

SOUTH AFRICA / JUDGMENT

Snyman v Van Tonder (16402/2016) [2017] ZAWCHC 60 (24 May 2017)

[2017] ZAWCHC 60

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

16402/2016

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Republic

of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

number: 16402/2016

Before: The Hon. Mr Justice Binns-Ward

Hearing: 22 May 2017

Judgment: 24 May 2017
In

the matter between: JOSEPH
FREDERICK
SNYMAN Plaintiff/Respondent
and
EBEN
JOHANNES VAN
TONDER Defendant/Excipient

JUDGMENT

BINNS-WARD J:

- [1] The defendant has noted an exception to the plaintiff's particulars of claim on the bases that they failed to make out a cause of action, alternatively, that they are vague and embarrassing.
- [2] The pleaded claim is one for 'constitutional damages' and purports, according to its tenor, to be founded directly on the Constitution. Notably, it is not one for compensation in respect of pecuniary loss or financial harm alleged to have been suffered, as could be pleaded under the Aquilian action; nor has it been framed as a claim for damages for an injuria. Insofar as it lends itself to characterisation, the claim appears instead to be for a solatium in respect the alleged infringement by the defendant of certain of the plaintiff's basic rights.
- [3] As appositely argued by Mr Cilliers, counsel for the defendant, with reference to the judgments in *Fose v Minister of Safety and Security*
- [1997] ZACC 6; 1997 (3) SA 786 (CC), *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre, *Amici Curiae*); *President of the RSA and others v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre, *Amici Curiae*) 2004
- (6) SA 40 (SCA), *MEC, Department of Welfare, Eastern Cape v Kate*
- [2006] ZASCA 49; 2006 (4) SA 478 (SCA) and *Minister of Police v Mboweni and another* 2014 (6) SA 256 (SCA), 'the South African cases in which constitutional damages have been awarded (or even seriously and directly considered) to date have not only been confined to situations involving patrimonial loss, but have ... invariably [also] been characterised by (a) the involvement of the State or at least the presence of a public law element (i.e. government authority pitted against those without it),
- (b) exceptional circumstances giving rise to the necessity of recognising and awarding constitutional damages as a remedy, or both
- (a) and (b)'. [1]
- [4] Whether a remedy in constitutional damages is appropriately available in a case depends on the given circumstances. The existence and character of the circumstances allegedly giving rise to a cognisable claim for such damages would have to appear in the particulars of claim in any action in which such damages were claimed.
- [5] Legal policy determines whether or not a claim for such damages is cognisable in the given circumstances. In my judgment the prevailing legal policy has been summed up correctly in Joubert el (eds) *LAWSA* 3rd ed. vol. 15, §Delict, para. 6, at p. 10: "A constitutional remedy does not aim to compensate and such an award should be considered in only the most

exceptional circumstances, when compelling reasons so dictate, and only if there is no other compensatory remedy available in law. In delict, an award for damages is the primary remedy; in constitutional law, an award for damages is a secondary remedy, to be made only in appropriate cases when other remedies would not be effective’.

- [6] It is well established that in the public law context, damages will be given as a remedy for an infringement of constitutional rights only exceptionally. In addition to the cases mentioned earlier, see *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC). The nature of the remedy appropriate to redress such infringements should in the first instance be directed at asserting or vindicating the right concerned. If the infringements have caused harm compensable in a delictual action, compensatory damages should be sought in delict.
- [7] In the current case the nature of the claim is encapsulated in paras. 3-5 of the particulars of claim, which, together with the prayers for relief, read as follows:
3. Since December 2011, when the defendant unlawfully purchased the plaintiff’s house from Absa bank based on a fabricated bond mortgage, he has been constantly harassed, intimidated, pestered, tormented and persecuted by the defendant, who has been using all means of coercion and unbearable pressure to terrorize the plaintiff and his family and to illegally force them to vacate the house.
 4. Despite the fact that the sale of the house was declared to be illegal by the high court and also notwithstanding the fact that there is a pending constitutional court application relating to the declaration of the right of ownership of the house, the defendant has illegally advertised the house for sale and organized some hooligans to terrorize the plaintiff and his family to abandon the house.
 5. As a result of all the matters aforesaid, the plaintiff therefore claims for constitutional damages based inter alia on the following grounds:
 - 5.1 Violation of his right to own property.
 - 5.2 Violation of his right to proper legal due process.
 - 5.3 Violation of his right to privacy.
 - 5.4 Violation of his right to dignity.
 - 5.5 Violation of his right to justice.
 - 5.6 Violation of his right to equal treatment and not to be abused, harassed or ill-treated.
 - 5.7 Violation or threatened violation of his right to life.

Moreover, the constant hounding, tormenting and pestering by the defendant, has created a ceaseless stress condition, interminable tantrums and incessant dependence on tranquillizers and other sedative drugs which seriously affect his health condition.

WHEREFORE, the plaintiff prays for judgement against the defendant for:

5.7.1 R1 000 000 (one million) constitutional damages.

5.7.2 Further and/or alternative relief.

5.7.3 Payment of all the plaintiff's wasted costs.

- [8] The appropriate remedy in respect of the allegedly constant harassment, torment and persecution by the defendant of the plaintiff would be a prohibitory interdict. Monetary compensation for the allegedly emotionally and physically harmful effects of the plaintiff's allegedly unlawful conduct would appropriately fall to be claimed in an action pleaded in delict. The particulars of claim do not make out a claim for either of the remedies that might be appropriate on the pleaded facts. They also do not make out a case for an exceptional remedy by way of an award in money.
- [9] The exception therefore falls to be upheld. The defendant has prayed for the dismissal of the action. It seems to me, however, that it would be appropriate, as is customary in such circumstances, to afford the plaintiff a reasonable opportunity to amend its pleading. The order will provide that in the event of him failing to do so within the time afforded the action will ipso facto be deemed to have been dismissed with costs.
- [10] I should mention in closing that the plaintiff failed to appear, either in person or through a legal representative, when the exception was called, and the matter was therefore heard in his absence. What purported to be an application for a postponement of the matter had been delivered shortly before the hearing. Answering papers opposing the postponement had been put in by the defendant. The basis for the postponement that was sought was the non-availability of a certain Jozana Ka Mahwanqa, who, it would appear, is advising or supporting the plaintiff in some capacity in these proceedings. It is evident from the papers that Ka Mahwanqa acknowledges that he has no right of appearance in this court, but apparently intended to apply for admission to the proceedings as *amicus curiae*. No application for admission has been received, and, in any event it is difficult to imagine how the court could have found Ka Mahwanqa's intervention of assistance other than in the capacity of a qualified legal representative with right of appearance, which he is not. (The opposing affidavit in the postponement application drew attention to a previous attempt by Ka Mahwanqa unsuccessfully to obtain audience in the Supreme Court of Appeal on behalf of the plaintiff in another matter; see *Absa Bank Ltd v Snyman* 2015 (4) SA 329 (SCA) at paras. 8 and 9.) In default of any appearance in support of it, the application for postponement was struck from the roll.
- [11] The following order is made:
- (a) The defendant's exception to the plaintiff's particulars of claim is upheld with costs.

- (b) The plaintiff is hereby afforded an opportunity to give notice in terms of rule 28 of the Uniform Rules within 20 days of the date of this order of his intention to amend his particulars of claim.
- (c) In the event of the plaintiff failing to give notice as permitted in terms of paragraph (b) of this order within the period therein provided, the action shall thereupon, ipso facto, be deemed to have been dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court

[1] Para. 14 of the defendant's counsel's heads.

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