

McCRACKEN v. O.R.C. GOVERNMENT.

1909. *March 16.* MAASDORP, C.J., and FAWKES and WARD, JJ.

Practice.—Pleading.—Exception.—Inconsistent plea.

Where M claimed an order declaring a contract of full force, or £5000 damages, and G pleaded first that they were ready to carry out the contract, but that M had not fulfilled his part, and pleaded in the alternative that, owing to a breach of one of the terms of the contract, it had lapsed and become void, an exception to the alternative plea as vague and embarrassing and inconsistent with the first plea was allowed.

The plaintiff alleged in his declaration that, under an agreement entered into between the Crown Colony Government and Messrs. Anderson & Co., the former undertook to pay the latter a bonus on biscuits manufactured in Bloemfontein in a factory to be erected, the bonus to continue for five years from the date manufacture was begun. This contract was ceded to the plaintiff, the cession being indorsed by the Colonial Secretary. The plaintiff was desirous of erecting the factory in order to earn the bonus, but the defendants in September, 1908, had intimated that the agreement had lapsed owing to a breach of its terms. The plaintiff claimed an order declaring the contract of full force, or £5000 damages. The defendants pleaded first that they had always been ready and willing to carry out the contract subject to the plaintiff's complying with the conditions imposed thereby. He had failed to comply with any of the conditions, the fulfilment of which would entitle him to make any claim under the agreement, and was premature in his action. In the alternative the defendants pleaded that, owing to a breach of one of the terms of the contract, it had lapsed and become void.

The plaintiff excepted to the alternative plea as vague and embarrassing and inconsistent with the first plea.

Blaine, K.C., for the plaintiff and excipient: Inconsistent pleas are not necessarily bad, but if so embarrassing as to pre-

judice the plaintiff's case they will be struck out. If the plaintiff is satisfied with the first plea, and withdraws the action, he may be met by the defendants with a refusal to carry out the contract on the ground of the breach alleged in the alternative plea, whereas, if he proceeds, he may be mulcted in costs. See *Durham v. Peiser & Co.* (Buch. 1878, p. 8); and *Lawrence v. Romain and Gronitzski* (10 C.T.R. 236).

Lloyd, for the defendants.

The exception was allowed with costs and leave granted to the defendants to file an amended plea.

Plaintiff's Attorneys: *Botha & Goodrick*; Defendants' Attorneys: *Marais & De Villiers*.

