



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No: 92/2014

In the matter between:

CLIFFORD MAMBA

PLAINTIFF

and

THE AFRICAN ECHO (PTY) LTD

1ST DEFENDANT

INNOCENT MAPHALALA

2ND DEFENDANT

MFANUKHONA NKAMBULE

3RD DEFENDANT

Neutral Citation : Clifford Mamba vs The African Echo (Pty) Ltd; Innocent Maphalala and Mfanukhona Nkambule (92/14) [2016] SZHC 101 (08 JULY 2016)

Coram : Q.M. MABUZA J :

Delivered : 8 JULY 2016

SUMMARY : **Practice – Pleadings – Exception – Exception to particulars of claim as lacking the necessary averments– Exception fails to comply with Rule 23 (3).**

JUDGMENT

MABUZA –J

- [1] In this matter, the Plaintiff issued summons against the Defendants claiming damages for defamation. The claim is for payment of damages in the sum of E2,000,000.00 (Two Million Emalangeni) interest thereon at the rate of 9% per annum from the date of summons to date of final payment; costs of suit; and further and or alternative relief. The amount claimed is sought from the Defendants jointly and severally, the one paying the other to be absolved.
- [2] The Defendants filed their notice of intention to defend the suit and thereafter filed a notice of exception in terms of Rule 23 (1) of the Rules of this Court, taking exception to the Plaintiff's particulars of claim.
- [3] The pertinent particulars of claim to which exception has been taken are set out as follows:
6. On or about 29th December 2013, and in the Times of Swaziland Sunday newspaper the Defendants acting with common purpose caused to be published an article under the heading "Clifford Mamba not divorcing". A copy of newspaper article is annexed hereto marked "A".

8. The aforesaid article contained statements to the effect that the Plaintiff was involved in an adulterous and/or illicit relationship with an unnamed woman who was said to be a “well known woman” and was or has been contemplating divorcing his wife.
9. The implication that the article made was that:
 - 9.1 That the Plaintiff was involved in an adulterous and/or illicit relationship with the so-called “well known woman”.
 - 9.2 The Plaintiff had at some stage contemplated divorcing his wife because of or on account of the adulterous relationship.
 - 9.3 The Plaintiff was a person of loose morals who was disposed to have adulterous relationships in public places such as hotels.
 - 9.4 The Plaintiff was disposed to unchastity and dishonourable conduct, which was not befitting a person of his status as Principle Secretary a former diplomat; and the son of distinguished late former Minister of Foreign Affairs.
10. The allegations on the newspaper article were plainly false and defamatory of the Plaintiff, and they were intended and/or understood by the readers of the newspaper to mean that the Plaintiff was involved in an adulterous relationship, that he had contemplated divorcing his wife; and had conducted himself in a dishonourable manner.

[4] The Article itself is reproduced hereunder as follows:

“Clifford Mamba not divorcing

Clifford Mamba the Principal Secretary (PS) in the Ministry of Housing and Urban Development vehemently denies allegations on Facebook, to the effect that he is divorcing his wife.

He said the photo circulating on Facebook social network depicting him and a known woman in the country entering a hotel was a demonstration of the art of photo-shopping.

The Principal Secretary had not even seen the picture when he was interviewed. He said claims that he was divorcing his wife were baseless and far from the truth.

“There’s nothing of that kind. In fact, it’s not true that I am divorcing my wife”, he said.

He said neither his wife nor children had informed him of the picture because they were not on Facebook.

I don’t think my wife has time for Facebook but I will ask if she has seen the photo. I doubt she has seen it,” he said.

Mamba’s wife has been keeping a very low profile and many people do not know him her. The former diplomat said his wife was a private person and it was not even wise for the media to attempt to interview her.

There are over 23,000 members of the internet group where the picture has been posted. Interestingly the person who posted the picture, identified as Temaveni Dlamini, is being hailed by users of the social network site as a reliable source of information.

Many of her followers believe her postings and comments which attract hundreds of responses.

She specializes in royal matters and claims to know the private lives of most of the members of the royal family.

His posting on Mamba has divided her followers as others believed she was telling the truth while some suspected that the photo was a demonstration of the art of photo-shopping.

The Principal Secretary said he did not know what to do about the issue but felt something had to be done to correct the wrong impression about him created by the social media.

He advised against interviewing his wife because she was not a public figure.

“I don’t think it’s in order to interview my wife. I suggest we give her the space she deserves and she hasn’t spoken about this thing, hence it’s impossible she doesn’t even know about it,” she said.

Mamba is a former diplomat and served in various foreign missions before he was recalled to take up the post of principal secretary in the Ministry of Foreign Affairs and International Cooperation.

He was later transferred to the Ministry of Housing and Urban Development. He has served as an ambassador to the European Union (EU), Korea and Asia. From 2002 – 2005, he was the ambassador to the United Nations (UN).

He is the son of the late Sir George Mamba, the former Minister of Foreign Affairs. His father was the Country's High Commissioner to England when Crown Prince Makhosetive, now King Mswati III, was attending school at Sherborne in Northwest Dorset, England."

[5] The contents of the exception are reproduced hereunder as follows:

"Be pleased to take notice that the Defendants herein hereby take exception to the Plaintiff's particulars of claim on the following basis.

Insofar as the Plaintiff complains of statements contained in the article published in the Times of Swaziland. Sunday Newspaper on the 29th December 2013, the words published in the article complained of are not reasonably capable of conveying the reasonable reader a meaning which defames the Plaintiff.

The implied meaning of the words contained in the article complained of taken in the context of the entire article and in their ordinary meaning are not reasonably capable of conveying to the reasonable reader, the implied meaning as ascribed to the article by the Plaintiff.

In the circumstance the Plaintiff's particulars of claim do not establish a cause of action and are excipiable.

[6] Rule 23 (1) reads as follows:

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of rule 6 (14).

Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall, within the period allowed under this sub-rule, by notice afford his opponent an opportunity of removing the cause of complaint within fourteen days.

Provided further that the party excepting shall within seven days from the date on which a reply to such notice is received or from the date on which such reply is due deliver his exception”.

[7] A reading of Rule 23 shows that there are two grounds upon which an exception to particulars of claim may be taken.

7.1 The first ground is that the particulars of claim lack averments to sustain an action. This is the ground relied upon by the Defendants.

7.2 The second ground is that the particulars of claim are vague and embarrassing. This ground is not relied upon by the Defendants.

[8] Rule 23 (3) states:

“where an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.”

[9] The Defendants were obliged to set out clearly and concisely the averments that they contend are lacking in the Plaintiff’s particulars of claim in order to sustain a cause of action. The Defendants have failed to do this.

[10] This is what the Defendants say:

“... words published in the article complained of are not reasonably capable of conveying to the reasonable reader a meaning which defames the Plaintiff.”

[11] The Defendants do not capture the words that they refer to in the article.

[12] The Defendants further say:

“The implied meaning of the words contained in the article complained of taken in the context of the entire article, and in their ordinary meaning are not reasonable capable of conveying to the reasonable reader, the implied meaning as ascribed to the article by the Plaintiff.”

[13] Once again the Defendants do not state what they mean by “the implied meaning of the words contained in the article complained of”.

[14] I re-iterate that Rule 23 (3) states that the ground upon which the exception is founded must be clearly and concisely stated. Where it is alleged that the particulars of claim lack averments which are necessary to sustain an action, it must be understood that this is a reference to a deficiency in the particulars of claim. In other words, it is meant that the particulars of claim are deficient in that there are averments that should have been made and which have not been made; put differently something is absent; something is missing. That is precisely what the work “lacks” in the rule means.

[15] It is established and trite that the particulars of claim must set out averments of material facts that, taken as a whole, establish “a cause of action”. The term “cause of action” means a set of facts which entitle a Plaintiff to obtain the relief that it seeks from a court. In **Abraham and sons v S.A. Railway & Harbours** 1933 CPD 625 Watermeyer J.A. stated:

“...every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

This definition was adopted by the Appellate Division of South Africa in **Evins and Shield Insurance Co. Ltd. 1980 (2) S.A. 814** per Corbert JA.

[16] In **McKenzie v Farmers’ Co-operative Meat Industries Ltd 1922 AD 16** the court held that “cause of action” meant:

“The proper legal meaning of the expression ‘cause of action’ is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a Plaintiff to succeed in his claim. It includes all that a Plaintiff must set out in his declaration in order to disclose a cause of action”.

[17] It follows that what is required of a party who takes exception to particulars of claim on the grounds that it does not disclose or establish a cause of action, is to identify clearly what allegations of material facts are missing.

See **Minister of Natural Resources and Energy vs. Johannes Nkwanyana Civil Case No. 3952/05**. It is material facts not evidence that must be contained in the pleadings. If the material facts are there, then an exception is not competent.

[18] It is my considered view that the Defendants were obliged to set out clearly and concisely the averments that they contend are lacking in the Plaintiff's particulars of claim in order to sustain a cause of action.

[19] Having failed to indicate the lack of averments set out in Rule 23 (1) the Defendants have tried to cure this defect in paragraphs 3 and 4 of their Heads of arguments. Heads of arguments do not a pleading make.

[20] At paragraph 6 of their Heads, the Defendants state:

“It is submitted that Plaintiff has misunderstood the context of the article and that the meaning he avers was not the meaning the ordinary reasonable reader would have understood. Indeed the article would have engendered sympathy on the part of the reasonable reader for the Plaintiff who was the victim of a posting on “Facebook”

[21] In **Basner v Trigger 1945 AD** at page 32 Tindall JA had this to say:

“Tindall JA said in *Basner v Trigger*. In other words all the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendant’s words and having knowledge of the circumstances ... might reasonably understand these words as meaning that the plaintiff had been guilty of illegal and criminal conduct...”

[22] In **Conroy v Stewart Printing Co. Ltd 1946 AD** at 1018 Greenberg JA had this to say:

“It is clear, and it was common cause, both in the Court *a quo* and in the argument before us, that the test to be applied in regard to the exception is whether the words complained of are reasonably capable of conveying to the average reasonable person of ordinary intelligence, who has knowledge of the facts set out in para. 3 of the declaration, the meaning assigned to them in the innuendo.”

[23] I do not think that the Plaintiff has misunderstood the contents and context of the article. A reasonable reader would after reading the article conclude that the Plaintiff was having a clandestine affair with the well known woman whom he was furtively meeting in hotels. It is immaterial that the author of the article was repeating what he found published in Facebook.

[24] The article is craftily written so that it appears not to be provocative. In Siswati we have a saying that “*uyaluma aphuphutse*”. This is exactly what this article does. It disguises the real intention of the article which seeks to show that the Plaintiff’s behavior is ethically reprehensible and dishonourable.

[25] Exceptions themselves are pleadings, and must fulfil the basic function of all pleadings; to inform the other party so that he/she knows what case he has to meet and can prepare accordingly, and so that the court knows exactly what it is called upon to decide.

[26] The purpose of the requirements that the grounds of an exception be stated clearly and concisely is to promote the achievement of this objective. A purported exception which fails to do so does not comply with the Rules, and is for this reason alone irregular. The present notice of exception does not comply with the rules of court and is liable to be set aside.

[27] Equally there is no prayer for relief. It follows that it is not and cannot be an 'exception' properly so called and as contemplated by sub-rule (1).

[28] In the circumstances, the exception is dismissed with costs. The matter is ordered to henceforth take its ordinary course.

JUDGE Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Plaintiff : Mr. Jele
For the Defendant : Advocate Flynn
Instructed by Attorney M. Sibandze