

SOUTH AFRICA / JUDGMENT

Mohlala v Gauteng MEC for Health (50226/2009) [2015] ZAGPPHC 1084 (9 November 2015) [2015] ZAGPPHC 1084

COURT

North Gauteng High Court, Pretoria

BEFORE

J.S. Strydom

CASE / FILE NUMBER

50226/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 50226/2009

DATE:

50226/2009
KWALABOTSENG
ANNIKIE
MOHLALA
PLAINTIFF
and
GAUTENG
MEC FOR
HEALTH
DEFENDANT

JUDGMENT

STRYDOM AJ:

1. The plaintiff issued summons against the defendant on 18 August 2009. It is unclear from the pleadings whether the plaintiff instituted action based on a breach of contract or delict. Counsel for the plaintiff submitted that the plaintiff's claim was based on a delict committed by an employee of the defendant.
2. In summary the plaintiff's claim, set-out in her particulars of claim, is as follows: 1
 - 2.1. The plaintiff was employed by defendant at the Steve Biko Hospital during December 2007. On 18 December 2007 she resigned from the employment of the defendant and gave two weeks notice, because she was employed by the defendant, for less than a month. On 20 December 2007 the defendant refused to accept the plaintiff's short notice of resignation and required her to give a month's notice instead, which was to run until 31 January 2008. The plaintiff signed documentation in support of her resignation on 3 January 2008.
 2008. The plaintiff further alleged that the defendant submitted documentation to the Gauteng Shared Services (hereafter "the GSS"), which indicated that she was dismissed from the service of the defendant due to misconduct. The plaintiff started employment with her new employer the George Stegmann Hospital, in the North West Province, on 7 January 2008 as a Senior Medical Officer. The plaintiff discovered that she could not be registered on the Persal System of her new employer, because the system indicated that her services were terminated with the defendant due to misconduct and not voluntary resignation.
 - 2.2. The plaintiff claimed that the circumstances set out above, in particular that she was not registered on the Persal System, was occasioned solely as a result of the gross negligence of an employee of the defendant.²
 - 2.3. The plaintiff further alleged that as a result of the said conduct of the defendant, payment of her salary was delayed for three months, which led to undue hardship in providing for her family, including their day-to-day needs. She averred that she suffered pain, inconvenience, humiliation and embarrassment as a consequence of the defendant's aforesaid negligence.
 - 2.4. The plaintiff claimed the amount of R531, 228. 85 as damages from the defendant calculated as follows: Special Damages in respect of penalties and interest in the amount of R5,728. 85,3 and the amount of R22, 500. 00 as legal fees incurred in defending a high court action of Nedbank against the plaintiff for the foreclosure of her home. General Damages for pain and suffering, humiliation, degradation and impaired credit profile was claimed in the amount of R500, 000. 00.

3. The defendant answered to the plaintiff's claim that the plaintiff was employed by the defendant for a lengthy time.⁴ It admitted that defendant instructed the plaintiff to work a month's notice period, but she failed to do so. The instruction, so it pleaded, was lawful. The defendant further denied any wrongful act and liability for the damages which the plaintiff alleged she sustained and suffered. Ultimately it pleaded that the plaintiff's alleged damages was in any event too remote to make the defendant accountable therefore.
4. At the commencement of the trial I had serious reservations whether the facts advanced by the plaintiff⁵ is sufficient to sustain a cause of action against the defendant. No exception was taken by the defendant, which it was obviously not compelled to do.

ACTIO LEGIS AQUILIAE

5. The Actio Legis Aquiliae enables a plaintiff to recover patrimonial loss (including purely economic loss) suffered through a (1) wrongful and (2) negligent act of the defendant.⁶
6. It is trite law that conduct which causes harm to another person is in itself insufficient to give rise to delictual liability.

Liability depends on the wrongfulness of the act or omission of the defendant, i.e. that the prejudiced suffered by the plaintiff was caused in a legally reprehensive or unreasonable manner. It follows that in the absence of wrongfulness the defendant may not be held liable at all. Wrongfulness is determined objectively and ex post facto by taking into account all the relevant facts and circumstances that were factually present and all the sequelae that factually ensued.⁷

6.1. The determination of wrongfulness is premised on a twofold assessment. ⁸

6.1.1. Firstly it must be determined whether a legally recognised individual interest has been infringed on. In *Premier, Western Cape v Faircape Property Developers (Pty) Ltd*⁹ Lewis, JA formulated this requirement as follows:

"For an act or omission to be actionable, it must constitute an infringement of a legal interest. Just as there cannot be negligence

in the air, so there cannot be wrongfulness...in the air..."

6.1.2. Secondly, after it is determined that a legal interest has been infringed, legal norms must be employed to determine whether such prejudice occurred in a legally reprehensive or unreasonable manner. This means that breach of a legal norm must have occurred.

6.2. Damaging consequences are also in itself insufficient to amount to wrongfulness. In *Thomas v BMW South Africa (Pty) Ltd*¹⁰ the court formulated this requirement as follows:

"There can be no delict in the absence of a wrongful act or omission on the part of a wrongdoer. An act or omission can be characterised only if it results in damnum. Until that happens an act or omission constitutes no more than 'negligence in the air'. Wrongfulness is not simply an attribute of a wrongdoer's conduct but a function of that conduct together with its consequences in relation to a particular person."

6.2.1. In practice wrongfulness most commonly arises from breach of a common-law right; 11 breach of a particular statutory duty; 12 or a breach of a duty of care.¹³

ABSENCE OF CAUSE OF ACTION

7. Most notable in this matter, the plaintiff made no averment of wrongfulness on the part of the defendant in her particulars of claim. In my view the plaintiff's claim thus do not disclose a cause of action.
8. Be that as it may, during the trial the plaintiff testified that defendant's wrongful action appears from a letter¹⁴ of Dr AP van der Walt dated 4 January 2008, which was, although it was not clearly argued, ostensibly in contradiction with the terms of the plaintiff's employment contract, which permitted her to give two weeks, instead of one month's notice of resignation. A party is always entitled to amend its pleadings to bring it in accordance with the evidence. No such

application was made by the plaintiff.

RECOVERABLE DAMAGES

9. As a general rule a plaintiff is entitled to recover from the wrongdoer the amount by which the plaintiff's patrimony was diminished as a result of the wrongdoer's conduct. ¹⁵
10. Damages will however not be recoverable if the extent or nature thereof were not foreseeable at the time when the delict was committed, or were it is too remote. This means that, even when factual causation of the damages which the plaintiff suffered has been established legal causation¹⁶ is also required. Willie's Principles of South African Law states this requirement as follows: ¹⁷

"The test in South African law for determining whether harm is too remote is the 'flexible test' which has been developed since the early 1990s. In *International Shipping Co (Pty) Ltd v Bentley Corbett J* adopted for the law of delict the policy-orientated approach which has been taken in the criminal case of *S v Mokgethi*. It was confirmed in a number of cases, including *Smit v Abrahams*, *Standard Chartered Bank of Canada v Nedperm Bank Ltd* and *OK Bazaars*

(1929) *Ltd v Standard Bank of South Africa Ltd*. In the latter case it was said that 'the test to be applied is a flexible one in which factors such as the reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice, all play their part'. "¹⁸

11. What I have set-out above are elementary principles of the law of delict and damages. Sad to say, the plaintiff's particulars of claim failed to reflect these principles.

EVIDENCE

12. The plaintiff was the only witness that testified in this matter. She was not a good or convincing witness. The plaintiff changed her version on several occasions. Under cross-examination the plaintiff conceded at least three times that she made mistakes/errors in her evidence-in-chief. It was clear to me that the plaintiff only started reconstructing the events, which took place at the end of 2007 beginning of 2008, during cross examination. This is obviously a recipe for failure.
13. I need not make a credibility finding in order to reject the evidence of the plaintiff as unfounded. Inconsistencies and improbabilities on material facts may render the plaintiff's case flawed. Furthermore, the evidence in support of the quantum of the plaintiff's claim may be so deficient that the plaintiff plainly just failed to prove her case. With the latter considerations in mind I now turn to consider the plaintiff's evidence.

14. Continued service of more than one year

14.1. The plaintiff testified that she is a medical doctor who was employed by the defendant as a medical practitioner at Steve Biko Hospital until the end of 2007 when she resigned. She maintained in her evidence in chief that she was employed from 1 December 2007 by the defendant, intimating that she was in the employment of the defendant for less than one month when she resigned on 18 December 2007 from its employment.

14.2. The plaintiff however accepted under cross-examination that she was in employment of the defendant from at least 1 July 2006 to 31 December 2007. This ultimately means that when the plaintiff resigned from the employment of the defendant, she had been in its employment for a continuous period of at least 12 months. The plaintiff sought to avoid the consequences of this conclusion by suggesting that she worked under different contracts of employment for the defendant. The different job titles that she held, such as "intern", "medical officer" and "senior medical officer", did not however, affect the plaintiff's continued employment with the defendant. In this regard the plaintiff conceded that for purposes of her pension fund contributions, by the defendant and herself, her service with the defendant was considered as continued employment, which was uninterrupted by the different job descriptions she held with the defendant.. She further conceded that for purposes of her claim for pension benefits, from the defendant's pension fund, her employment with the defendant commenced on 1 July 2006.

14.3. Ultimately it was argued on behalf of the plaintiff that the employment contract she entered into with the defendant on 1 December 2007, specifically provided that she was entitled to give only two weeks notice of termination thereof. On such a decisive part of the plaintiff's claim I expected that the plaintiff would have tendered the alleged service contract as evidence. This contract was however never produced as evidence nor discovered by either of the parties. Due to the inconsistencies in the plaintiff's evidence, as indicated hereunder, I cannot rely on her ipse

dixit evidence in this regard. In any event, as indicated, the plaintiff conceded that she was longer than one year in service of the defendant when she resigned.¹⁹

14.4. Section 84 of Basic Conditions of Employment Act²⁰ ('the BCEA') provides as follows:

"84. Duration of employment

- (1) For the purposes of determining the length of an employee's employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year. "

14.4.1. This section does not distinguish between job titles for purposes of ascertaining continued employment. In order to determine the length of service of an employee, by definition, reference should only be made to the employment of an employee with an employer and not the job title he/she had during this time.

14.5. The BCEA defines an "employee" as follows:

"employee" means -

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b)....."

14.5.1. In order to qualify as an "employee", by definition, a person is required to

- (1) work for another person or the State; and, (2) be entitled to receive remuneration and/or receive remuneration.

14.6. The plaintiff worked for the defendant (the State) from at least 1 July 2006. During this period she was entitled to and in fact did receive remuneration from the defendant. It follows that when the plaintiff gave notice of resignation on 18 December 2007, she was employed by the defendant for an uninterrupted period of at least one year.

14.7. Section 37 of the BCEA provides for a period of notice of resignation and reads as follows:

37. Notice of termination of employment

- (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than -
- (c) four weeks, if the employee -
- (i) has been employed for one year or more; or
- (ii) "

14.8. It follows that since the plaintiff was employed for more than one year by the defendant at the time when she resigned, she was required to give four weeks' notice on termination of her service contract.

14.9. It is common cause between the parties that the plaintiff gave written notice on 18 December 2007 of her resignation from the service of the defendant and only worked for a further 13 days. To state the obvious, the plaintiff gave less than two weeks' notice of termination of her service. She confirmed under cross-examination that she had a discussion with the acting CEO of the Steve Biko Hospital of the defendant. He informed the plaintiff that she was to serve a four weeks notice period. She was told that the defendant was short staffed at Steve Biko Hospital of the defendant. There is nothing to indicate that the reason for refusal by the defendant to accept the plaintiff's short notice of resignation was unreasonable. It follows that the instruction to the plaintiff to give four weeks notice was lawful and in accordance with the BCEA. There is no reason to suspect that the defendant's employee would have given an instruction to the plaintiff, contrary to the provisions of plaintiff's employment contract with the defendant. In view of the above considerations I find that the Plaintiff was required to give four weeks notice of resignation²¹ and not, as she testified that she has been advised, only two weeks notice. ²²

15. Negligent conduct of the defendant

15.1. The plaintiff alleged that an employee of the defendant was grossly negligent therein that (1) he/she failed to pay the necessary and sufficient attention to detail in her administrative duty; (2) he/she failed to properly execute her duties; (3) he/she failed to take adequate steps and thus avoid the administrative inaccuracies; (4) he/she could have exercised more reasonable and diligent care he/she could and should have done so.

15.2. No evidence was produced in support of any of the latter allegations. To the contrary, the evidence demonstrates that the plaintiff failed to follow a lawful instruction by the acting CEO of the Steve Biko Hospital of the defendant. She simply did not arrive for work within the period of one month which she was required to give notice of resignation. Factually the plaintiff had absconded from the employment of the defendant. It is common cause between the parties that the defendant recorded in the Persal System (being the administrative system in terms of which her salary/remuneration payment was effected) that the plaintiff absconded. This action was followed by the employees of the defendant after the Acting CEO of the Steve Biko Hospital submitted a letter to his superior to stop the salary and overtime of the plaintiff. I will return to this letter hereunder.

15.3. It follows by necessary implication that the plaintiff failed to prove any negligent conduct on the part of the employee's of the defendant.

16. Obligation to pay the plaintiff's salary from 1 January 2008

16.1. The plaintiff's new employer, the George Stegman Hospital, (hereafter "the GSH" was responsible to pay her salary from 1 January 2008. Payment of her salary would ordinarily have been effected on 31 January 2008. When the plaintiff did not receive her salary for January 2008, she resigned on 6 February 2008 from the service of her new employer.

16.2. The plaintiff testified in chief that the GSH, during a meeting in mid February 2008, advised her to resign from their employment. The reason for this advice was, so the plaintiff testified in chief, because her salary was blocked by the defendant on the Persal System. I will return to the meeting between the plaintiff and the GSH and their advice to the plaintiff hereunder.

16.3. The defendant had, by way of telefax, despatched to the GSH on 28 February 2008, confirmed that approval had been granted for the plaintiff to be transferred from the defendant to the GSH with effect of 1 January 2008.²³ It follows by necessary inference that the GSH was on all accounts allowed by the Persal System to effect payment to the plaintiff of her salary, immediately after it received the letter from the defendant, dated 28 February 2008. The GSH requested the head of its salary section to pay the plaintiff's salary on 5 March 2008.²⁴ The plaintiff's new employer however only effected payment by way of cheque on 5 April 2008 into the plaintiff's bank account. This was done some one and a half months after the plaintiff's new employer was informed by the defendant that the blocking of the plaintiff's salary on the Persal System had been lifted.

16.4. The documentary evidence demonstrates that the GSH failed to pay the plaintiff because their system did not make any run. This occurred because the new employer's mainframe computer was not working due to a power cut.²⁵ It is clear from the latter evidence that the failure to effect payment to the plaintiff in March 2008 was solely due to the problems

the GSH had, without any involvement of the defendant. The plaintiff eventually received her salary for January and February 2008 from the GSH on 15 April 2008 after the cheque, deposited on 5 April 2008, was cleared by her bank.

16.5. The plaintiff's evidence is innately incoherent. On the one hand the plaintiff accepted that the defendant could not be held liable for the conduct of her new employer that caused delay payment of her salary for January and February 2008. At the same time, she insisted that the defendant is to be blamed that her salary was not paid until 15 April 2008. Put in a different way: The plaintiff accepted that there was an intervening omission from the GSH to effect payment of her salary at the end of February 2008. The plaintiff however illogically denied that this delay was the reason why she did not received payment of her salary at the end of February 2008 and not because of the defendant's blocking of her salary on the Persal System. The plaintiff steadfastly insisted, despite irrefutable evidence to the contrary, that the defendant is ultimately liable for her damages because he labelled her as an absconder and blocked her salary on the Persal System.

16.6. The plaintiff resigned within six days after not receiving her salary from the GSH at the end of January 2008. The plaintiff initially testified that the personal of the GSH told her that she had no other option but to resign from its employment. This advice, so the plaintiff testified in chief, was given to her during a meeting with her new employer in mid February 2008. The plaintiff however further testified during cross examination that she wrote her letter of resignation ²⁶ after she had the meeting with her new employer. It followed by necessary implication that the plaintiff could not have had the

meeting with the personal of the GSH in mid February 2008. When the plaintiff was confronted with this fact, she indicated that she made a mistake in regard to when she had the meeting with GSH during February 2008. She then changed her version to the effect that the meeting was held at the beginning of February 2008.

16.7. The plaintiff further changed her evidence, during cross examination, to the effect that she was given three options (an not only one) by the personal of the GSH during the meeting she had with them, being:

- (a) she had to leave (resign); (b) she could stay and they would pay her - she confirmed that this is why she stayed until the end of February; and (c) she could attempt to resolve the dispute, while she stayed in the employment of the GSH. On the plaintiff s own version she was not compelled by the GSH to resign from their employment. Resignation was but one of three options which she elected on own preference to follow.

17. Employability of the plaintiff

17.1. The plaintiff further testified in chief, that her new employer informed her that due to the fact that her salary was blocked on the Persal System she was unemployable. Insofar as this might have been sincere advice, which the plaintiff received from the GSH, it is self-evidently incorrect. She also indicated that she consulted with her union and other people who were experts in the labour law field. Insofar as it was suggested that she received similar advice from any other individual, this also appears to have been incorrect. The reason for this that the plaintiff testified that she was in fact employed and paid via the Persal System by the defendant after 15 April 2008.

17.2. At best for the plaintiff, the actions of the defendant only caused delayed payment of her salary for one month, being January

2008. This however does not mean the defendant is liable to the plaintiff. Factually the plaintiff absconded from the service of the defendant. Despite this, the defendant still ensured that the Persal System was changed to remove that fact from its employment records. This was done by 28 February 2008, within a month from the first non-payment by the plaintiff s new employer. In any event, the plaintiff worked until the end of February 2008 for her new employer. She also testified that if she would now apply for a job with the defendant she would most likely be employed.

17.3. The plaintiff may not have received her salary for January 2008 because the defendant blocked the payment thereof on the Persal

System. Not receiving a salary is however a far cry from being unemployable. I accordingly find that it is simply not true that the defendant was unemployable after the defendant stopped her salary on the Persal System.

18. Plaintiff's claim for damages

18.1. Special damages

18.1.1. The plaintiff testified that she suffered special damages as a result of the delayed payment of her salary by the defendant. The plaintiff further testified in this regard that she received letters of demand from various institutions in which they claimed penalties and interest from her for failure to pay her accounts timeously. In this regard she referred to correspondence that she received from Truworths²⁷ and Absa.²⁸ She referred to various letters that she had received from Bestmed,²⁹ A&G 30 and Old Mutual Bank (in relation to her mortgage bond).³¹

18.1.2. The plaintiff testified that she was indebted in relation to her bond for over three months. This was relied upon for the issue of a summons against her by Old Mutual Bank. The plaintiff indicated that her attorney had written one letter to Old Mutual Bank (Nedbank) to ask that their case against her be hold over pending resolution of the predicament she had with payment of her salary. She indicated that she could not recall how much she had paid in legal fees. Under cross-examination, the plaintiff claimed that the legal fees she paid included payment for defending the action that was instituted against her. No tax bill of cost was presented as evidence. The summons in the latter matter was issued by Old Mutual Bank on 15 April 2008. The plaintiff received her remuneration from her new employer on 15 April

2008. A reading of the pleadings bundle shows that despite having received her income, and having paid the outstanding balance on 15 April 2008, the plaintiff nonetheless went on to file a notice of intention to defend the action. This appears to be an unnecessary step. The plaintiff appears to claim for instructing her attorney to defend an action where she had already paid her outstanding balance. Her own conduct resulted in her incurring legal costs. In any event,

it is impossible that her legal costs could have amounted to R22 500.00 for writing a letter and filing a notice of intention to defend.

18.1.3. From the evidence in support of her claim for special damages it is clear that the plaintiff is not only claiming penalties and interest³² from the defendant, but the capital amounts outstanding on the aforesaid accounts. The plaintiff is not entitled to these amounts on any basis. The total amount of the proven penalties and interest on the plaintiff's outstanding accounts, only amounted to R55. 00 (Fifty five rand). This amount was conceded by Counsel appearing on behalf of the plaintiff.

18.1.4. In view of the above considerations I find that the plaintiff failed to prove her claim under this head of damages.

18.2. General damages

18.2.1. In relation to her claim for non-patrimonial loss, the plaintiff testified that a letter from Dr A.P. van der Walt,³³ the then acting CEO of the Steve Biko Hospital of the defendant, in which he complain about the conduct of the defendant, was the sole cause of her non-patrimonial loss.

It is apposite to note that the plaintiff at the time when the letter was written could not have had knowledge thereof. 34 It is unclear how she would have suffered any non-patrimonial loss from a document that she never had sight of. In this letter the aforesaid Dr van der Walt wrote to his superior to stop the salary and overtime of the plaintiff. The relevant portion reads as follows:

"In view of the above I request that dr Moh/ala's salary as well as commuted overtime be terminated with immediate effect as she had wilfully disregarded a direct instruction to remain in service and is clearly not considering returning for duty."

The plaintiff's evidence in this regard is irrational and I accordingly reject it in full.

18.2.2. The plaintiff further alleged that her non-patrimonial loss arose from the financial consequences as a result of the delayed payment of her salary for three months. She sought to constantly attribute responsibility to the defendant for the said delayed payment, notwithstanding the documentary evidence to the contrary.³⁵

18.2.3. The plaintiff testified that she suffered humiliation, was affected psychosocially and was ashamed that she had to ask money from her siblings to survive. On her evidence, it was too much for the plaintiff.³⁶ The plaintiff questioned whether she was properly qualified as a medical doctor and had to obtain her certificate to prove (apparently

only to herself) that she had the necessary qualifications. She had been labelled as an absconder by the defendant who damaged her image in this regard. The plaintiff indicated that she still carries some of the emotions today when she thinks back upon what happened years ago in 2008. It was a tough experience for her, so she testified. The plaintiff indicated that she had to go for counselling in order to recover from the injury caused by the defendant. She suffered from depression and had to receive treatment to recover.

18.2.4. There was no documentary proof produced in support of the plaintiff's alleged depression and counselling sessions. No expert evidence was presented by the plaintiff. The Plaintiff did not give any indication of when she became depressed, how long the depression lasted, and what treatment she received. What shines in absence is medical evidence supportive of the plaintiff's claim for general damages.

18.2.5. The plaintiff expected the court to rely on her ipse dixit evidence in respect of the general damages she allegedly suffered. I do not for one moment believe that a medical doctor, a person trained to treat traumatic medical situations, would have experienced the extensive pain, suffering and humiliation, which the plaintiff insists she suffered, in the event payment of her I his salary is delayed for one month (or for that matter for three months). That a medical doctor will question her I his qualifications in such circumstances goes beyond my imagination. I cannot however find that the plaintiff did not experience any pain, suffering and humiliation. Such feelings are self-evident and subjective. The defendant can however not on any basis be held liable for such damages suffered by the plaintiff. The plaintiff is the sole cause of the hardship she experienced as a result of the blockage of her salary on the defendant's Persal System. She elected, contrary to her employment contract to resign by giving only two weeks notice. As

indicated above her conduct was correctly labelled that she absconded from work. After 5 March 2008 the delay in payment of the plaintiff's salary was caused by problems the GSH had with their computer system and not any conduct of the defendant. In this regard the plaintiff's feelings are clearly misdirected towards the defendant.

18.2.6. The evidence submitted by the plaintiff is totally insufficient to sustain any claim for general damages. Counsel for the plaintiff made no submission in this regard, undoubtedly because of absence of evidence that the plaintiff suffered any such damages.

18.2.7. In view of the above consideration it follows that the plaintiff failed to prove her claim for general damages.

COSTS

19. The plaintiff failed to make sufficient averments in her particulars of claim to sustain a cause of action. To this extent her legal team is to be blamed. They drafted the pleadings on her behalf and should at least have ensured that a cause of action was set out in the plaintiff's particulars of claim. I am thus of view that the plaintiff's attorneys of record should be deprived from charging any fees for their service to the plaintiff. Adv. L Maite, appearing for the plaintiff, was not the author of the plaintiff's particulars of claim. I do not know what advice Adv Maite gave to the plaintiff and I or her instructing attorney of record upon accepting the brief. I consider the fees of the latter counsel as internal matter between her and her instructing attorney. If the instructing attorney is unhappy with the fees of the said advocate, he can obviously refer the matter to the Bar Counsel for consideration. If an application for a de bonis propriis cost order was made in this matter, I would have considered the granting thereof.
20. The plaintiff was clearly ill advised. Even if she had any prospect of succeeding with a claim, it should have been apparent at the onset that any quantum of her claim could not exceed the jurisdiction of the magistrate's court. She nonetheless instituted an action in the High Court, causing the defendant to incur unnecessary costs. There is no need that the defendant should be out of pocket in this matter.
21. The purpose of costs orders is to allow a party to recover funds where they have been unnecessarily expended in litigation. A punitive cost order is only granted in exceptional circumstances against a party. Courts are very reluctant to make such an order.³⁷
22. I consider the present circumstances as highly exceptional. The defects in the plaintiff's pleadings and the total insufficient evidence which I have summarised above demonstrate the exceptional circumstances of this matter and need not be repeated. The plaintiff's claim can be label nothing less than extremely

opportunistic.

ORDER

The following order is made:

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the defendant's costs on a scale as between attorney and client.
3. The plaintiff's attorneys of record may not charge any fees to the plaintiff for the services which they rendered to the plaintiff in this matter.

J.S. STRYDOM

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff: Adv. L Maite

Instructed by: Samba Mlahleki Attorneys.

Counsel for the respondents: Adv. L Pillay

Instructed by: State Attorney, Pretoria

Date Heard:

Date of Judgment:

1 See: Pleadings bundle, p 5-7.

2 See: Record, p 6.

3 Calculated as follows: (1) R428.00 in respect of bank charges on an Absa credit card; (2) R4,940.00 in respect of Best Med' s membership fees; (3) R1 ,176.85 in respect of motor vehicle insurance with Auto & General (hereafter "A&G"); (4) R1,484.00 in respect of a Standard Bank overdraft facility; (5) R700.00 in respect of a Truworths account.

4 In paragraph 5 of the plea the defendant alleges that the plaintiff was employed by the defendant from 1 August 2012. Thereafter it pleaded that the plaintiff was employed by the defendant for a lengthy time. The evidence of the plaintiff is that she was employed from 1 August 2006. This issue was not raised by any of the parties. It appears that the reference to 2012 is a typing error and should have referred to 2006.

5 In her particulars of claim.

6 Comp. Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 (4) SA 901 (N).

7 See: Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC). At 139 Moseneke DCJ stated that "the enquiry into wrongfulness is an after-the fact, objective assessment. "

8 Comp.: Neetling, Potgieter & Visser, Law of Delict, 6th Ed., pp 33-40.

92003

(6) SA 13 (SCA) at 31 -32.

10 1996 (2) SA 106 (C) at 102.

11 Comp.: Osborne Panama SA v Shell & BP SA Petroleum Refineries (Pty) Ltd 1982 (4) SA 890 (A) 900.

12 Comp.: Callinicos v Burman 1963 (1) SA 489 (A) 497-498; Da Silva v Coutinho (3) SA 123 (A); Dorland v Smits 2002 (5) SA 374 (C).

13 Comp. Administrateur, Natal v Trust Bank van Afrika Bpk 1979

(3) SA 824 (A); Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A); Minister van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA).

14 See: Bundle "A", p 101.

15 Comp. Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd 1985 (1) SA 475 (A).

16 Comp. Standard Bank of SA Ltd v Coetsee 1981 (1) SA 1131 (A); International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) 700-701; Smit v Abrahams 1994 (4) SA 1 (A); Thoroughbred Breeders' Association of SA v Price Waterhouse 2001 (4) SA 551 (SCA).

17 The plaintiff's Particulars of Claim omits to state that she suffered damages for which the defendant is liable and I or described the damages as natural flowing from the defendant's wrongful act or that the plaintiff's damages was reasonable foreseeable.

18 See: Francois Du Bois, Willie's Principles of South African Law, 9th Ed, p 1130.

19 The plaintiff's particulars of claim allows for the inference that in the event the plaintiff was in service of the defendant for less than one year she would have been entitled to give 2 weeks notice of resignation; otherwise, she was required to give 4 weeks notice of resignation.

20 Act No. 75 of 1997, as amended.

21 Counsel for the plaintiff argued that if I make this finding the plaintiff's cause of action falls away. I disagree; the plaintiff

did not make out a cause of action in her particulars of claim. No wrongful act of the defendant was pleaded or proved by the

defendant.

22 More to the point, it was never pleaded that the plaintiff was, by virtue of her contract of employment entitled to give two weeks notice of resignation and the defendant, contrary to this, insisted on one month's (four weeks) notice.

23 See: Bundle A pp 31 - 32

24 See: Bundle A p 62. It is clear from this letter that the George Stegman Hospital had, at least on 5 March 2008 taken note of the letter of the defendant of 28 February 2008.

25 See: Bundle A p 99

26 Dated 6 February 2008.

27 See: Bundle A, p 111.

28 See: Bundle A, p 112.

29 See: Bundle A, p 103.

30 See: Bundle A, p 105.

31 See: Bundle A, p 106.

32 As claimed in the plaintiff's Particulars of Claim.

33 See: Bundle A p 101.

34 The letter is dated 4 January 2008.

35 Contained in documents discovered by the plaintiff's attorneys of record and in respect of which she was confronted in cross examination.

36 The court had to adjourn to allow the plaintiff to emotionally compose herself and continue with her evidence.

37 See: Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd 1995

(4) SA 790 at 807 C - E; Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574

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