

SOUTH AFRICA / JUDGMENT

Samuels v Vuka Marketing (Pty) Ltd and Others (23237/12) [2013]

ZAGPPHC 412 (10 December 2013)

[2013] ZAGPPHC 412

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy

CASE / FILE NUMBER

23237/12

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG, PRETORIA)

CASE

NO:23237/12

In

the matter between:

SAMUELS,

HENDRIK JOHANNES.....Plaintiff

and

VUKA

MARKETING (PTY) LTD.....1st

Defendant

DOCTOR

MNISI.....2ndDefendant

AL

K MAARTENS.....3rd

Defendant

DIRECTOR-GENERAL

OF THE NATIONAL.....4th

Defendant

DEPARTMENT

OF LABOUR

DEPARTMENT

OF LABOUR.....5th

Defendant
NELSPRUIT
LABOUR CENTRE
THE
DIRECTOR GENERAL OF THE NATIONAL.....6th

Defendant
DEPARTMENT
OF ENVIRONMENTAL AFFAIRS
AND
TOURISM

HEAD: SPORT AND RECREATION SOUTH AFRICA.....

7th
Defendant
OF
THE NATIONAL DEPARTMENT OF SPORT
AND
RECREATION SOUTH AFRICA
DIRECTOR
GENERAL: TRADE AND INDUSTRY.....8th

Defendant
OF
THE NATIONAL DEPARTMENT OF TRADE
AND
INDUSTRY

HEAD: SPORT, RECREATION, ARTS AND OF.....9th

Defendant
CULTURE
OF THE PROVINCIAL DEPARTMENT
OF
CULTURE, SPORT AND RECREATION,
MPUMALANGA

JUDGMENT

MURPHY J

1.The plaintiff issued summons claiming damages in the amount of R580 000 suffered when on 30 October 2007 he and his deceased wife

participated in a tandem swing, known as The Big Swing during which they plummeted into and collided with rocks at the bottom of a gorge resulting in severe injuries to the plaintiff and the death of his wife.

2. The plaintiff has cited nine defendants: the first three are the persons who owned and operated the swing. The remainder are national and provincial government departments of labour, sport and recreation, and trade and industry and the officials who head them. They have been referred to collectively in argument as “the state defendants”.

3. The state defendants have filed an exception to the particulars of claim alleging that they do not disclose a cause of action.

Subsequent to the filing of the exception, the plaintiffs amended the particulars of claim. The State Defendants contend however that the amended particulars of claim remain excipiable, and still seek a determination of the exception.

4. The plaintiff's claim for damages against the state defendants is for the damages suffered as a result of the personal injuries

sustained by him in the fall when The Big Swing malfunctioned. The first defendant conducted the business of The Big Swing which was a recreational free-fall swing system from a cliff into a gorge in the vicinity of Graskop Mpumalanga. The state defendants are alleged to have been in breach of a duty of care in relation to their regulatory responsibility for the operation of the swing.

5. Paragraphs 3.4 - 3.7 of the particulars of claim read:

"3.4 The activity of The Big Swing as a commercial venture open to the public entailed making use of inter alia plant and equipment to accommodate and enable one or two persons simultaneously to swing for leisure and recreational purposes and the said plant and equipment included fixtures, fittings, ropes, cords, cables, shackles, harnesses, bolts, nuts, screws, winches and gears;

3.5 The business and/or operation, the safety associated with the use thereof and the plant and equipment used in conducting same resorted under the jurisdiction and/or control and/or auspices and/or authority and/or was the responsibility of one, or more, or all of the 4th to 9th Defendants as the applicable regulating authority;

3.6 As a result of the foregoing the 1st to 9th Defendant labored under a legal duty, the breach of which would be unlawful, to ensure that the business and/or operation of The Big Swing was safe for persons using same and more particularly the Plaintiff and the deceased.

3.7 There was a legal duty of care on one or more or all of the Defendants by virtue of the foregoing and also:

3.7.1 The fact that the public in general and the Plaintiff and the deceased in particular relied in accordance with the legal convictions of the community on the said Defendants to do what was required of them in law to exercise their regulatory duties in the public interest and/or to protect the public;

3.7.2 The fact that policy considerations dictate that the said Defendants have to do what was required of them in law to exercise their regulatory duties in the public interest and/or to protect the public;

3.7.3 The knowledge of the said Defendants that any person using the facilities of the big Swing could be killed or seriously

injured if they did not take reasonable precautions to comply with the statutory and common law duties that rested on them;

3.7.4 The fact that the said Defendants could and should have taken steps to prevent or avoid the injury to the Plaintiff and the death of the deceased;

3.7.5 The fact that the Plaintiff and the deceased were unable to protect themselves against the incident, his injuries and her death;

3.7.6 The community's sense of justice and legal policy;

3.7.7 The fact that the acts and omissions recorded in paragraph 5 below were in general wrongful."

6. The allegations of negligence against the state defendants are spelt out in paragraph 5.3 or the particulars of claim as follows:

5.3. Further alternatively, the incident was caused by the unlawful negligence and/or breach of a legal duty of one, more, or all of the 4th to 9th Defendants and/or one or more of their employees acting as aforesaid who were negligent in one or more of the following respects:

5.3.1 One or more or all of them omitted to protect the public in general and the Plaintiff and the deceased in particular from the hazards

associated with the operation/business of the Big Swing and the participation therein;

5.3.2 One or more or all of them omitted to take any, alternatively adequate, measures to ensure the health and safety of the public in general and the Plaintiff and the deceased in particular;

5.3.3 One or more or all of them omitted to take any, alternatively adequate, measures/steps to ensure that the use by the public in general and the Plaintiff and the deceased in particular of the facilities offered at The Big Swing was safe without risk;

5.3.4 One or more or all of them omitted to take any, alternatively adequate, measures to ensure that the system employed to operate the plant and equipment was safe and without risk, whilst no system, alternatively no adequate system was in place at all;

5.3.5 One or more of them omitted to take any, alternatively adequate, measures/steps to ensure the elimination/mitigation of any hazard or potential hazard associated with the use of the plant equipment;

5.3.6 One or more or all of them omitted to take any, alternatively adequate, measures/steps to ensure that the plant and equipment used in the venture were safe and functional whilst it was not;

5.3.7 One or more or all of them omitted to take any, alternatively adequate, measures/steps to ensure that the plant and equipment used in the venture were appropriate, whilst it was not;

5.3.8 One or more or all of them omitted to take any, alternatively adequate, measures/steps to ensure that the operational employees associated with the venture was properly trained to safely operate and use the plant and equipment, whilst such employees was not properly qualified, nor trained to operate the said plant and equipment;

5.3.9 One or more or all of them omitted to take any, alternatively adequate, measures/steps to train the operational employees associated with the venture in order to enable them to safely operate and use the plant and equipment, whilst such employees was not properly qualified, nor trained to operate the said plant and equipment;

5.3.10 One or more or all of them omitted to take any, alternatively adequate, measures/steps to promote the safety of the Plaintiff and the deceased;

5.3.11 One or more or all of them omitted to inspect the business to assess the safety associated with the use of the plant and equipment with such intervals as would have ensured the safety of the public in general and the Plaintiff and the deceased specifically;

5.3.12 One or more or all of them omitted to require of the operator/owner of the Big Swing to employ a system ensuring that the plant and equipment could be used safely

and without any hazard by the public in general and the Plaintiff and the deceased in particular.”

7. The essence of the claim against the state defendants, having regard to these particulars, is that they were legally obliged “to

exercise their regulatory duties in the public interest” to protect the public either in accordance with the law, the dictates of policy considerations and/or the community’s sense of justice and legal policy; and that they had omitted to protect the public from the hazards associated with the operation/business of The Big Swing, by ensuring it was safe and without risk and that the operational employees were properly trained to safely operate and use the plant and equipment.

8.Paragraph 4 of the exception sets out the objection to the particulars of claim as follows:

“With specific reference to the abovementioned the Fourth to Ninth Defendants except to the particulars of claim as it does not disclose

a cause of action on the grounds that:

4.1 No substantiating factual and/or legal grounds are advanced by the Plaintiff in support of the allegation made in paragraph 3.5 of the Plaintiff’s particulars of claim, therefore no liability can accrue to any of the Defendants,cited as Fourth to Ninth Defendants with reference to the allegation contained herein that no causality is alleged on what basis any liability can accrue to any of the Defendants cited as Fourth to Ninth Defendants.

4.2 The allegation in paragraph 3.6 that, inter alia, Fourth to Ninth Defendants labored under the legal duty is an allegation made without any substantiating factual and/or legal grounds, therefore no liability can accrue to any of the Fourth to Nine Defendants.”

9. In argument, the state defendants amplified on the objection with reference to the particulars in paragraph 3.7 of the particulars of claim. They complain that the particulars do not make any allegation substantiated by fact and/or law of any causal link between a breach of legal duty and the damages suffered. Nowhere is it alleged that the state defendants are in breach of any specific statutory provision or any identified regulatory duty. All the state defendants function in terms of statutory enactments and regulations promulgated in terms thereof, but none are identified as forming the basis of the alleged liability on their part. The specific statutory or regulatory duties in respect of which the state defendants are in alleged violation or breach are not identified or referred to in any way. The allegations are “in the air”.
10. The plaintiff contends that it has sufficiently alleged the *facta probanda* of his cause of action. In his view it is inconceivable that a dangerous activity such as the Big Swing can operate entirely without

regulatory oversight by an organ of state and that it must have fallen under the jurisdiction, control and responsibility of one or more of the state defendants. Hence the incident was caused by the breach of duty of one of the state defendants and they are liable for resultant damages.

11. The plaintiff contended further that he is not required to specify relevant statutory provisions or the specific applicable law imposing regulatory duties which the state defendants are alleged to have breached. In this regard, he relied on *Ketteringham v City of Cape Town* 1934 AD 80 at 90 where it was stated:

“As a matter of pleading, even if a pleader relies on a particular section of a statute, it is not necessary for him to state the number of the section, provided he formulates his claim clearly.”

12. However, it remains necessary to plead facts from which the conclusion can be drawn that the provisions of a particular statute

apply. As Levy J held in *Wasmuth v Jacobs* 1987 (3) 629 (SWA) at 634 I:

“Where a litigant relies upon the provisions of a statute he should, in his pleading or affidavit, as the case may be, refer to the Act and section whereon he relies. More important, however, he should plead such facts which entitle him to invoke the legislation concerned.”

Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative - *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*

[2004] ZACC 15; 2004 (4) SA 490 (CC) at para 27.

Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto. Accordingly, it seems obvious that where a breach of statutory duty or regulatory authority is alleged it is incumbent on the pleader to identify the source, nature and content of the statutory duty with sufficient particularity to enable the defendant to

plead. A vague allegation that some law, or principle or policy somewhere must impose a duty of oversight and regulation is not sufficient. The plaintiff is obliged to formulate his claim of breach of duty with greater specificity. The facts pleaded must point to a particular statutory provision being relevant and operative. Any liability attaching to the state defendants can only conceivably arise from the breach of a statutory provision or a policy directive. They did not operate the swing. Consequently, any breach of a provision or directive is a material fact upon which the plaintiff relies. It must accordingly be pleaded with sufficient particularity. A failure to particularise the claim to that extent means that the particulars do not set forth the nature of the claim and the pleading lacks the averments necessary to sustain the action, rendering them excipiable in terms of rule 23.

11. The state defendants have asked for the claim against them to be dismissed in the event of the exception being good. The correct

course is to permit the plaintiff an opportunity to amend.

12. The following orders are issued:

I) The exception is upheld with costs, including the costs of senior counsel.

ii) The plaintiff is granted leave to amend his particulars of claim within 15 days of this order, failing which the excipients may apply to court for the claim against them to be dismissed.

JR MURPHY

JUDGE OF THE NORTH GAUTENG

HIGH COURT

Counsel for Plaintiff:.....Adv B Geach SC

.....Adv LJ Visser

Instructed by Attorneys:.....Salome Le Roux Attorneys

Counsel for State Defendants:..... Adv S Joubert SC

Instructed by Attorneys:.....State Attorneys, Pretoria

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