

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO: 72/2021

In the matter between:

OSCAR NKAMBULE

Appellant

And

CIVIL SERVICE COMMISSION

1st Respondent

THE PRINCIPAL SECRETARY –MINISTRY

OF PUBLIC WORKS & TRANSPORT

2nd Respondent

THE UNDER SECRETARY – MINISTRY OF PUBLIC

WORKS & TRANSPORT

3rd Respondent

THE PRINCIPAL SECRETARY – MINISTRY

OF PUBLIC SERVICE

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

Neutral Citation: *Oscar Nkambule vs Civil Service Commission and 4 Others*
(72/2021) [2022] SZSC 35 (23rd May, 2022)

CORAM: **S. P. DLAMINI JA**

M. J. DLAMINI JA

M. J. MANZINI AJA

DATE HEARD: 23rd May, 2022

DATE DELIVERED: 25th August, 2022

SUMMARY: *Civil Procedure: – Exception to particulars of claim raised on the basis that not all the necessary averments to sustain a claim for defamation were alleged – The High Court upheld the exception mainly on the basis that vicarious liability on the part of First, Second, Fourth and Fifth Respondents had not been established; Rule 23 (1) of the High Court rules as a basis and for an exception considered; and the law relating to exception and its Application considered – Held that the High Court misdirected itself is not confining itself to the issues raised in the exception but instead veered off to consider vicarious liability – Held that even if the High Court were to be found to have been right to consider vicarious liability, it misdirected itself not to pronounce itself on the liability of the Third Respondent at the very least – Held that the High Court misdirected itself on the principles governing exceptions and their application to the present case – Held that the Appeal is upheld with costs and; Held further that the matter is referred for trial at the High Court before a different Judge.*

JUDGMENT

S. P. DLAMINI – JA

INTRODUCTION AND THE PARTIES

[1] The main protagonists in this matter are the Appellant (Plaintiff *a quo*) and the Third Respondent (3rd Defendant *a quo*).

[2] The Appellant and Third Respondent, at all material times, were Civil Servants; the Appellant was/is employed by the Central Transport Organization a governmental department under the Ministry of Public Works and Transport and the Third Respondent was/is employed as the Under Secretary in the same Ministry.

[3] The First Respondent is a Government entity and the Second, Fourth and Fifth Respondents are cited in their official capacities as fully set out in the papers before Court.

PROCEEDINGS BEFORE THE HIGH COURT

[4] The Appellant instituted action proceedings against the Respondents by way of Combined Summons dated 6 June 2019.

[5] In terms of the particulars of claim the relief sought by the Appellant against the Respondents was damages in the sum of Emalangeni 5 million based on alleged defamation of the appellant by the Third Respondent. In addition to the claimed damages, Appellant sought costs on Attorney and Own client's scale against the Respondents.

[6] Furthermore in terms of the particulars of claim the First, Second and Fourth Respondents were jointly and severally liable for the alleged damages together with the Third Respondent due to their employment relationship, and that the alleged defamation arose in the context of this employment relationship.

- [7] It appears that the genesis of the suit by the Appellant was a letter he wrote to the Principal Secretary dated 2017 in which he complained in his personal capacity as a Shop Stewart about apparently “biased” and “dishonest” promotions in his department.
- [8] Somehow the letter is alleged to have triggered a mobile phone communication in which it is alleged that the Third Respondent uttered and caused to be published the defamatory words.
- [9] On 6 April 2018, Appellant’s Attorneys wrote a letter of demand in which they demanded on behalf of their client the relief set out in the combined summons. Clearly, they received no joy from the letter of demand hence then they launched the proceedings before the High Court.

[10] The Respondents entered an appearance to defend Appellant's claim. Instead of filing a plea, the Respondent's elected to except to the particulars of claim as they are entitled in terms of Rule 23 of the High Court Rules.

[11] It is apposite to reproduce the Respondent's Notice of Exception, namely;

"Take Notice that the Defendants/Excipients herein except to the Plaintiff's Particulars of Claim on the following grounds:

LACK OF SUFFICIENT AVERMENTS

1. *The Plaintiff's claim as pleaded is for defamation.*
2. *In an action for defamation a Plaintiff must allege:*
 - 2.1 *That the Defendant made a statement that is considered defamatory to the Plaintiff.*
 - 2.2 *That the statement was published.*
 - 2.3 *That the statement caused injury to the image or reputation of the Plaintiff.*
 - 2.4 *That the statement is false.*
 - 2.5 *That the statement is not privileged.*
3. *It is clear on the face of the particulars of claim that the Plaintiff have not allege all the requirements of defamation.*

4. In the premise the particulars of claim do not disclose a cause of action against his employer.

Wherefore the Defendants pray for an order upholding the exception with costs.”

[12] It appears that the exception was set down for hearing and was actually heard by the High Court in view of its judgment. I say this because between the filing of the Notice of Exception and the judgment, this Court has not been provided with any Court documents and/or record of what transpired.

[13] Be that as it may, the High Court as per Her Ladyship Mabuza P. J. delivered its judgment dated 28 September 2021 on which at paragraphs 42 and 43 the Court concluded that:

“[42] I am persuaded by the Defendants’ arguments in light of the principle of vicarious liability for which they have made out a sterling case with which I totally agree.

[43] In the event I uphold the Defendants point(s) of law and hereby dismiss the Plaintiff’s combined summons with costs.”

[14] The Appellant was dissatisfied with the said judgment of the High Court and launched an appeal before this Court.

PROCEEDINGS BEFORE THIS COURT

[15] The Appellant by way of an undated Notice of Appeal (an act that is to be censored with the seriousness it deserves which is very grave) but bears the Registrar's stamp dated 27 October 2021, launched the proceedings before this Court.

[16] The Appellant as per the Notice of Appeal advanced three grounds of appeal, namely that;

- “1. The Court a quo erred in law and in fact by finding that there was no connection to justify imputation of vicarious liability, yet the cause of the phone call that resulted to the utterance of defamatory words was a work related letter that was regarding irregularities or promotions and was directed to CSC, it prompted the 1st Respondent in her official capacity regarding the letter of complainant.*
- 2. The Court a quo erred in law and in fact by finding that the employee deviated from her course and scope of employment, without conducting an enquiry through oral evidence regarding the circumstances whether the employee had deviated from the course and scope of employment when uttering the defamatory words and in the absence of a Plea alleging such deviation. In essence, there were no basis in law or on the facts for the court to make such finding conclusively as same had neither been pleaded nor alleged orally.*

3. *The Court a quo erred in law and in fact in making the finding that, the wrong-doing in question is not legally characterized as occurring in the course of employment yet, in paragraph 4, 8.1 of the Particulars of Claim Appellant unequivocally stated that, the utterances were made in the course and scope of employment and it was regarding a work related letter of complaint about irregularities that occurred during a promotions process, such letter was directed to the employer CSC.*

3.1 *The Court a quo erred further in law in fact by categorizing the defamation as arising from a private spite, yet the utterances were prompted by a work related letter of complaint about promotions that were tainted by irregularities and was directed to the employer (CSC). At paragraph 8.1.5 the utterance was clearly regarding the subject of complaint in the letter of complaint to the employer to wit “promotions”, hence it was a work related reaction.”*

[17] The Appellant proceeded in his Notice of Appeal to pray for this Court that;

- “1. *The Appeal be upheld.*
2. *The Exception be dismissed with costs.*
3. *Directing the Respondents to file their Plea within twenty – one (21) days from date of the Judgment.*
4. *Granting costs of the Appeal against Respondents.*
5. *Granting further and or alternative relief.”*

[18] The Parties have filed Heads of Argument and Bundles of Authorities before this Court and at the hearing proceeded to make submissions in line with their respective Heads.

[19] However, in the course of the hearing and on being probed by the Court, both Counsel conceded that the issue of vicarious liability got interjected in the proceedings before the High Court and almost exclusively forms the basis of the impugned judgment. This point is critical as it appears more fully below.

ANALYSIS OF THE LAW AND ITS APPLICATION TO THE FACTS

[20] The Respondents Notice of Exception, as reproduced in paragraph 11 of this Judgment is entitled “lack of sufficient averments”.

[21] The Respondents proceeded to aver in the Notice that since the Appellant’s claim was for defamation he ought to allege “the statement was defamatory”, “the statement was published”, “the statement caused injury to the image or reputation of the Plaintiff”,

“that the statement is false”, and “the statement is not privileged.

The Respondents proceeded to state that “it is clear in the face of the particulars of claim that the Plaintiff have (*sic*) not allege (*sic*) all the requirements of defamation. Then Respondents concluded that “in the premise the particulars of claim do not disclose a cause of action against his employer”.

[22] The Respondents did not specify which of the listed averments required in a defamation claim were not alleged by the Appellant except that not all the necessary averments were alleged.

[23] Rule 23 provides as follows;

“23 (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):

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.

(2) *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.*

(3) *Where an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.*

(4) *Where any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary". (my underlining).*

[24] Clearly, Rule 23 as it appears above, is couched in peremptory terms.

Therefore, a party who wishes to exercise his or her rights in terms of Rule 23 must comply with its peremptory legislative sentence.

[25] As already mentioned above, the Respondents failed or omitted to specify which of the listed averments required the defamation claims by the Appellants were lacking. The Respondents merely lists in general terms what a plaintiff needs to aver in order for defamation claim and proceed to state that the Appellant failed to “**allege all the requirements**” without specifying which of those requirements were omitted by the Appellant. The Respondents proceeded to make a bold statement that as result of the

omission “**the claim does not disclose a cause of action against the employer and ignore the other Respondents**”, without even making minimum effort to demonstrate as to how such a conclusion is to be reached.

[26] I am of the view, that in the face of the peremptory nature of Rule 23 and established principles of a fair hearing, it is legally impermissible for the Court to come to the rescue of the Respondents and start to connect the legal dots and gabs on their behalf. A litigant in our law stands and falls on the papers filed of record. (See **PHANGOTHI INVESTMENTS (PTY) LTD v SWAZILAND DEVELOPMENT AND SAVINGS BANK AND FOUR OTHERS, TAGA INVESTMENTS (PTY) LTD v PHANGOTHI INVESTMENTS (PTY) LTD AND FOUR OTHERS, HIGH COURT OF SWAZILAND CIVIL CASE No. 2392/2008 para 30**).

[27] In view of the above, the Court misdirected itself in upholding the Respondents’ exception on the basis of Rule 23. The law is clear that when it comes to legal remedies that serve to bring proceedings to finality

without hearing the merits of a matter the Court in dealing with such must exercise great caution and ensure that all the necessary requirements are met, such remedies include summary judgments or exceptions such as in this case with respect, I am unable to agree with the High Court that in the present matter the exception is well founded at law. Therefore, the appeal must succeed.

[28] The issue of the application of Rule 23 in the impugned judgment is further complicated by the fact that *ex facie* the judgment, it appears the principal ground for dismissing Appellant's claim was that he failed to demonstrate vicarious liability on the part of the Respondents.

[29] Firstly, nowhere in the Notice of Exception does the Respondent raise the issue of vicarious liability. I am totally at loss as to how such a defence was not advanced in the pleadings yet it only found its way and became the cornerstone of the judgment of the High Court resulting in the dismissal of the Appellant's claim.

Perhaps what the Court did say in paragraph 42 of the judgment is worth noting namely;

“I am persuaded by the Defendant’s arguments in light of the principle of vicarious liability for which they have made out a sterling case with which I totally agree. (my underlining)

It is trite in our law that a party must plead his or her case in the papers and not introduce such in Heads of Argument or arguments. The High Court misdirected itself on this point and this is a proper legal basis for the impugned judgment to be set aside.

[30] In the matter of **OBSIDIAN HEALTH (PTY) LIMITED AND MAUREEN MAKHUVHA AND PRIME SURGICAL (PTY) LIMITED, HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION CASE NO: 33905/2019, WINDELL J** had this to say at paragraph 18 of the judgment:

“[18] An applicant is bound by the case made out in its founding affidavit. It must stand or fall by the allegations contained in its founding affidavit and it is not allowed to make out its case in the replying affidavit. A court will not allow the introduction of new matter in reply when no case at all was made out in the original application or if the reply reveals a new cause of action. In POSEIDON SHIPS AGENCIES (PTY) LTD v AFRICAN COALING AND EXPORTING CO (DURBAN) PTY AND ANOTHER BROOME J held as follow;

“The correct approach to the problem was enunciated clearly by CANEY J in Bayat and Others v Hansa and Another 1955 (3) SA 547 (N) at 553D:

“.... The principle which I think can be summarized as follows... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.”

The *dictum* in that case finds application in many cases in our jurisdiction and it has been applied not just with regard to affidavits but to other court processes such as grounds of appeals. I do not see any legal reason as to why it should not apply to a Notice of Exception.

[31] Secondly, the judgment of the High Court while dealing with the issue of vicarious liability omitted to deal with the direct liability of the Respondents. Thus in my view, even if it is accepted for a moment that vicarious liability was properly before the High Court.

By its nature vicarious liability arises because of an alleged act or omission of party or parties which in turn is imputed to others in many instances an employer (as it is the case in the present matter). As a result of the approach adopted by the High Court there was a blanket absolution of all of the Respondents irrespective of whether the alleged claim against any of them was direct or vicarious. In my view, the High Court misdirected itself in its approach.

ORDER

[32] In view of the foregoing, the Court makes the following order;

1. That the appeal is upheld.

- 1.1 The judgment of the High Court is set aside and replaced with the following;

“The exception filed by the Respondents be and is hereby dismissed with costs.”

2. That the matter is referred to the High Court for trial before a different Judge and the Defendants must still file a Plea(s) within 21 days of this judgment and thereafter the matter proceeds in terms of the applicable rules of the High Court.


3. That the Appellant is awarded costs at an ordinary scale.



S. P. DLAMINI


JUSTICE OF APPEAL

I agree



M. J. DLAMINI
JUSTICE OF APPEAL

I agree



M. J. MANZINI

ACTING JUSTICE OF APPEAL

FOR THE APPLICANT: M.L.K. Ndlangamandla
(M. L. K Ndlangamandla Attorneys)

FOR THE RESPONDENTS: M. Dlamini
(The Attorney General)