtaining rights but also incurring obligations.
- (d) The Plaintiff must accept the benefits by indicating that he is willing to become a party to the contract and that he has in fact done so.

[8] It was submitted on behalf of the Plaintiff that his cause of action is based on a contract concluded by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the benefit of the Plaintiff which benefit the Plaintiff accepted. Consequently, there is a direct contractual nexus between the Plaintiff on the basis of which the Plaintiff can sue the 1<sup>st</sup> Defendant for performance.

[9] It was further submitted by Mr. Nkomondze on behalf of the Plaintiff that a *stipulatio alteri* has been properly pleaded and established by the Plaintiff when he says in the particulars of claim:

“that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a contract of Insurance for the benefits of the latter’s employees employed in managerial or supervisory positions; that he (Plaintiff) was employed in a managerial position by the 2<sup>nd</sup> Defendant; and that he accepted the benefit contracted for.”

[10] Specifically at paragraph 7.5 of the particulars of claim the Plaintiff states that:

By virtue of the conclusion of the said contract of employment the Plaintiff accepted the benefit contracted for by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in terms of the contract of insurance or insurance policy.”

[11] The contract of employment between Swaziland Railways (Second Defendant) and the Plaintiff is annexed to the particulars of claim as annexure “G2”. Section II of attachment “A” to the contract of employment provides as follows:

“Section II. Workmen’s Compensation Insurance.

The Railway carries personal insurance on behalf of the Employee in addition to Workmen’s Compensation. The Employee agrees to accept any such benefits together with any other benefit payable hereunder as full and exclusive compensation of any compensable bodily injury, occupational disease, or death resulting therefrom, arising out of and in the course of the Employee’s employment hereunder.”

[12] A review of the authorities regarding the *stipulatio alteri* is revealed hereunder. In the 4<sup>th</sup> Edition of Gordon and Getz on the South African Law of Insurance the learned authors state, *inter alia*, the following about the *stipulatio alteri* at p. 277 and 278:

“The *stipulatio alteri* was not generally recognized in Roman law: *alteri stipulari nemo potest*. But it was recognized by the Dutch jurists of the sixteenth and seventeenth centuries: *extraneo potest stipulari*. The institution is established in South African law: one party to a contract may promise another that he will confer some benefit on a third person who is not a party to the contract. In **Crookes NO v Watson** Schreiner JA said: ‘The typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. ... Broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other.

As the stipulation alteri is not peculiar to the law of insurance, recourse must be had to South African law in general.

The stipulation alteri is a convenient instrument for the institution of a third person as beneficiary under a life policy. A typical clause is: ‘The Company hereby agrees to pay the sum of R1,000 which will become due on the death of John Smith (the life assured) to Martha Smith, or should she predecease him, to his estate.’ It is used also to extend over to third persons in indemnity insurance. A typical clause (from a public liability insurance policy) is: ‘The Company will ... indemnify also any director or employee of the insured as though he were the insured in respect of any sums for which he shall become legally liable in the event of accidental bodily injury to any person or damage to property as within described, caused while such director or employee is acting in the course of and in the scope of his capacity as a director or employee of the insured’s business. In these examples the insurer promises the insured to pay or indemnify a third person, namely Martha Smith or the insured’s director or employee respectively.

The contract between insurer and insured does not itself confer any rights on the third person; he acquires such rights only by accepting the benefit or offer held out to him.”

[13] It is important to bear in mind that any claim lodged by the Plaintiff against the First Defendant would have to be based on the insurance policy in terms of which the First Defendant insured Swaziland Railway, the Second Defendant. For the purposes of his claim against the First Defendant, the Plaintiff relies on the acceptance of benefits contained in his contract of

employment with the Second Defendant. As is pointed out by the learned authors on page 277, in the work of Gordon and Getz:

“one party to a contract may promise another that he will confer some benefit on a third person who is not a party to the contract. In **Crooks NO v Watson** Schreiner JA said: ‘The typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying C to become a party to a contract between himself and A ... Broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other’.

[14] In *casu* there is no averment in the particulars of claim, or any indication in the annexures thereto, that the First Defendant was notified that the Plaintiff accepted the benefits conferred upon the Second Defendant, Swaziland Railway. The consequence of the Plaintiff’s contentions, were they found to be correct, would be that upon the conclusion of similar contracts of employment, and without the First Defendant being aware of the fact, the First Defendant would be bound to some 38 unnamed employees who could then institute proceedings against the First Defendant in the way in which the Plaintiff has done. The wording of the policy document itself demonstrates that this cannot be so.

[15] The insured in terms of the policy is Swaziland Railway. The policy stipulates that the premiums are to be paid by the insured.

[16] Under the heading “STATED BENEFITS”, THE “Person/positions insured” are described as

“Names or estimated number”

Occupations

38

ALL STAFF IN N1, SUPERVISORS”

[17] Under the heading “DEFINED EVENTS” the policy provides that First Defendant” ... will pay to the insured on behalf of such persons or his estates, the compensation stated in the schedule. ...”

[18] It seems to me that the correct approach to be adopted in *casu* is that which was laid down in the matter of **Sage Life Ltd v Van der Merwe** 2001 (2) SA 166 (W). In that matter the Plaintiff instituted action against the Defendant, claiming certain benefits under a group life insurance scheme of which the Plaintiff was a member by virtue of his employment. The Defendant excepted to the claim on the grounds that the Plaintiff had sued the wrong party: as the Defendant had contracted with a group life insurance scheme of which the Plaintiff was a member, there was no contractual nexus between itself and the Plaintiff.

[19] It was pointed out in the Sage Life judgment that one of the general principles underlying the *stipulatio alteri* was that it had to be clear from the terms of the contract between the original parties that it was a contract meant for the benefit of a third party in the sense that a third party was meant to step in, whether as an additional party or in lieu of one of the other parties. It was held that the contract did not constitute a *stipulatio alteri* in any form, and that no contractual nexus between the Plaintiff and Defendant was apparent from any of the documents placed before the Court.

[20] The **Sage** Life case is applicable in *casu* as far as the principle set out therein is concerned. Lewis J stated the following, at 167F to 168D:

“A number of such terms make it abundantly clear that the contract is between ABSA Group Life Assurance Scheme and Sage Life. Various other terms of the contract support that interpretation. ... A further term of significance is set out in clauses 5.1 and 5.2. These provide that with the payment of the death benefit (which I should note is not in issue in this matter), the scheme shall give notice to Sage Life of any event which gives rise to a benefit thereunder and must give 90 days’ notice of such claim. Clause 5.2 which deals with the payment of a permanent disablement benefit, is directly relevant to

the claim made by the respondent. It is that the scheme shall give notice to Sage Life of any event which gives rise to a benefit within 90 days after such event occurring. Clause 5.2 goes on to give Sage Life the sole discretion as to whether to consider claims submitted after the 90 days notification period. Clause 5.2 provides also that, on the total and permanent disablement of a member or spouse, Sage Life will pay to the Scheme for the benefit of such member or spouse the disability benefit that is set out in the contract. It is apparent from these terms that it is only the scheme and the excipient/defendant that have obligations and rights arising out of this contract. Moreover, it is clear from the contract between the scheme and Sage Life that Sage Life does not have any right to claim premiums from any individual member of the scheme; its right is to make claims against the scheme itself. Likewise it is the scheme's obligation to pay the premiums rather than the individual's obligation to do so."

[21] The Plaintiff in *casu* has misconceived the position by relying on the contract of employment in support of a claim based on the *stipulatio alteri*. For the Plaintiff to have successfully relied on the stipulation alteri it would have been necessary for the stipulation to have been contained in the agreement between the contracting parties, that is to say, the insurance policy in terms of which the First Defendant insured the Second Defendant. As is pointed out by Schreiner JA in **Crookes NO v Watson** (Supra)

"The typical contract for the benefit of the third person is one where A (in *casu* the First Defendant) and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. ...Broadly speaking, the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other."

[22] This is clearly not what transpired in this matter, and there can therefore be no question of a *stipulatio alteri*. There is accordingly no *vinculum juris* between the Plaintiff and the First Defendant and the Plaintiff's claim is therefore not well founded.



[23] In totality and in view of the foregoing the First Defendant's exception is hereby upheld with costs including the certified costs of senior counsel.

### **The Rule 30 Notice**

[24] On the 14<sup>th</sup> February 2013, the Plaintiff filed a notice of bar against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has responded thereto by filing a Rule 30 notice namely that the notice of bar is an irregular proceeding which stands to be set aside.

[25] The reason given therefore is that since the 1<sup>st</sup> Defendant has filed a notice of exception to the Plaintiff's particulars of claim on the basis that they do not disclose a cause of action against it and that the exception goes to the root of the Plaintiff's action.

[26] In terms of Rule 23 (4) of the High Court Rules where an exception has been taken to any pleading, **no pleading over shall be necessary.** (my emphasis)

[27] In the premises the notice of bar is hereby set aside with costs including the certified costs of senior counsel.

### **Application to strike out: Rule 23 (2)**

[28] The 2<sup>nd</sup> Defendant on the other hand filed a notice in which it seeks to strike out paragraphs 5, 6 and 7 of the particulars of claim:

Paragraph 5 of the particulars of claim makes reference to the insurance policy that was taken out by the second defendant with the first defendant.

Paragraph 6 makes reference to the renewal of the policy so as to ensure that it covered the period of the alleged incidence.

Paragraph 7 makes reference to the fact that the plaintiff was a beneficiary of the policy by virtue of his appointment and position at the time of the incident.

The 2<sup>nd</sup> Defendant seeks to have these paragraphs struck out on the basis that the averments they make are vexatious and scandalous and inadmissible.

[29] The information contained in the paragraphs sought to be struck out is sourced from Policy No. MBMMA 0014816. This policy was the subject matter of an *Anton Pillar exparte* application moved by the Plaintiff (Applicant) on an urgent basis before this Honourable Court on the 29<sup>th</sup> April 2010.

[30] An urgent application was instituted *ex parte* by the Plaintiff seeking an order authorizing the Deputy Sheriff for the Hhohho Region accompanied by the Plaintiff's Attorney to enter into the offices of the First Defendant (Respondent) situated along Somhlolo Road in Mbabane and to search for, attach and seize the original Insurance Policy Documents under Policy No. MBMMA0014816 described as the multimark III Policy and its schedules; he further sought an order authorizing and ordering the Deputy Sheriff to make a true photocopy of the Insurance Policy Documents and to hand back the original to the First Defendant and to keep the said copy in safe custody pending trial in the action to be instituted by the Plaintiff against the First Defendant.

[31] On the 30<sup>th</sup> April 2010, the High Court per Agyemang J granted the Anton Piller Order *exparte* and it was promptly executed. The Anton Piller *exparte* order was subsequently challenged by the 1<sup>st</sup> Defendant and discharged by the Court in a judgment delivered on the 28<sup>th</sup> March 2012 per Maphalala M.C.B. J in **George Edward Green v Swaziland Royal Insurance Corporation and Another**; High Court Case No. 1451/2010 (unreported).

[32] When the Anton Piller application was launched by the Plaintiff, he had not instituted any action but at the time of delivery of the judgment in respect of the discharge of the Anton Piller Order on 28<sup>th</sup> March 2012, the Plaintiff had issued summons. The Plaintiff issued summons on the 24<sup>th</sup> March 2011, a year before the judgment of the 28<sup>th</sup> March 2012. The Plaintiff used the

information in the Insurance Policy documents that had been attached after the grant of the Anton Piller Order to found its cause of action. The Order did not authorize the Plaintiff to use the information in the documents to found a cause of action.

[33] In the judgment of Maphalala M.C.B. J in the case of Edward Green above, the learned Judge widely discusses the nature and purpose and the circumstances under which an Anton Pillar Order will be granted and cites a variety of cases. I need not repeat the dicta nor cite all the cases cited in that judgment. I shall however, for purposes of this judgment refer to the case of **Universal City Studios Incorporated & Others v Network Video (Pty) Ltd** 1986 (2) SA 734 at 755 where Corbett CJ says:

“In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that respondent has in his possession specific documents or things which constitutes vital evidence in substantiation of the applicant’s cause of action (but in respect of which the applicant can claim no real or personal right), and that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial ... and the applicant asks the court to make an order designed to preserve the evidence in some way...”

[34] Equally Herbstein and Van Winsen in the Civil Practice of the High Court of South Africa page 1498 state concerning the above dicta:

“The court stressed that such an order will be available only to preserve specific evidence for trial, not for purposes of founding a cause or causes of action, and dismissed the applicant’s claim for certain orders on the grounds that they were designed to give authority for a search for and attachment of, evidence in order to found a cause or causes of action.”

[35] It is clear from the foregoing that the Anton Piller is available for the preservation of evidence for trial rather than to found a cause of action.

[36] In *casu* the discharge of the Order meant that the basis upon which the attachment of the Insurance Policy documents was effected was no longer there. In other words the effect of the Order was that the parties were back to square one where the Plaintiff had no documents as the documents remained in the 2<sup>nd</sup> Defendants' possession. In reality that is not the case. Mr. Jele contends that the effect of the setting aside of the interim order, is that the evidence and or information secured by means of the Anton Piller Order, can no longer be relied upon by the Plaintiff. In fact he opines that the Plaintiff was obliged upon issuance of the judgment of Maphalala M.C.B. J to return the documents attached by him together with any copies made thereof and not to use them for any other purpose. I agree.

[37] To support his argument with regard to the effect of the discharge of an Anton Piller Order, Mr. Jele cited the cases of **Audio Vehicle Systems Whitfield and Another 2007 (1) SA 434 and Memory Institute SA cc t/a SA Memory Institute v Hanson and Others 2004 (2) SA 630.**

[38] Mr. Nkomondze on the other hand concedes that an Anton Piller Order will be refused if the Applicant seeks the attachment of the documents or evidence to use them to found his cause of action. He further concedes that an Anton Piller Order will be discharged if it becomes apparent that the Applicant has used the documents or evidence sought to be secured to establish his cause of action. However, he says that it is not true that the use of that evidence can, in law be sanctioned by the striking out of same because it allegedly amounts to vexatious and or scandalous matter.

[39] He further argues that a court may not grant an application to strike out unless it is satisfied that the Applicant will be prejudiced in the conduct of his claim or defence if the application to strike out is not granted. To fortify his argument he cited the case of **Putco Ltd v Radio Guarantee Company (Pty) Ltd** 1984 (1) SA 443 (W) 456. However, the case of **Putco** is in my view

distinguishable from the case in *casu*. In **Putco** the matter complained of was not an averment in the summons but in one of the prayers.

[40] Mr. Jele is equally adamant that the reference to the policy and reliance on it by the Plaintiff is prejudicial to the 2<sup>nd</sup> Defendant as the Plaintiff is placing reliance on information that was obtained unlawfully. Mr. Jele says that there is good cause for the striking out of the paragraph in relation to the information that has been unlawfully included by the Plaintiff. He says that the information is scandalous and vexatious within the meaning of Rule 23 (2) of the rules of this Court. He says that the 2<sup>nd</sup> Defendant will be prejudiced by the inclusion of material that should not have been included in the summons.

[41] In response Mr. Nkomondze contends that no prejudice will be suffered by the 2<sup>nd</sup> Defendant if the application to strike out were to be dismissed; unless the 2<sup>nd</sup> Defendant can show prejudice.

[42] An application to strike out vexatious and scandalous matter is based on Rule 23 (2) of the rules of this Court which provides that:

“where any pleading contain averments which are scandalous, vexatious, or irrelevant the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of such matter, and may set such application down for hearing in terms of rule 6 (14), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted”.

[43] In the case of **Vaatz v Law Society of Namibia**, 1991 (3) SA 563 (NM) at 566 I – 567 B, the court dealing with the question of prejudice stated:

“The phrase ‘prejudice to the applicant’s case’ clearly does not mean that, if the offending allegations remain, the innocent party’s chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party’s allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left

unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party”.

[44] A decision on whether to or not to strike out material from a summons is discretionary in nature.

See **Rail Computers Action Group v Transnet Ltd 2006 (6) S.A. 68:**

“When dealing with an application to strike out the court will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action; that may be a matter for exception”.

[45] In the circumstances and exercising my discretion judicially I am of the view that the 2<sup>nd</sup> Defendant will be prejudiced in its defence should I not allow the application.

[46] In the event the following order is made:

- (a) that the 1<sup>st</sup> Defendant’s exception be upheld with costs;
- (b) that the Plaintiff’s notice of bar be set aside with costs;
- (c) that the costs in (a) and (b) hereto include the certified costs of senior counsel
- (d) that the application to strike out be granted with costs.

**Q.M. MABUZA -J**

**JUDGE OF THE HIGH COURT**

For the Plaintiff : Mr. Nkomondze

For the 1<sup>st</sup> Defendant : Mr. Joubert

Instructed by Mr. Mthethwa

For the 2<sup>nd</sup> Defendant : Mr. Z. Jeje

