

SOUTH AFRICA / JUDGMENT

Bam v Eastern Cape Development Corporation and Another (1787/2016) [2017] ZAECMHC 18 (29 June 2017) [2017] ZAECMHC 18

COURT

Eastern Cape High Court, Mthatha

BEFORE

RWN Brooks

CASE / FILE NUMBER

1787/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1787/2016

PUMELELE NGUBENANI BAM

Plaintiff

and

EASTERN CAPE DEVELOPMENT

CORPORATION

First Defendant

TYEKS SECURITY COMPANY

Second Defendant

JUDGMENT

BROOKS J

- [1] The plaintiff is an Mthatha businessman. It is alleged in the amended particulars of claim that he was a director of a close corporation registered as Broadlux Carriers CC, which owned buses and vehicles, and that he also owned buses in his personal capacity.
- [2] The first defendant is the Eastern Cape Development Corporation. The second defendant is a company registered as Tyeks Security Company.

- [3] It is alleged in the amended particulars of claim that an entity known as MBM Enterprises leased certain immovable property known as Erf 2668 Mthatha from the first defendant, which is the registered owner thereof. MBM Enterprises is alleged to have repaired buses owned both by Broadlux Carriers CC and by the plaintiff whenever repairs were necessary. For some reason, MBM Enterprises disintegrated and abandoned the immovable property, leaving a debt of unpaid rental owed to the first respondent.
- [4] Broadlux Carriers CC appears to have secured the first defendant's permission to take over occupation of the immovable property. It made payment of an agreed rental to the first defendant but did not pay the arrears due by MBM Enterprises. No formal written lease appears to have been entered into by the first defendant and Broadlux Carriers CC.
- [5] At some stage, the first defendant appears to have obtained an order against MBM Enterprises. In terms of the order, the lease agreement between MBM Enterprises and the first defendant was cancelled. MBM Enterprises was directed to pay an amount of R131 492, 36 as arrear rental to the first defendant and the occupants of the immovable property were evicted.
- [6] In due course the sheriff was placed in possession of a warrant of execution against the property of MBM Enterprises and proceeded with the execution thereof.
- [7] Since the order evicted all occupants of the immovable property, the plaintiff made arrangements to remove his own buses and motor vehicles from the immovable property. However, it is apparent that he was prevented from doing so by the employees of the second defendant who had been authorised by the first defendant to secure the premises and to prevent the removal of assets from the immovable property. It is alleged in the amended particulars of claim that the first defendant did not have a tacit hypothec over the property.
- [8] The plaintiff eventually resorted to making an application to court, seeking the release of a list of specified property by way of spoliation order. The order was granted on 6 June 2013.
- [9] It is pleaded that it took the plaintiff "some months after the order was issued to have his property released to him."

When it was, some of the property was missing.

- [10] Against this background, which is pleaded as a somewhat rambling narrative in the amended particulars of claim, the following is pleaded as paragraphs 26 to 28 thereof:

"26 The first defendant is held liable for the loss of property of the plaintiff because it is its staff who authorised the second defendant should not release the goods to the plaintiff. The second defendant is held liable for the damage suffered by the plaintiff because its guards failed to guard plaintiff's property against being stolen and when they left the premises unguarded.

27 Had the first defendant not have refused the release of plaintiff's goods at the time he demanded their release, they would not have disappeared through being stolen. Whilst the goods remained at first defendant's premises at its instance, the first defendant had a duty of care

towards plaintiff's property in that it had to ensure that the goods were kept safe until whatever was the issue between it and the plaintiff, resulting in the confiscation of plaintiff's goods, was resolved. It failed to exercise that duty of care and as a result thereof plaintiff has suffered damages occasioned by the loss of property.

28 Both defendants are held liable for the damages suffered by plaintiff jointly and severally. Both defendants ought to have studied the contents of the warrant of execution and should have confiscated only the property attached by the sheriff belonging to MBM Enterprises. The total amount to replace the stolen goods is R1 177 840,00."

[11] Prior to the amendment of the particulars of claim, the first defendant excepted thereto. Notwithstanding the amendments

brought about to the particulars of claim, the first defendant persists in the exception. The relevant paragraphs thereof

reads as follows:

"4 Plaintiff's claim is formulated in the law of delict and its cause of action is, at best, based on the omission of the first defendant to safeguard the equipment allegedly kept at the premises of the first defendant.

5 Plaintiff's particulars of claim do not allege,

5.1 That the goods kept by the plaintiff at the first defendant's premises were not covered by tacit hypothec.

5.2 That the first defendant had a duty of care towards the plaintiff in respect of the goods kept at the premises.

5.3 That plaintiff had, prior to the order of eviction, made first defendant aware of the goods kept at the premises which were exclusively owned by the plaintiff and not by any of the entities featured in the lease agreement, alternatively, that first defendant was in any event aware of the goods kept at the premises.

6 Plaintiff has sought to rely on a principle of strict liability emanating solely out of defendant's ownership of property and the common law does not provide for that kind of liability.

7 In the circumstances, the plaintiff's purported cause of action is bad in law as it does not disclose facts necessary to sustain a cause of action."

[12] By its very nature, an exception amounts to a legal objection to a pleading. It addresses a defect inherent in the pleading.

Assuming for the purposes of the argument that all the allegations made in the pleading are true, the exception asserts that even if all the allegations in the pleading are true, the pleading does not disclose either a cause of action or no defence is disclosed.[1] The principle that for the purposes of determination of the exception the facts in the relevant pleading must be accepted as correct

does not extend to inferences and conclusions not warranted by allegations of fact. The court is not obliged to stultify itself by accepting allegations of “fact” which are manifestly false i.e. allegations which are so removed from reality that they cannot possibly be proved.[2]

[13] The plaintiff has attempted to meet the complaints raised in the exception. It has now been pleaded that “the first

defendant did not have the tacit hypothec over the property”. However, notwithstanding the attempt made, the particulars of claim are still deficient. The reference to the tacit hypothec imports a conclusion of law. No proper factual basis is pleaded to support this conclusion. In particular, there is no reference to knowledge at the material time on the part of the first defendant which would be required to exclude the plaintiff’s own goods from the tacit hypothec flowing from the lease agreement between the first defendant and its tenants.[3]

[14] In turn, nothing is set out in the amended particulars of claim to support the conclusion of law pleaded to the effect that the first defendant owed the plaintiff a duty of care. Whether the plaintiff believes that a duty of care arose by virtue of the plaintiff’s placement of his movable assets on the immovable property, or by virtue of the substitution of Broadlux Carriers CC as the tenant thereon, or by some mechanism extraneous to the limited facts pleaded is unclear. Was there a legal duty on the part of the first defendant to act positively and, if so, on what is it based?[4]

[15] Absent from the amended particulars of claim are allegations to establish whether there was in fact a positive legal duty on the part of the first defendant towards the plaintiff, that it was to act positively to prevent loss to the plaintiff, whether loss to the plaintiff was foreseeable, whether the first defendant failed to act as a reasonable person would have done and a factual basis for a contention that the first defendant’s conduct was wrongful. Although not raised in the notice of exception, I may mention in passing that as for as the quantum of the plaintiff’s claim is concerned, no basis is laid in justification thereof with the sort of detail required by the Uniform

Rules of Court to enable the first defendant to plead thereto or to make a tender.

[16] It follows that the exception taken, that the amended particulars of claim lack averments sufficient to sustain a cause of action, must be upheld.

[17] I have given consideration to an outright dismissal of the plaintiff’s action, but I have elected to afford the plaintiff

a further opportunity to remedy the deficiencies in the amended particulars of claim. In light of the quantum of the damages claimed, which is substantial, and the extremely poor standard of pleading evident overall in the amended particulars of claim, I consider it to be fair and in the interests of justice to do so.

[28] The following order will issue:

- [1] The first defendant's exception is upheld.
- [2] The plaintiff is given leave to amend his amended particulars of claim within twenty days of the date of this order, failing which the first defendant shall be entitled to approach the court on notice of motion for the dismissal of the plaintiff's action against it;
- [3] The plaintiff is directed to pay the costs of the exception on the scale as between party and party and on an opposed basis.

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances

ON BEHALF OF THE PLAINTIFF:

ADV EN NYOBOLÉ

Instructed by

NDZAMELA ATTORNEYS.

AND ASSOCIATES INC

Plaintiff's Attorneys,

1ST FLOOR

ECDC DEVELOPMENT HOUSE

Cnr YORK and ELLIOT STREETS

MTHATHA

On behalf of the defendant/excepient:

ADV B MASWAZI

Instructed by

MABANE and SOKUTU INC

Defendant's Attorneys

C/o D.Z DUKADA & CO,

73 NELSON MANDELA DRIVE

Date heard:

22 June 2017

Date delivered:

29 June 2017

- [1] ERASMUS, Superior Court Practice B1 - 151
- [2] NATAL FRESH PRODUCE GROWERS' ASSOCIATION AND OTHERS V AGROSERVE (PTY) LTD AND OTHERS 1990 (4) SA 749 (NDP) AT 754J – 755B
- [3] WEBSTER v ELLIS 1911 AD 73
- [4] SILVA'S FISHING CORPORATION (PTY) LTD v MAWEZA 1957 (2) SA 256 (AD) 264 – 265; PERI URBAN AREAS HEALTH BOARD v MUNARIN 1965 (3) SA 367 (A) 373; MINISTER OF FORESTRY v QUATHLAMBA (PTY) LTD 1973 (3) SA 69 (A) 81 -82.
- [4] SILVA'S FISHING CORPORATION (PTY) LTD v MAWEZA 1957 (2) SA 256 (AD) 264 – 265; PERI URBAN AREAS HEALTH BOARD v MUNARIN 1965 (3) SA 367 (A) 373; MINISTER OF FORESTRY v QUATHLAMBA (PTY) LTD 1973 (3) SA 69 (A) 81 -82.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMHC/2017/18.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bam-v-eastern-cape-development-corporation-and-others-unknown-topic-aecmhc-2017>

Prepared on 12 October 2026 · Esheria