

SOUTH AFRICA / JUDGMENT

Unique Rope Experiences At Length CC v Visser N.O and Another (59644/14) [2015] ZAGPPHC 918 (2 December 2015) [2015] ZAGPPHC 918

COURT

North Gauteng High Court, Pretoria

BEFORE

Fourie

CASE / FILE NUMBER

59644/14

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REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE

(GAUTENG DIVISION. PRETORIA)

CASE NO: 59644/14

DATE: 02 DECEMBER 2015

In the matter between

UNIQUE ROPE EXPERIENCES AT LENGTH CC.....Plaintiff

And

MATTHYS MAG I EL VISSER N.O.....First Defendant

EVENING STAR TRADING (PTY) LTD.....Second Defendant

JUDGMENT

Fourie AJ

1. The plaintiff instituted action against the first and second defendants for the recovery of damages which the plaintiff had allegedly suffered arising from an accident that occurred on 20 December 2011, when a helicopter, piloted by Arie Neven, collided with a zipline cable owned and operated by the plaintiff.
2. The first defendant is cited in his capacity as the executor of the deceased estate of the late Neven. The second defendant is cited in its capacity as the registered owner of the helicopter.

3. In its particulars of claim, the plaintiff pleaded that the collision was caused by the negligence of the pilot, and, as would be expected, pleaded comprehensive grounds of the alleged negligence. The liability of the second defendant however, as the registered owner of the helicopter, is premised solely on the provisions of section 8(2) of the Civil Aviation Act, 13 of 2009 ("the Act"), which reads as follows:

tt(2) Where material damage or loss is caused by -

- (a) an aircraft in flight, taking off or landing;
- (b) any person in any such aircraft; or
- (c) any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the registered owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his or her wilful act, neglect or default "

1. The plaintiff claims the following heads of damages from each of the defendants:

1.1. An amount of R 364 088.91 being the costs of repair of the zipline cable, which was damaged when the accident occurred; and

1.2. An amount of R 1 287 785.00 being the net profit which the plaintiff would have derived from the operation of the zipline cable, had it not been damaged.

2. Subsequent to an amendment being effected to the particulars of claim, the defendants took exception in terms of Rule 23 of the Uniform Rules of Court on the grounds that the particulars of claim, as amended, "are vague and embarrassing or fail to disclose a cause of action as contemplated by Rule 23(1), alternatively, are irregular as contemplated by Rule 30".

3. The exception is based on two grounds:

3.1. That the plaintiff does not allege how the pleaded quantum of its loss of profit claim is calculated, and

3.2. That the loss of profit claim falls outside the scope of section 8(2) of the Civil Aviation Act because it does not constitute "damages" in respect of "material damage or lossn within the meaning of the

section.

4. The excipient's counsel did not persist with the first exception as it transpired that an incomplete annexure "B", setting out the computation of the quantum of the claim, had inadvertently been delivered. Once the papers were complete, the computation was easily determined and the objection fell away.

5. The primary issue in the exception is accordingly the proper construction of section 8(2) of the Act and in particular, the meaning to be ascribed to the phrase “materia/ damage or/oss” as it appears in section 8(2) of the Act.
6. It is important to point out that the defendants have not taken exception to the plaintiffs claim for damages arising from the cost of repairs to the zipline, only to the claim for damages arising from the loss of profit, insofar as such damages are claimed from the second defendant.
7. Although the exception was couched in the general terms appearing in italics in paragraph 5 above, the argument of the excipients’ counsel was premised on the contention that the claim does not disclose a cause of action.
8. At the outset, Mr Ngcongo submitted that it is competent and appropriate to take exception to part of a summons only, where such part comprises a self- contained separate claim for damages. In support of his submission, Mr Ngcongo relied on *Barclays National Bank Limited v Thompson*, 1989 (1) SA 547 (A) at 553, *Barrett v Rewi Bulawayo Development Syndicate* 1922

AD 457 at 459, *Kerbels Flooring and Carpeting (Pty) Ltd v Shrosbree and Another* 1994 (1) SA 655 (SE) at 656G, as well as *Fose v Minister of Safety and Security*, [1997] ZACC 6; 1997 (3) SA 786 (CC).

9. While this may be correct as a general proposition, in my view the exception is not appropriate in this particular matter. This matter may be distinguished from the cases relied upon by the excipients for the simple reason that in each one of those cases, the claim/s excepted to had been instituted against only one defendant and where the exception was upheld, the claim was indeed disposed of in toto.
10. If the exception in casu were to be upheld, however, the plaintiff will still be entitled to pursue the same loss of profit claim as against the first defendant, while the second defendant will not be released, as the claim for the costs of the repair to the zipline remains intact as against both the first and the second defendants.
11. The main purpose of an exception that a declaration does not disclose a cause of action, is to avoid the leading of unnecessary evidence at the trial. *Dharumpal Transport (Pty) Ltd v Dharumpal*, 1956 (1) SA 700 (A) at 706. Even if the construction that Mr Ngcongo places upon section 8 of the Act is correct, that will not have the effect of destroying the loss of profit claim. The main function of the exception will not have been attained, namely the elimination of unnecessary evidence. *Santos and Others v Standard General Insurance Co, Ltd and Another*, 1971 (3) SA 434 (O) at 437;

Mtetwa v Minister of Health, 1989 (3) SA 600 (D) at 605.

12. For this reason, I am inclined to dismiss the exception.

13. The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts. *Lewis v Oneanate (Pty) Ltd and Another*, [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817; *Picbel Groep Voorsorgfonds (in liquidation) v Somerville, and Related Matters*, 2013 (5) SA 496 (SCA) at [26].
14. The excipient relied heavily on the unreported judgment of Msimeki J, delivered in this Division on 12 October 2010, in the matter of *Govender v Gypsey Empire Properties*. This concerned an exception taken to a similar claim based on the predecessor to this Act, being the Civil Aviation Act, 74 of 1962. In a considered judgment, including references to foreign authorities, Msimeki J concluded that material damage means physical damage and that the strict liability provided for in section 11(2) (the predecessor to section 8(2)), is restricted to physical damage and does not include consequential loss, such as loss of profit. He upheld the exception.
15. Counsel for the excipients contended that I am bound to follow *Govender*, while Mr Stockwell SC, who appeared for the plaintiff, submitted that *Govender* was wrongly decided and should not be followed.
19. I do not believe that it is necessary for me to find that *Govender* was wrongly decided. That judgment pertains to an Act which, in my view, differs from the present Act in a material respect. While section 8(2) corresponds to the wording of section 11(2), the inclusion of section 8(5), which does not appear in the repealed section 11, is significant. Section 8(5) reads as follows: "A registered owner or operator of an aircraft must have insurance as prescribed for any damage or loss that is caused by an aircraft to any person or property on land or water" (my emphasis). It does not draw a distinction between material and other damage or loss.
20. Mr Ngcongo argued that the result of the inclusion of section 8(5) was that the owner would be covered for any claims whether brought under the strict liability clause (8(2)) or under delict. Mr Stockwell SC, on the other hand, submitted that the wide wording of section 8(5) meant that the insurance required was intended to cover the damages envisaged in that section, without limitation.
21. There is no general rule that matters requiring the interpretation of statutes cannot be decided on exception, but where the 'factual situation is complex and the legal position uncertain' it will normally be better not to do so. Compare *H v Fetal Assessment Centre*, 2015 (2) SA 193 (CC).
22. The factual situation pertaining to this claim may well not be complex, but the interpretation of the statute is novel and has no precedent, and the result of this exception has important implications not only for this plaintiff, but for the

entire industry that is subject to the provisions of the Civil Aviation Act.

24. In the premises, the exception is dismissed with costs.

H R FOURIE

ACTING JUDGE OF THE HIGH COURT

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