

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES/NO |

05 September 2023

Case Number: **57741/2021**

In the matter between:

MILES VAN DER MOLEN

Plaintiff

and

SOUTH AFRICAN CIVIL AVIATION AUTHORITY

Defendant

AND

Case Number: **57742/2021**

In the matter between:

CEMAIR (PTY) LTD

Plaintiff

and

SOUTH AFRICAN CIVIL AVIATION AUTHORITY

First Defendant

SIMPHIWE SALELA

Second Defendant

ORDER

[1] The exceptions are dismissed with costs.

JUDGMENT

Fisher J

Introduction

[2] This judgment is in respect of two related cases in which exceptions have been brought in actions for damages in delict against the Civil Aviation Authority (“CAA”). The CAA contends that there is no cause of action pleaded in both matters.

[3] The cases comprise an action based on a defamation brought under case number 57741/2021 by a director of Cemair, Mr Miles van der Molen which I shall refer to as the “van der Molen action”, and an action under case number 57742/2021 based on the alleged breach by the CAA of its duty of care towards Cemair, which I shall refer to as the “Cemair action”. The Cemair action includes a claim against Mr Simphiwe Salela, an Airworthiness Inspector who acted in his official capacity as an employee of the CAA.

The nature of the exceptions

[4] Exceptions taken in both cases relate to the application of the Institution of Legal Proceedings Against Certain Organs of State Act (“the Act”).¹ Essentially the argument is that the Act applies to actions against the CAA; that the formalities prescribed by the Act in relation to the institution of legal proceedings against the CAA have not been complied with; and that this non-compliance is fatal to the claims in both actions.

¹ 40 of 2002.

- [5] In addition, the CAA raises in the Cemair action that there is no duty of care as pleaded and that in relation to the second defendant that there is a statutory exclusion of liability which applies in respect of the claim.
- [6] It is accepted that a pleading will be excipiable when, even accepting the allegations of the plaintiff, it does not disclose a cause of action on any interpretation.²

The plaintiffs' arguments

- [7] The plaintiffs argue in relation to the exception pertaining to compliance with the Act that, regardless of the applicability or otherwise of the Act to actions against the CAA, the use of the exception process is not competent to determine the point and that the CAA, if it wishes to raise the point, is obliged to do so by pleading thereto in a special plea.
- [8] In relation to the exclusionary provision in section 99 of the Civil Aviation Act ("CA Act"),³ the plaintiffs in the Cemair action argue that the protections under such section do not extend to *mala fides*, which is pleaded.
- [9] In relation to the duty of care, Cemair argues that a cause of action has been pleaded and that, to the extent necessary, the Aquilian action may be extended to allow for a claim in the circumstances pleaded.

The issues

- [10] The following questions are raised for consideration:
- [10.1] Is the exception process competent to raise lack of compliance with the Act?
- [10.2] Is the liability of the second defendant excluded under section 99 of the CA Act?
- [10.3] Does the duty of care relied on by the plaintiffs in the Cemair action establish a cause of action?

² *Minister of Law and Order v Kadir* [1994] ZASCA 138; 1995(1) SA 303 A at 318 and *First National Bank of Southern Africa Ltd v Perry N.O.* [2001] ZASCA 37; 2001 (3) SA 960 (SCA) at para 6.

³ 13 of 2009.

I will deal serially with each of these questions after a brief consideration of the facts relied on in each case.

Pleaded facts

- [11] Cemair conducts the business of a commercial airline. Under the CA Act the CAA has an oversight and regulatory function in relation to the conduct of such a business.
- [12] The Cemair action relates to administrative decisions made by the second defendant in his official capacity during December 2018 and January 2019 which had the effect of grounding Cemair's entire fleet of airplanes.
- [13] The van der Molen action relates to statements made by the CAA on its website relating to the grounding.
- [14] Appeals against the decisions of the second defendant were lodged by Cemair with the Director of Civil Aviation (DCA) in terms of the CA Act. These appeals were dismissed in January 2019. Further appeals to the Civil Aviation Appeal Committee (the CAAC) were heard in March and April 2019 and these were successful.
- [15] Cemair alleges that the CAA breached its statutory duties to it by halting its business without reasonable grounds for doing so; grounding the plaintiff's entire fleet under circumstances where the CAA's investigation only pertained to one aircraft; failing to comply with the procedures in the CA Act in relation to the periods provided for the determination of appeal processes and failing to allow the plaintiff to make representations.
- [16] Cemair alleges further that the CAA breached the plaintiff's rights at common law by halting the plaintiff's business operations without any proper basis and without following a proper process; by subjecting the plaintiff to arbitrary and biased decision making; by conducting its processes in bad faith and outside of the legitimate scope of the relevant empowering provisions and by failure to apply the *audi alteram partem* principle.

- [17] Cemair alleges further that the defendants took the decisions intentionally, in bad faith and in a manner that was unfair. It alleges that, as a direct result of this conduct, it suffered damages in an amount of R 130 million.
- [18] It furthermore alleges that it was defamed by the publication by the CAA of articles on its website and seeks damages of R 40 million and interdictory relief.
- [19] The van der Molen action is brought on the basis of statements made by the CAA in a press release in relation to Mr van der Molen personally to the effect that there has been a dereliction of duty on his part in relation to the incident involved.

Is the point as to non-compliance with the Act properly raised by way of exception?

- [20] The Act repealed several statutes that had previously regulated proceedings against various state bodies such as the police and the defence force.
- [21] The Act was enacted after *Mohlomi v Minister of Defence*,⁴ in which the Constitutional Court held that section 113(1) of the Defence Act⁵ was unconstitutional for its encroachment on section 22 constitutional rights (being the right to have justiciable disputes determined by a court). Part of the reasoning of the Court in *Mohlomi* was that because it made no allowance for condonation, it fell foul of section 22.
- [22] The SCA in *Minister of Safety and Security v De Witt*.⁶ held that the Act was intended not only to bring consistency to procedural requirements for litigating against organs of state but also to render them compliant with the Constitution.
- [23] One way in which the Act seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of state is to give a court the power to condone a plaintiff's non-compliance with procedural requirements.

⁴ *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559.

⁵ 44 of 1957.

⁶ *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA) at para 2 (*de Witt*).

[24] Section 3(4) of the Act gives the court a discretion to condone non-compliance, subject to three requirements being met. Section 3(4) reads as follows:

“(4)(a) *If an organ of state relies on a creditor’s failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.*

(b) *The court may grant an application referred to in paragraph (a) if it is satisfied that-*

(i) *the debt has not been extinguished by prescription;*

(ii) *good cause exists for the failure by the creditor; and*

(iii) *the organ of state was not unreasonably prejudiced by the failure.*

(c) *If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate”.*

[25] The CAA argues that because there has not been the requisite notice I am entitled to find, on exception, that the actions are fatally defective. The plaintiffs argue that the section, properly construed, precludes the raising of the point on exception.

[26] In *Cochrane v City of Johannesburg*,⁷ in which the Full Court of this division dealt with an application under rule 30 to set aside a summons on the basis of a failure to give notice under the Act, it was held that when a summons had been served the correct procedure was to raise the point by way of special plea. The rule 30 process in that case, invoking as it did the rule 18 provisions, was akin to an exception.

[27] Furthermore, the raising of such a point is in the nature of a prescription claim. It is generally accepted that the proper way of raising a defence of this nature is by way of a special plea. The reason for this is that stated in *de Witt*, being

⁷ *Cochrane v City of Johannesburg* [2010] ZAGPJHC 61; 2011 (1) SA 553 (GSJ)

that there is potentially an answer to such a defence in the form of condonation or waiver.

[28] The failure to state that there has been notice in terms of the Act or that it is intended that condonation for the lack of filing of the notice will be sought does not affect the integrity of the cause of action pleaded. The lack of notice is a point external to the pleading. Such points must be raised by way of special plea.

[29] The scheme in the Act allows for an organ of state which is entitled to the notice provided for in the Act to waive receipt of such notice. If it chooses not to do so, the scheme in the Act provides for the point to be raised by way of pleading and in turn expressly creates a platform for condonation to be sought by the plaintiff.⁸

[30] Furthermore, a determination on exception of the question whether the Act applies at all to proceedings against the CAA would defeat the object the scheme.

[31] Accordingly, I find that the exceptions in terms of the Act are not competently raised.

Is the claim against the second defendant in the Cemair claim excluded by section 99 of the CA Act?

[32] Section 99 reads as follows:

“No employee of the Civil Aviation Authority is liable in respect of anything done or omitted *in good faith* in the exercise of a power or the performance of a duty in terms of or by virtue of this Act, or in respect of anything that may result therefrom.” (Emphasis added).

[33] Cemair alleges that the defendants took the decisions intentionally and in bad faith and in a manner that was unfair. This puts the pleaded claim outside of the limitation in section 99.

[34] Thus, this exception must also fail.

⁸ See *de Witt* (fn 6) at para 2.

Does the duty of care relied on by the plaintiffs in the Cemair action establish a cause of action?

[35] The legal duty on the part of the defendants for which Cemair contends in its pleadings rests on the alleged breach of the CAA's statutory duty and duty of care at common law.

[36] It is argued on behalf of the CAA that there exists no such duty under our law and that the argument that there be an extension of the Aquilian Action to accommodate such a duty is unsustainable. In this regard it is submitted that, as a matter of public and legal policy, the imposition of such a duty would have a chilling effect on the regulatory function of the CAA - which is to promote aviation safety.

[37] In *H v Fetal Assessment Centre*⁹ the Constitutional Court recognised that where the factual situation is complex and the legal position uncertain, it will normally be better not to decide the case on exception.¹⁰ This is because the question of the development of the common law would be better served after hearing all the evidence.¹¹

[38] It is thus only if the court can conclude that it is impossible to recognise the claim, irrespective of the facts as they might emerge at the trial, that an exception can and should be upheld. This is not such a case.

[39] In *Pretorius v Transport Pension Fund*,¹² the Constitutional Court reiterated that exception proceedings are inappropriate to decide the complex factual and legal issues involved when there is an extension of the common law sought.

[40] *Fetal Assessment Centre* also confirmed the judgment of the SCA in *Children's Resource Centre Trust*,¹³ to the effect that if a novel or

⁹ *H v Fetal Assessment Centre* ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC).

¹⁰ Id at para 12 see also *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) (*Tembani*) at para 15.

¹¹ Id at para 11.

¹² *Pretorius v Transport Pension Fund* [2018] ZACC 10; 2019 (2) SA 37 (CC); [2018] 7 BLLR 633 (CC).

¹³ *Trustees for the time being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2012] ZASCA 182; 2013 (2) SA 213 (SCA).

unprecedented claim is “legally plausible” then it must be determined in the course of the action.¹⁴

[41] Accordingly, a court must be satisfied that a novel claim is inconceivable under our law as potentially developed under section 39(2) of the Constitution before it can uphold an exception premised on the alleged non-disclosure of a cause of action.¹⁵

[42] In the circumstances this exception must also fail.

Costs

[43] Given the clear and well settled legal prescripts which operate this result should have been seen as inevitable.

[44] There is no reason in the circumstances which dictate that the defendant should not pay the costs.

Order

[45] In the circumstances I make the following order:

[1] The exceptions are dismissed with costs.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 05 September 2023

Heard: 27 July 2023

¹⁴ Id at para 37.

¹⁵ Constitution of the Republic of South Africa, 1996.

Delivered: 05 September 2023

APPEARANCES:

For the Plaintiffs: Adv. Goolam Ameer

Instructed by Raees Chothia Attorneys

For the Defendants: Adv. Phillip Mokoena SC

Adv. Cingashe Tabata

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