

FAUSTMANN v. G. A. FICHARDT & CO.
AND A. E. FICHARDT.

1910. February 18. MAASDORP, C.J., and WARD, J.

Practice.—Pleading.—Matter inadmissible as evidence.—Application to strike out paragraphs under Rule 35.

Where facts were alleged in a plea which would have required inadmissible evidence to support them, *Held*, that the paragraphs containing the allegations must be struck out.

This was an application to strike out certain paragraphs in respondents' plea on the ground that they were superfluous and also that, if they were allowed to stand, the respondents might claim to lead evidence at the trial in support of them.

The declaration in the matter alleged that up to 30th June, 1906, the plaintiff had been in the employ of G. A. Fichardt & Co. for thirty years. When the employment terminated the then partners, the second defendant and one Gill, agreed on account of long and faithful services to pay plaintiff, who accepted the same, a pension of £240 per annum for the remainder of his life, and this had been paid until recently. The above firm was dissolved, and all its business was taken over by the first defendants, who notified the plaintiff on the 3rd September, 1909, that they would discontinue paying the pension after the 30th September, 1909, and have since refused to make any further payments, disclaiming all responsibility on account of the pension.

In the alternative the plaintiff alleged that after the dissolution of the partnership between the second defendant and Gill, the former carried on the business as G. A. Fichardt & Co., till it was acquired by the first defendants. The plaintiff claimed alternatively against the defendants an order declaring him entitled to payment of a pension at the rate of £240 per annum during the remainder of his lifetime, payment of the amount already accrued due, and general relief and costs.

The defendants, after admitting the employment, pleaded that plaintiff's services were dispensed with by G. A. Fichardt & Co. on a month's notice in the ordinary course on the 30th June, 1906:—

(4) Thereafter, in November, 1906, G. A. Fichardt & Co. were requested by the Fichardt estate to make payments to the plaintiff of sums of money at the rate of £120 a year on account of the Fichardt estate.

(5) At about the same time G. A. Fichardt & Co. were requested by the Beck estate to make payments to the plaintiff of sums of money at the rate of £120 a year on account of the Beck estate.

(6) G. A. Fichardt & Co. informed plaintiff hereof and made payments to him quarterly at the said rates on account of the said estates respectively until the month of August, 1909, when they received instructions from the said estates respectively to make no further payments to plaintiff on their accounts after the 30th September, 1909, and the said estates respectively informed G. A. Fichardt & Co. that as regards any further payments they might respectively desire to make to plaintiff, they would make same directly themselves to plaintiff, whereof G. A. Fichardt & Co. informed plaintiff.

(7) G. A. Fichardt & Co., as requested by the said estates respectively, duly made the payment to plaintiff on the 30th September, 1909, but plaintiff returned the cheque making this payment, which cheque or its value in cash has always been and still is held by G. A. Fichardt & Co. at plaintiff's disposal.

(8) Defendants never entered into any agreement with nor made any promise whatever to plaintiff to pay him or to continue paying him £240 a year or any other sum for life or for any definite period or at all, nor did they ever take over upon themselves from any one else any such agreement or proviso, if any ever existed.

(9) There exists no consideration or cause for any such agreement or proviso, nor has there been any registration thereof.

Blaine, K.C., for the applicant: Pars. 4–7 contain evidence which would be inadmissible at the trial and are superfluous; see Rule of Court 35. They must therefore be struck out. As to par. 9, this too is superfluous, since it has been decided both in this court and the Cape courts that as between donor and donee registration of a gift up to any amount is not required, and, further, that in the case of an annual grant not exceeding £500 per annum registration is not required. See *Barrett v. O'Neil's Executors* (Kotzé, 109); *Wiese, N.O., v. Executors of Wiese*

([1905] O.R.C. 130); and Maasdorp's *Institutes of Cape Law*, vol. 3, pp. 96 and 98.

Fichardt, for the respondents: As to par. 9, there can be no prejudice to the plaintiff, and though not incumbent on defendants to plead law, there can be no objection to their doing so. As to the other paragraphs, the defendants are pleading agency, and allege that payments were made on behalf of their principal to the knowledge of the plaintiff, and must set out the material facts constituting such agency.

In answer to the Court, counsel stated that he certainly claimed to lead evidence on all the facts alleged in pars. 4, 5 and 6.

MAASDORP, C.J.: The Court is of opinion, since Mr. Fichardt insists on his right to lead evidence in support of the allegations contained in pars. 4, 5 and 6 of the plea, that they must be struck out. Mr. Fichardt raises the point that if the paragraphs were allowed to stand he would be entitled to lead evidence as to what passed between the respondents and the Fichardt estate and the Beck estate; but such conversations would be inadmissible as evidence. As to par. 7, that is clearly irrelevant, for the alleged tender was admittedly made by the respondents as agents, and not as principals. It is therefore ordered that pars. 4, 5, 6 and 7 be struck out, with leave to respondents to insert an amended paragraph or amended paragraphs in the place of 4, 5 and 6 on or before Tuesday next with costs. As to par. 9, there is nothing to prevent the respondents pleading the law in that form.

Applicant's Attorneys: *Fraser & Scott*; Respondents' Attorneys: *Gordon Fraser & McHardy*.
