

SOUTH AFRICA / JUDGMENT

Tecmed (Pty) Ltd and Another v Minister of Health and Others (16980/11) [2012]

ZAGPPHC 112 (15 June 2012)

[2012] ZAGPPHC 112

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

16980/11

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NOT

REPORTABLE

IN

THE NORTH GAUTENG HIGH COURT

Case

number: 16980/11

DATE:15/06/2012

In

the matter between:

TECMED
(PTY)
LTD.....FIRST
PLAINTIFF
TECMED
AFRICA (PTY)
LIMITED.....SECOND
PLAINTIFF
and
MINISTER
OF
HEALTH.....FIRST
DEFENDANT
DEPARTMENT
OF
HEALTH.....SECOND
DEFENDANT
DIRECTOR-GENERAL
OF NATIONAL HEALTH.....THIRD
DEFENDANT

MR
KAREL EUO
SMIT.....
FOURTH DEFENDANT

JUDGMENT

RAULINGA. J

- [1] This matter concerns an exception raised by the Defendants to the Plaintiff's particulars of claim on the grounds that it did not disclose a cause of action.
- [2] The Plaintiffs issued summonses claiming under the following causes of action:
- (a) The actio legis aquillia (pleaded more fully in paragraphs 28 to 33) alternatively the public law action (pleaded more fully in paragraphs 34 to 37; and
- (b) The action injuriarium (pleaded more fully in paragraphs 38 to 43)
- [3] The summons was issued on the 15 March 2011 and served on the 16 March 2011 on the Defendants. The Defendants served their notice of intention to defend on the Plaintiffs on 8 April 2011, but failed to deliver a plea thereafter within the prescribed period. The Defendants then served the exception on the Plaintiffs on the 27 May 2011.
- [4] Defendants predicate their exceptions in the main on the following:
- (a) that Plaintiffs claims arise from an alleged invalid administrative action; and that the delictual claims instituted by the Plaintiffs are outside the remedies provided by the provisions of the Promotion of the Administration Justice Act (PAJA). They , contend that the principle that the court is obliged to take the pleadings as they stand for purposes of determining whether an exception to them should be upheld is limited in operation to allegations of facts, and cannot be extended to inferences and conclusions not warranted by the allegations of facts. They further argue that the Plaintiffs cannot seek a private remedy for the breach of a public law duty. On the contrary the Plaintiffs advance a number of reasons why the contentions of the Defendants cannot be upheld. I do not support the contentions of the Defendants for the following reasons.
- [5] Exceptions are governed by the provisions of rule 23 of the Uniform Rules of this court. Rule 23 provides: "where any pleading..... lacks averments which are necessary to sustain an action of defence, as the case may be, the opposing party

may, within the period allowed for , filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph(f) of subrule(5) of rule 6." It must be noted that the Defendants served their notice of intention to defend on the 8th April 2011, but failed to deliver a plea thereafter, within the prescribed period. The Defendants then served the exception on the Plaintiffs on the 27th May 2011. Thereafter, the Defendants did not take any further steps

in the prosecution of the exception. This matter is before this court at the instance of the Plaintiffs who took steps to enrol it. An adverse inference can therefore be drawn that the Defendants filed an exception merely for the purpose of delaying the trial. The aim of an exception is to avoid the leading of unnecessary evidence and dispose of a case in whole or in part in an expeditious and cost effective manner. A party is therefore not allowed to raise an exception for the purpose of frustrating its opponent. Further, an exception is meant to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings

- Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627.

It does not seem to me that the Defendants' exception seeks to achieve this purpose.

[6] My reading of PAJA is that it does not exclude the Plaintiffs' common law remedies. Relevant sections of PAJA provide as follows:

Section 8(1) (c) : " the court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders -(c) setting aside the administrative action and-

- (i) remitting the matter for reconsideration, by administrators, with or without directions or
- (ii) in exceptional cases - (aa) substituting or varying the administrative action or connecting a defect resulting from the administrative action; or (bb) directing the administrator or any other party to the proceedings to pay compensation.

Section 8(2): "7776 court or tribunal, in proceedings for judicial review" in terms of section 6(3), may grant any order that is just and equitable, including orders -

- (a) directing the taking of the decision;
- (b) declaring the rights of the parties in relation to the taking of the decision;
- (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- (d) as to cost".

Premised on these sections, it is clear that the claims instituted by the Plaintiffs fall within the parameters of the remedies contemplated by PAJA. All the issues raised by the Defendants in the exceptions are matters which must be dealt with by the trial court.

[7] There exists an established rule of practice by our courts that in so far as there can be an onus on either party on a pure question of law it rests upon the excipient who alleges that a summons does not disclose a cause of action; and he must establish that in all its possible meanings no cause of action is disclosed - Amalgamated Footwear & Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (c) at 893. In my view the Defendants have failed to establish that no cause of action is disclosed when one looks at the pleadings

as a whole. Moreover, pleadings are made for the court, not the court for the pleadings, it is the duty of the court to determine what the real issues „between the parties are and..... to decide the case on the real issues - Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198.

[8] In the circumstances I have decided that it is just and equitable that the parties should be allowed to ventilate their dispute between them to determine the real issues by way of trial.

[9] I make the following order:

(a) The exception is dismissed with costs.

TJ RAULINGA

JUDGE OF THE HIGH COURT NORTH GAUTENG HIGH COURT

FOR THE PLAINTIFF: Adv M Nowitz

INSTRUCTED BY: Schindlers Attorneys

FOR THE DEFEDANTS: Adv V Notshe SC Adv N Makhubela

INSTRUCTED BY: Maponya Ledwaba Inc HEARD ON: 6 December 2011

DATE OF JUDGMENT: 15 June 2012

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Prepared on 9 October 2026 · Esheria