

SOUTH AFRICA / JUDGMENT

Santam LTD v Pedlar (2022/010346) [2024] ZAGPJHC 756 (31 July 2024)

[2024] ZAGPJHC 756**COURT**

South Gauteng High Court, Johannesburg

BEFORE

H F Oosthuizen

CASE / FILE NUMBER

2022/010346

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO: 2022/010346

1.

REPORTABLE: YES/ NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: YES / NO

In the matter between:

SANTAM
LTD
Plaintiff
and
QUENTIN
PEDLAR
Defendant

JUDGMENT

OOSTHUIZEN AJ

INTRODUCTION

- [1] This is an exception to three special pleas on the ground that they lack averments which are necessary to sustain a defence, alternatively that they are vague and embarrassing.
- [2] The defendant was previously employed by the plaintiff and an internal disciplinary hearing on charges of misconduct was scheduled against him.
- [3] On the date of the disciplinary hearing, the parties concluded a written settlement agreement in terms of which the defendant agreed to retire early subject to the payment of certain amounts to him as an alternative to the continuation of the disciplinary hearing. The plaintiff accordingly withdrew the charges against the defendant.
- [4] The settlement agreement contained an undertaking that the defendant would “not to make any written or oral statements injurious to, or of a disparaging nature” about the plaintiff, any Group company (as defined in the settlement agreement) or the Group’s directors, employees and/or business associates.
- [5] In its combined summons, the plaintiff claims an interdict against the defendant, enforcing the said term, as well as general damages in the amount of R550 000,00 for breach of the said term.
- [6] The defendant was initially represented by attorneys, who withdrew before the delivery of the defendant’s plea.
- [7] The defendant failed to appoint new attorneys and accordingly acted in person, including when his plea was delivered.
- [8] In addition to the three special pleas, with which I will deal below, the defendant pleaded over that the settlement agreement was agreed to under duress, which, if proven, will result in a finding that the settlement agreement is void.[1]

THE FIRST SPECIAL PLEA

- [9] The heading of the first special plea reads as follows:

“Abuse of process and strategic litigation against the Defendant.

SLAPP CASE - LITIGATION OF ABUSE OF THE COURT.

LITIGATION AGAINST A WHISTLEBLOWER AS PROTECTED UNDER THE “PROTECTED DISCLOSURES ACT AS AMENDED 2017”

- [10] The first special plea contains the following allegations:

“7 The Plaintiff’s Action is brought for the ulterior purpose of

7.1 discouraging, intimidation and coercing the defendant and other members of SANTAM Staff, into not objecting to current or future matters that may be raised by Staff, Whistle-blowers, and any other person that may stand against the wrongdoings in the workplace for disregard of the Labour Act, and Company Policy, Clients that have been unfairly treated in terms of TCF, and unfair practices against suppliers, Brokers and the Public in general.

7.2 discouraging, intimidation and coercing the defendant and other members of SANTAM Staff, into not participating in current or future matters that may be raised by Staff Whistle-blowers, and any other person that may stand against wrongdoing in the workplace for disregard of the Labour Act, and Company Policy, Clients that have been unfairly treated in terms of TCF, and unfair practices against suppliers, Brokers and the Public in general.

7.3 discouraging, intimidation and coercing the defendant and other members of SANTAM Staff, into not challenging any decisions made in favour of the Applicants in current or future matters that may be raised by Staff, Whistle-blowers, and any other person that may stand against wrongdoing in the workplace for disregard of the Labour Act, and Company Policy, Clients that have been unfairly treated in terms of TCF, and unfair practices against suppliers, Brokers and the Public in general.

7.4 intimidating and silencing the defendant, other Ex-Staff, Staff, Suppliers, Clients, Brokers and/or the public in relation to the plaintiff.

8. The Plaintiff’s conduct in bringing the present action:

8.1 Is an abuse of process of the Court;

8.2 Amounts to the use of Court Process and litigation to achieve an improper end; and

8.3 Violates

8.3.1 Section 16 of the Constitution...

8.3.2 The Labour Act...

8.3.3 The Protected Disclosure Act as amended in 2017.”

[11] The Constitutional Court acknowledged a SLAPP suit defence, which should be raised as a special plea, in *Mineral Sands Resources (Pty) Ltd v Reddell*. [2]

[12] SLAPP, short for Strategic Litigation against Public Participation has been described as “lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest ... not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others ... and deter that party, or other potential interested parties, from participating in public affairs.” [3]

[13] The Constitutional Court held that a SLAPP suit defence is recognised as a species of abuse of process in which both the merits of and motives for bringing the case with its likely consequences must be considered:

“The merits are relevant to the question whether the plaintiff has a right to vindicate. The motive for bringing the case is relevant to the true object of the litigation. The likely effects of the suit bring into the reckoning what harm to free expression may result.”[4]

[14] The Constitutional Court accordingly held that the defendant’s special plea should allege that the plaintiff’s suit:

[14.1] is an abuse of process of court;

[14.2] is not brought to vindicate a right;

[14.3] amounts to the use of court process to achieve an improper end and to use litigation to cause the defendant financial and/or other prejudice in order to silence it; and

[14.4] violates, or is likely to violate, the right to freedom of expression entrenched in section 16 of the Constitution in a material way.[5]

[15] I am prepared to accept in favour of the defendant that the first special plea contains the necessary allegations, set out in paragraph [14.1], [14.3] and [14.4] above. I do not however make any finding whether the first special plea contains a clear and concise statement of the material facts upon which the defendant relies for his defence with sufficient particularity to enable the plaintiff to reply thereto, as required by rule 18(4). My approach is motivated by the concession by Ms Isparta (who was instructed to appear on behalf of the defendant after the appointment of new attorneys of record the day before the hearing of the exceptions) that the first special plea is vague and embarrassing and that it will accordingly be necessary to amend it. I do not accordingly consider it necessary or proper to deal in too much detail with and criticise the attempt by a lay man to plead relatively complicated legal issues which will become moot. There is in any event a possibility that the amended first special plea will form the subject of either an exception or an application in terms of rule 30(1), read with rules 18(4) and 18(10).

[16] The main argument of Mr Berger, who appeared on behalf of the plaintiff, in support of the exception, is that the first special plea does not contain an allegation that the main action is not brought to vindicate a right.

[17] Ms Isparta contends that the plaintiff does not have a legitimate or valid right and relies in this regard on section 9A of the Protected Disclosures Act, 2000,[6] (“the act”) which reads in relevant parts as follows:

“(1) A court may find that an employee ... who makes a protected disclosure of information-

(a) [that a criminal offence has been committed, is being committed, or is likely to be committed]; or

- (b) which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur,

shall not be liable to any civil ... proceedings by reason of having made the disclosure if such disclosure is prohibited by any ... contract ... or agreement requiring him ... to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.”

[18] It is for purposes of this judgement unnecessary to perform a comprehensive analysis of the act. It will suffice to refer to certain of the provisions of the act to demonstrate why the first special plea lacks averments which are necessary to sustain a defence based on the act.

[19] “Disclosure” is defined in relevant parts as “any disclosure of information regarding any conduct of an employer ... made by any employee who has reason to believe that the information concerned shows or tends to show ... that a criminal offence has been committed, is being committed or is likely to be committed.”

[20] “Protected disclosure” is defined in relevant parts as “a disclosure made to ... any other person or body in accordance with section 9”.

[21] Section 9 of the act is headed “General protected disclosure” and reads in relevant parts as follows:

“(1) Any disclosure made in good faith by an employee ...

- (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
- (b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if

- (i) one or more of the conditions referred to in subsection (2) apply; and
- (ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection 1(i) are-

- (a) that at the time the employee ... who makes the disclosure has reason to believe that he ... will be subjected to an occupational detriment if he ... makes a disclosure to his ... employer in accordance with section 6;”

[22] “Occupational detriment” (as used in section 9(2)(a) of the act) is defined in relation to an employee in relevant parts “being subjected to any civil claim for the alleged breach of ... a confidentiality agreement arising out of the disclosure of a criminal offence or information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur”.

- [23] 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.[7]
- [24] Although the first special plea refers to the act, it does not specify that the defendant relies on section 9A, read with section 9(2)(a) and the definition of “occupational detriment”, and it is not clear from the allegations in the first special plea that the defendant relies on these provisions.
- [25] Paragraph 2.3.7 of the first special plea, on which Ms Isparta relies in support of her contention that the first special plea contains averments in support of the allegation that the plaintiff does not have a legitimate or valid right, reads as follows:

“The Defendant was exposed to victimisation, due to the nature of the Defendants view of ethical and moral stance against wrongdoing,

cover-up of fraud, manipulation, fabrication, and outright arrogance of the Labour Relations Act of the RSA, Company Policy, and the failure to act accordingly to uphold the laws as prescribed in the Republic of South Africa, as follows ... The Protected

Disclosures Act.”

- [26] This paragraph does not contain any reference to a “disclosure” which amounts to a “protected disclosure”, as required by section 9(1) of the act.
- [27] Paragraph 5.8 of the first special plea, upon which Ms Isparta also relies, refers to the conclusion of the settlement agreement “under duress”, which similarly does not contain any reference to a “disclosure” which amounts to a “protected disclosure”, as required by section 9(1) of the act.
- [28] It accordingly follows that the first special plea lacks averments which are necessary to sustain a defence and that it is accordingly excipiable.
- [29] In *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Ltd*[8] Ponnann JA overruled the order of the court a quo upholding an exception to a plea and granting judgement in favour of the plaintiff on the following basis:

“Preliminary, it is necessary to observe that it is unclear upon what basis Le Grange J dealt with the case in the manner he did. Having upheld the exception and struck out the plea he proceeded to enter judgement for Old Mutual, instead of granting leave to the appellants, if so advised, to amend their plea. The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence. The rationale for this seems to be that, although the defence contained in the pleading may be bad, the pleading as such continues to exist. Ordinarily therefore the court should grant leave to defend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course unless there is good reason that the pleading cannot be amended. No ‘good reason’ was evident or asserted in this case. In those circumstances, counsel for Old Mutual conceded that, irrespective of the merits of the exception, Le

Grange J ought not to have proceeded to enter judgement against the appellants. It follows that para 3 of his order cannot stand and accordingly falls to be set aside.”

- [30] I disagree with Mr Berger’s contention that “good reason” exists that the first special plea cannot be amended. The defendant should accordingly be afforded the opportunity to amend the first special plea.

THE SECOND AND THIRD SPECIAL PLEAS

- [31] The second special plea, as its title suggests, contains a long list of alleged victimization of the defendant and some of his colleagues over a period of approximately five years without any indication how such victimization amounts to a defence to the action.
- [32] The third special plea contains a long list of legislation which the plaintiff allegedly failed to comply with as well as an allegation that the defendant suffered damages in the amount of R25 million for which he should be compensated. The third special plea similarly does not contain any indication how such conduct amounts to a defence to the action.
- [33] A special plea does not raise a defence on the merits of the case but, as its name implies, sets up some special defence which has at its object either to delay the proceedings (a dilatory plea, which delays the plaintiff’s claim until some defect is remedied or some temporary bar to the claim is removed) or to object to the jurisdiction of the court (a declinatory plea) or to quash the action altogether (a peremptory plea).
- [34] The following was held in this regard in *Reuben v Meyers*:^[9]

“According to the modern practice a defence of prescription is raised by special plea: in the Courts of Holland this was done by an exception, a term which ... is used not in the narrow sense applied to it in South Africa ... but as covering a number of what would here be called special pleas... [E]xceptions before the Courts of Holland were divided into three classes, declinatory (i.e. objections to the jurisdiction), dilatory and peremptory (one of which was the exceptio praescriptionis). The characteristic of exceptions in this third class is permanence - they are not a mere resistance to the plaintiff’s selection of the particular tribunal, nor an attempt to delay the enforcement of plaintiff’s alleged rights by raising the contention that they are not presently enforceable: they strike at the root of plaintiff’s allegations of right by asserting that such a right has either been extinguished or preempted, or that (as in the case of prescription) it has permanently ceased to be enforceable.”

- [35] A special plea does not flow from allegations in the claim but embodies a substantive, self-contained defence outside the allegations made in the plaintiff’s cause of action.^[10]
- [36] Examples of special pleas of a peremptory or permanent nature (to quash the action altogether) includes prescription, res judicata, compromise, payment and release.
- [37] If a special plea fails, it is dismissed. If the special plea succeeds, the action is either dismissed or stayed, depending on the nature of the special plea.

- [38] The second and third special pleas do not assert that the plaintiff's alleged rights are not presently enforceable (which would entitle the defendant to delay the enforcement of the rights) or that such rights have been extinguished, perempted or are permanently unenforceable. These special pleas do not embody substantive, self-contained defences outside the allegations made in respect of the plaintiff's cause of action.
- [39] It accordingly follows that the second and third special pleas lack averments which are necessary to sustain a defence to the action which can be raised as special pleas.
- [40] Insofar as the defendant contends that any of the allegations in the second and third special pleas may affect the validity of the settlement agreement (which is far from clear), such allegations should be pleaded in the plea itself and not contained in a special plea.
- [41] Insofar as the defendant contends that it suffered damages, he should introduce such claim by way of a claim in reconvention, after having complied with the procedure prescribed by rule 24(1) and not in passing in the third special plea.
- [42] Ms Isparta conceded that the exception against the second and third special pleas should be upheld on the grounds set out above.
- [43] There is no indication that the second and third special pleas can be amended or that the defendant intends to try. It accordingly follows that it is unnecessary to grant the defendant the opportunity to amend the second and third special pleas and that both should accordingly be dismissed.

COSTS

- [44] The plaintiff is substantially successful in the exception and it is entitled to its costs.
- [45] Ms Isparta requests that I should consider ordering the cost of the exception to be costs in the cause in view of the fact that the defendant is a layman.
- [46] Although I have sympathy for the defendant and I agree that he clearly requires legal representation to properly plead the defence which he intends to raise, the defendant is to a certain extent the author of his own misfortune. Marumoagae AJ indicated in a judgement dated 17 October 2023 in a previous interlocutory application between the parties that he had specifically enquired from the defendant whether he wished to represent himself; that he has a right to seek legal representation; and that there are institutions that offer free legal services that he could approach for legal assistance. Notwithstanding this advice, the defendant waited until the day before the hearing of the exception to appoint new attorneys of record who, I am advised, are paid by the so-called Whistleblower Foundation.
- [47] I am of the view that the complexity of the matter only justifies costs on scale A

ORDER

- [48] I accordingly grant an order in the following terms:

[48.1] The plaintiff's exception to the first special plea is upheld on the basis that it lacks averments necessary to establish a defence.

[48.2] The defendant is afforded 10 days from the date of this order to deliver an amended first special plea, failing which, the first special plea is dismissed.

[48.3] The plaintiff's exceptions to the second and third special pleas are upheld on the basis that they lack averments necessary to establish defences.

[48.4] The second and third special pleas are dismissed.

[48.5] The defendant is ordered to pay the plaintiff's costs of the exception on scale A.

H F OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 31 July 2024.

Appearances

Counsel for the Plaintiff: J M Berger

Instructed by Werksmans Attorneys

Attorney for the Defendant: L Isparta

Instructed by Tintingers Inc

Date of Hearing: 25 July 2024

Date of Judgment: 31 July 2024

[1] Savvides v Savvides 1986 (2) SA 325 (T) at 329A-330B

[2] 2023

(2) SA 68 (CC)

[3] Mineral Sands supra para [2]

[4] Mineral Sands supra para [95]

[5] Mineral Sands supra para [96]

[6] Act 26 of 2000

[7] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs [2004] ZACC 15; 2004 (4) SA 490 (CC) par [27]

[8] 2018

(3) SA 405 (SCA) para [7]

[9] 1957

(4) SA 57 (SR) at 58C-F

[10] Brown v Vlok 1925 AD 56 at 58

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