



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1583/2013

In the matter between:

CARL BOY CARVALHO

PLAINTIFF

and

ROYAL SWAZILAND SUGAR CORPORATION LTD

1ST DEFENDANT

NJABULO MAMBA

2ND DEFENDANT

Neutral Citation : Carl Boy Carvalho vs Royal Swaziland Sugar Corporation Ltd & Njabulo Mamba (1583/2013) [2017] SZHC 192 (19 SEPTEMBER 2017)

Coram : MABUZA – PJ

Heard : 6 JUNE 2017

Delivered : 19 SEPTEMBER 2017

SUMMARY

Civil Procedure – Summons issued for damages – Exception raised thereto – Exception does not follow procedure set out in Rule 23 – Exception dismissed with costs.

RULING

MABUZA -PJ

- [1] The Plaintiff is Carl Boy Carvalho, a male Swazi adult of Tea Road, Ezulwini, Hhohho district, Swaziland.
- [2] The 1st Defendant is Royal Swaziland Sugar Corporation, a limited liability company duly incorporated according to the law of Swaziland with its principal place of business at Simunye, Lubombo district, Swaziland.
- [3] The 2nd Defendant is Njabulo Mamba, a male Swazi adult currently being held at a Correctional Services facility in Swaziland.
- [4] On the 24th October, 2010 one Byron G.A. Carvalho, was knifed to death by the 2nd Defendant whilst attending a musical festival which is called “Simunye Fun Fair”. A death certificate was filed as proof of his death.

- [5] During October 2013, the Plaintiff issued a summons against the Defendants jointly and severally for the payment of the sum of E361,000.00 (Three hundred and sixty one thousand Emalangeni) costs and further and or alternative relief.
- [6] The facts upon which the summons are based are that during October 2010, the 1st Defendant hosted a musical festival called “Simunye Fun Fair”. The Plaintiff’s son Byron G.A. Carvalho (Byron) attended the fair on the 24th October 2010 and was stabbed to death while there. Byron died leaving a minor child called Tamia J.R. Carvalho (Tamia) who was born 24th December, 2006. Byron was also survived by his biological father the Plaintiff. It is alleged by the Plaintiff that Byron maintained and supported both him and Tamia.
- [7] The claim against the Defendants is in respect of loss of support for the Plaintiff and on behalf of Tamia. It also includes funeral expenses pertaining to the deceased.

[8] The matter is defended by the 1st Defendant who has raised an exception to the Plaintiff's particulars of claim **on the grounds that the said particulars are bad in law in that they do not disclose a cause of action** (My emphasis).

[9] I set out the 1st Defendant's grounds of exception hereunder:

1. The Plaintiff's claim is for patrimonial loss caused by the alleged negligence of the Plaintiff.
2. To sustain a cause of action for negligence the Plaintiff must detail the particular grounds of negligence he relies on.
3. The Plaintiff has not set out the grounds for negligence.
4. In the premises, the Plaintiff's particulars of Claim do not disclose a cause of action and lacks the necessary averments to sustain a cause of action for negligence.
5. The Plaintiff also relies on a breach of duty of care.

6. To disclose a cause of action based on a breach of duty of care, the Plaintiff is required to set out the facts that could or should have been foreseen by the 1st Defendant.
7. The Plaintiff has not alleged facts that could or should have been foreseen by the 1st Defendant.
8. Alternatively, the allegations in paragraph 15 do not in law disclose a cause of action against the Defendant. The alleged failure to provide protection does not on its own constitute a breach of the duty of care. The Plaintiff has to allege circumstances that impose a duty upon the 1st Defendant.
9. In the premises the Plaintiff's Particulars of Claim are bad in law and do not disclose a cause of action for breach of duty of care.

[10] The Procedure for taking exceptions is set out in Rule 23 of the rules which states that:

- (1) "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):"
- (3) "where an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated".

[11] A reading of Rule 23 shows that there are two grounds upon which an exception to particulars of claim may be taken. The first ground is that the particulars of claim lack averments which are necessary to sustain an action. The second ground is that the particulars of claim are vague and embarrassing. There is no provision for the list that is set out in paragraph 8 hereinabove (by the 1st Defendant).

[12] The 1st Defendant has not clearly identified between the two grounds stated which rule it relies on when it says that the particulars of claim **are bad in law in that they do not disclose a cause of action.** (My emphasis). This is not provided for in the Rules as the basis for exceptions. The starting point must always be the Rule and its precise wording. There must not be any derogation therefrom.

[13] It is only in the request to uphold the exception with costs that the 1st Defendant finally seems to wake up to the Rule when it says:

“Accordingly the Plaintiff’s claim lacks necessary averments to sustain the cause of action”, wherefore Defendants pray that the exception be upheld with costs, that it finally complies with the 1st part of the Rule.

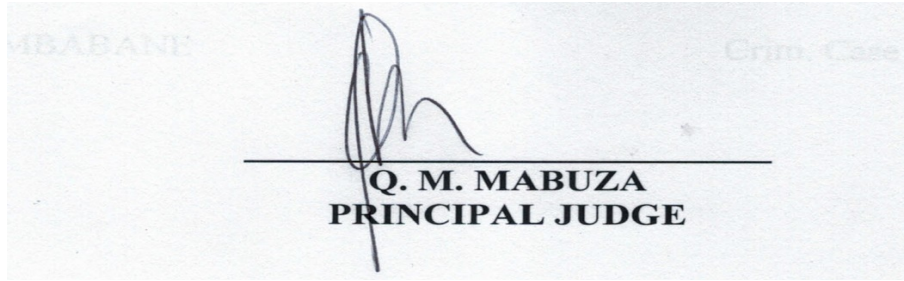
[14] **“Non-disclosure of the cause of action”** is not in the Rule; but **“lacking necessary averments to sustain the cause of action”** is in the Rule. These are two different issues, and have different meanings. (My emphasis)

[15] The notice of exception is totally defective because it does not indicate whether reliance is placed on either of the grounds that are stated in the Rules, namely “whether the particulars of claim do not sustain a cause of action” or whether they are vague and embarrassing”.

[16] The 1st Defendant has in my view failed to follow the correct procedure that is set out in Rule 23 (1) and (3). The exception must therefore fail and I so hold.

[17] The order of the Court is as follows:

- (a) The exception is dismissed with costs; and
- (b) The matter is ordered to henceforth take its ordinary course.



For the Plaintiff : Mr. S.C. Dlamini

For the 1st Defendant : Mr. M. Magagula