



REPUBLIC OF NAMIBIA

"Reportable"

CASE NO. I 1704/2009

HELD AT THE HIGH COURT OF NAMIBIA, MAIN DIVISION

In the matter between:

GIDEON HANGULA

PLAINTIFF / RESPONDENT

and

THE MOTOR VEHICLE ACCIDENT FUND

DEFENDANT / APPLICANT

***CORAM:* DAMASEB, JP**

Heard: 20 September 2011

Delivered: 18 April 2012

EXCEPTION

JUDGMENT

DAMASEB, JP: [1] On 25 February 2011, the plaintiff instituted action against the defendant by way of combined summons. The claim was served on the defendant on 3 March 2011 and is based on a motor vehicle collision that took place on 25 August 2009 along the highway between Karibib and Okahandja.

[2] The plaintiff alleges in his particulars of claim that the accident was caused by the negligent driving of a third party, Alpers Friedrich, who at the time drove the vehicle that collided against that of the plaintiff¹. As a result of the accident, the plaintiff alleges, that he sustained bone fracture of the leg and was admitted to hospital for rehabilitative medical care. He alleges that he also suffered loss of income due to a diminished earning capacity while recovering from the injuries and still experiences severe pain and discomfort as well as recurring and permanent pain and discomfort.

[3] The plaintiff alleges that following the accident and the injuries sustained as a consequence, he lodged a claim with the defendant in terms of the Motor Vehicle Accident Fund Act ²(hereinafter referred to as "the Act"), and that the defendant, acting through its officials, repudiated the claim for the payment of benefits, excepting for benefits towards medical

¹ See section 24 of the Motor Vehicle Accident Fund Act, no. 10 of 2007.

² Act No. 10 of 2007.

attention and expenses. It is the plaintiff's case that the defendant had acted wrongfully and unlawfully in repudiating the claim for loss of income alternatively loss of earning capacity; a cash grant as compensation for injury; an undertaking to pay for medical treatment or injury management as well as rehabilitation; and reimbursement for costs reasonably incurred by the plaintiff in the provision of services³. He then seeks the following relief, allegedly in terms of sec. 32(4) of the Act:

(i) an order that the defendant is liable to plaintiff in terms of sec.24 and must proceed to make a determination of the benefits in terms of sec.25;

(ii) alternatively an order that the defend is liable to plaintiff in terms of sec 24 and must proceed to make a determination to award benefits in accordance with sec. 25 at such reduced levels as accords with the court's determination of the claimant's contribution to the accident, injury or death(sic).

[4] Having defended the matter, the defendant's legal practitioner of record requested further particulars in the following terms:

(i) on what basis does plaintiff claim for loss of income alternatively loss of earning? Full details and proof is required thereof.

³It is not immediately apparent what services he could, or provided, to himself.

(ii) on what basis does plaintiff claim for medical treatment and rehabilitation? Full details of expenses and proof is required thereof.

(iii) on what basis does plaintiff claim for reimbursement for cost reasonably incurred? Full detail and proof is required thereof.

(iv) On what basis does plaintiff claim cash grant as compensation for injury? Full details and proof is required thereof.

(v) On what basis does plaintiff allege that the repudiation and refusal by defendant is wrongfully, unlawfully and that defendant failed, neglected and refused its liability and determination thereof?'(Sic)

[5] In reply, the plaintiff provided the following particulars:

1. loss of income by reason of interrupted, diminished or terminated earning capacity as contemplated under sections 25(1)(a) thereof;
2. a cash grant for the physical injury suffered for the pain and suffering as contemplated under section 25(1)(c);
3. an undertaking towards future medical treatment for injury management and rehabilitation as contemplated under section 25(1)(d) and (e) thereof; and
4. reimbursement for cost reasonably incurred by the plaintiff in the provision of service as contemplated under section 25(1)(i) thereof.

[6] The defendant then excepted to the particulars of claim filed by the plaintiff on the ground that same is bad in law and does not disclose a cause of action. The defendant relies on rule 18(10) of the rules of the High Court which requires a plaintiff suing for damages to specify the nature, effect and extent of the injuries, as well as the duration of the disability alleged to

have given rise to such damages. Still relying on rule 18(10), the defendant further points out that the plaintiff did not indicate the income lost to date as a result of the injuries to enable the defendant to make any determination in terms of the Act.

[7] The defendant also takes the view that in terms of sec. 32(3) of the Act, the plaintiff had failed to allege on what basis the High Court has jurisdiction in this matter. Additionally, the defendant states that the relief claimed by the plaintiff has the effect of a *mandamus* in that it compels the defendant, a public body, to perform its statutory duties; and that such relief ought to have been sought by way of application and not action proceedings.

[8] The plaintiff had elected not to amend the particulars of claim after the exception was taken and chose to oppose the exception. That necessitated adjudication of the exception.

[9] At a case management hearing the parties waived their right to oral argument and were directed to file written heads of argument, whereafter judgment would be deemed reserved. The defendant filed its heads of argument as directed, but the

plaintiff failed to and has not sought any extension of time to file the heads as agreed and directed.

Lack of jurisdiction

[10] Section 32(3) of the Act reads:

'Despite any law to the contrary, where the cause of action is founded on a repudiation of liability or a dispute regarding the claimant's contribution to the accident, injury or death giving rise to the claim, proceedings may be instituted in a court of competent jurisdiction.'

It is this provision that provides fodder for the claim on behalf of the defendant that the particulars of claim must have included (but failed to include) an allegation that the claim falls within the jurisdiction of the High Court. The point has no merit. That the High Court has jurisdiction must be clear on the face of the pleadings, even if not specifically pleaded. The only circumstance in which this Court has no jurisdiction in a civil case is if the defendant (respondent) is a *peregrine*.⁴ In the present case the following is apparent from the pleadings:

- (i) Both the plaintiff and the defendant are *incolae* of this Court.

⁴ Compare, *SOS -Kinderdorf International v Effie Lentin Architects* 1990 NR 300 at 303A-J.

(ii) The accident founding the cause of action occurred between Karibib and Okahandja, a location which this court is entitled to take judicial notice as falling within the boundaries of Namibia.

[11] Section 16 of the High Court Act⁵ states as follows:

“The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognizance ...”

Besides, sec. 22 of the High Court Act states that the civil process of the High Court shall run throughout Namibia. The lack of jurisdiction point is not only bad in law but is frivolous and placed an unnecessary burden on the court to deal with it. It deserves censure.

[12] The exception filed on 13 April 2011 makes no mention of the claim being prescribed. But in the heads of argument subsequently filed, prescription is raised in respect of the claim and as a basis for the court’s lack of jurisdiction. Raising prescription in heads of argument and not in the exception amounts to trial by ambush. It is trite that an excipient is confined to the grounds put forth in the exception.⁶ The lengthy arguments advanced on

⁵ Act No 16 of 1990

⁶*Wicksteed and Others v George* 1961 (1) SA 651(FC).

prescription do not avail the defendant who did not raise it squarely in the exception. This conduct too deserves censure.

Form of proceedings

[13] The other objection raised by the exception is that the present proceedings should have been brought by way of motion because (i) no disputes are anticipated and (ii) it is in the nature of a *mandamus*. It is added for good measure that motion proceedings are faster and less costly compared to action proceedings. I am not aware of any rule of law, and none has been pointed out to me, that supports the view that a proceeding must be dismissed because it was brought by way of action when motion proceedings would have been more convenient and cost effective. In my view it is a sort of consideration that is more appropriately had regard to when the court reaches the stage of apportioning costs. As was observed by Murray JP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155(T)at 1162:*

“Where no real dispute of fact exists there is no reason for the incurrance of the delay and expense involved in a trial action and motion proceedings are generally recognised as permissible.”

It is trite that even where a statute makes provision for proceedings to be initiated by way of motion it does not exclude proceedings to be brought by way of action.⁷ A fortiori, where a statute does not expressly provide for motion proceedings, there can be no bar in principle to proceeding by way of action. I can put the principle no higher than this: a party choosing a costlier way of litigating runs the risk of being mulcted in costs if it transpires at the end of the day that there was a much more convenient and less costly alternative available. That said, this objection too borders on being frivolous and deserves censure.

Particulars not disclosing cause of action

[14] The next issue falling for decision is whether the particulars of claim filed of record contain the necessary averments to sustain a cause of action. The defendant excepted to the plaintiff's particulars of claim on the basis that it lacks averments necessary to sustain an action and or failed to disclose a cause of action; alternatively are vague and embarrassing. Being a delictual claim, the defendant argues, the plaintiff's claim should comply with rule 18(10) of the Rules of Court to sustain a cause of action. Rule 18(10) reads:

⁷See, *Food & Nutritional Products (Pty) Ltd v Neumann* 1986 (3) SA 465 (W); *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366; *Howard v Herrigel* 1991 (2) SA 660 (A).

"A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify the nature and extend of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-

- (a) Medical costs and hospital and other similar expenses;
- (b) Pain and suffering;
- (c) Disability in respect of-
 - (i) The earnings of income(stating the earnings lost to date and the estimated future loss)
 - (ii) The enjoyment of amenities of life (giving particulars).

[15] The defendant's counsel argues that the plaintiff's claim is an illiquid delictual one, not being a claim for a debt, and therefore the quantum of damages allegedly suffered should have been alleged in the particulars of claim. The complaint encapsulated in this exception is that the particulars of claim lack sufficient information to allow defendant to plead or are, in the alternative, vague and embarrassing.

[16] In adjudicating an exception the Court must accept the correctness of the facts as alleged by the plaintiff. The test that I must apply is this: notwithstanding the truth of the facts alleged, do those facts in law establish any sufficient case? If

they don't, the exception is good and must be allowed. As Parker J so eloquently put it in *Motor Vehicle Accident Fund v July*⁸:

'The crisp question to determine is essentially this: is the defendant's contention that the plaintiff's pleading objected to, taken as it stands, legally invalid for its purpose well founded?'⁹

[17] It was held in *Denker v Cosack*¹⁰ that the remedy of exception is only available where an exception goes to the root of a claim or defence¹¹ and that the main purpose of an exception that a claim does not disclose a cause of action is to avoid leading unnecessary evidence at the trial.¹² In that case HOFF J held¹³ that an excipient has a duty to persuade the court that, upon every interpretation that the particulars of claim can reasonably bear no cause of action is disclosed and further that the court, for the purposes of an exception, takes the facts as alleged in the pleadings as correct. As was observed in *McKelvey v Cowan NO*¹⁴:

'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not

⁸ 2010 (1) NR 368 at 371 para 8.

⁹ See, *Salzmann v Holmes* 1914 AD 152 at 156.'

¹⁰ 2006 (1) NR 370 at 373H.

¹¹ *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 599F-G; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706).

¹² *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553G-I.

¹³ At 374A-B

¹⁴ 1980 (4) SA 525 (Z) AT 526

excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.'

[18] Rule 18(10) requires all necessary averments to be alleged in particulars of claim and to include the extent, amount and the effect of the damages suffered. That is to enable the defendant to reply thereto and to assess the *quantum* of such damages. In order to disclose a cause of action, the plaintiff's pleading must therefore set out every material fact which it would be necessary for the plaintiff to prove, including damages, in order to support the right to judgment of the court. It was held in *Grindrod (Pty) Ltd v Delport*¹⁵, that to comply with rule 18 (10), it behoves a plaintiff suing for damages to set them out in such a way as will enable the defendant reasonably to assess the *quantum* thereof, even if the additional information to be provided involves interpretation of facts and opinion of professional advisors. The plaintiff sought leave to amend its declaration *inter alia* annexing a written report from a firm of auditors explaining in detail how the plaintiff's damages claims were formulated and quantified. The court granted plaintiff leave to amend the declaration by annexing eight medical reports running to 52 pages in order to comply with rule 18(10). The *ratio decidendi* for the decision is that rule 18(10) enjoined a party claiming damages to provide sufficient information to

¹⁵ 1997 (1) SA 342 (W) at 347.

enable the opposing party to know why the particular amount being claimed as damages was in fact being claimed.

[19] In favour of the plaintiff I must accept the following facts to be correct:

- (a) He was involved in an accident.
- (b) He sustained injuries as a result of the accident.
- (c) He was admitted to hospital for rehabilitative care.
- (d) He suffered loss of income.

Section 25 of the Act determines what the plaintiff is entitled to claim as a result of injuries suffered in the motor vehicle accident. As far as it relates to him those are:

- (a) reimbursement of income lost as a result of being unable to secure employment;
- (b) cash payment as compensation for injury including loss of earning capacity;
- (c) reimbursement of costs of medical treatment;
- (d) an undertaking to pay for future medical treatment for injury management in accordance with a treatment plan;

(e) an undertaking to pay for rehabilitation;

(f) an undertaking to pay for life enhancement in accordance with an approved plan;

(g) reimbursement of costs reasonably incurred in the provision of a service to a person entitled to an award¹⁶.

Yet no specific amount is being claimed as the plaintiff fails to quantify the claims that obviously sound in money. He quite improperly also does not specify when and towards whom future medical care is owed or costs are or will likely reasonably be incurred in the provision of services to him.

[20] In a nutshell, in the way the plaintiff has pleaded, the defendant will not be able to reasonably assess the *quantum* of damages in respect of the benefits the plaintiff claims he is entitled. The failure to provide the information sought in further particulars is all the more troubling. No additional information or opinion evidence in support of the damages allegedly suffered has been presented by the plaintiff in support of his claims. A bald statement of broad principles as to the basis on which the damages have been claimed will not satisfy the requirement of adequate quantification. The plaintiff ought

¹⁶ Assuming (which is doubtful) that he can personally claim for such services.

clearly to have indicated the damages suffered as a result of the collision and the expenses incurred and specified the persons in respect of whom he expects to be indebted for future medical care; or the extent of the expenses reasonably incurred in the provision of services. He has failed to do so and in the result the particulars of claim are excipiable.

[21] Section 32 (4) (a) and (b) of the Act states that in any action brought against the Fund (in the event the plaintiff is unsuccessful) the court may order absolution from the instance or dismiss the claim and make an appropriate order as to costs. For the reasons I have set out in the body of the judgment, I do not propose to grant the plaintiff costs.

[22] I therefore make the following order:

1. The exception is allowed.
2. The defendant is granted absolution from the instance.
3. There is no order as to costs.

DAMASEB, JP

ON BEHALF OF THE PLAINTIFF/RESPONDENT:

Mr AEJ Kamanja

Instructed by:

SISA NAMANDJE & CO INC.

ON BEHALF OF THE DEFENDANT/APPLICANT:

Mr P S Muluti

Instructed by:

MULUTI & PARTNERS