Case Nr 641/91

E du Plooy

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

LIONEL NORMAN TROPE

ZOONDEL BRENNER

AARON BRENNER Appellants

and

THE SOUTH AFRICAN RESERVE BANK Respondent

Coram: JOUBERT ACJ, KUMLEBEN, F H GROSSKOPF JJA, HOWIE et KRIEGLER AJJA

Heard: Delivered:

9 March 1993 31 March 1993.

JUDGMENT

F H GROSSKOPF JA:

This is an appeal against the judgment of McCreath J, sitting in the Transvaal Provincial Division (reported sub nom Trope v South African Reserve Bank and Another and Two Other Cases 1992(3) SA 208 (T)). The court a quo upheld an exception taken by the respondent to the appellants' amended particulars of claim on the ground that they were vague and embarrassing. The present appeals relate to three of 38 virtually identical actions, brought by various plaintiffs against the respondent as first defendant and Volkskas Bank Ltd ("Volkskas") as second defendant, claiming damages from them jointly and severally. These are delictual actions for the recovery of pure economic or financial loss, based on the alleged wrongful and negligent conduct of the respondent and Volkskas. (Cf Administrateur, Natal v Trust Bank van Afrika Bpk 1979(3) SA 824 (A) at 829H-

830B; Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985(1) SA 475 (A) at 498C-E.)

Before the merits of the appeal can be considered the appellants must first show that the order of the court a quo is appealable. The court a quo granted the appellants leave to appeal to this court on a number of grounds set forth in their notice of application for leave to appeal. Thereafter this court granted the appellants further leave to appeal on certain additional grounds set out in the said notice, but subject to the respondent's right to argue that the order of the court a quo is not appealable.

Leave to appeal is of course only one of the jurisdictional requirements for a civil appeal from a provincial or local division sitting as a court of first instance. The other is that the decision appealed against must be a "judgment or order" within the meaning of those words in the context of s 20(1) of the Supreme Court Act 59 of 1959 (Zweni v Minister of Law and Order

1993(1) SA 523 (A) at 531B-D). The question whether a decision is an appealable "judgment or order" is not always easy to determine, as appears from a number of authorities referred to in the Zweni judgment. It will serve no purpose to re-examine those authorities. It has been held in Zweni's case, supra, at 532J-533B:

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra [1987(4) SA 569 (A)] at 586I-587B; Marsay v Dilley 1992 (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992(4) SA 202 (A) at 214D-G)."

The decision of the court a quo, and its effect, must therefore be considered in order to determine whether it qualifies as an appealable "judgment or order".

Before I deal with the facts of the present

case I should first make a few general observations relating to exceptions, and more particularly exceptions on the ground that a pleading is vague and embarrassing.

Rule 18(4) of the Uniform Rules of Court provides as follows:

> "Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

(And see Rule 18(12).) Previously "minor blemishes in, and unradical embarrassments caused by, a pleading" could be cured by further particulars (Purdon v Muller 1961(2) SA 211 (A) at 215F), but requests for further particulars to pleadings are no longer competent. Exceptions that pleadings are vague and embarrassing have been allowed in the past even though the embarrassment might have been removed by the furnishing of particulars in response to a request. (See Osman v Jhavary & Others 1939 AD 351 at 365-366, a case which dealt with the practice at that

time pertaining in Natal.) The position is now

regulated by Rule 23(1) of the Uniform Rules of Court, which provides that where a party intends taking an exception that a pleading is vague and embarrassing, he shall first afford his opponent an opportunity of removing the cause of complaint. The embarrassment and consequent prejudice complained of can indeed often be removed by an appropriate amendment providing further and better particularity. No such preliminary step is required, on the other hand, where the exception is taken on the ground that the pleading lacks averments necessary to sustain an action or defence.

The respondent in the present matter duly gave the appellants notice in terms of Rule 23(1) that unless they removed the cause of complaint set out in the notice it intended taking an exception to their particulars of claim on the ground that they were vague and embarrassing. The appellants thereupon amended their particulars of claim, but the respondent was still not

satisfied and gave them notice once again that it intended taking an exception that their amended particulars of claim were vague and embarrassing. Their response to this request was that they did not intend amending their particulars of claim, which they averred were in order. The respondent then took an exception in terms of Rule 23(1) on the ground that the appellants' amended particulars of claim were vague and embarrassing. There was never any suggestion that the respondent also objected to the particulars of claim on the ground that they did not disclose a cause of action. The exception was nothing more than it purported to be, i.e. an exception that the amended particulars of claim were vague and embarrassing. Both in substance and in form the notice of exception unequivocally assails the manner in which the particulars of claim were formulated and not the validity of the causes of action sought to be alleged therein. That is how the parties treated the exception throughout and how the learned judge a quo viewed it and

dealt with it in his judgment. The following statement appears in the judgment of the court a quo, supra, at 217 H-I, immediately preceding the order:

> "Finally, I should state that I have not considered it necessary to deal with certain aspects of the law raised in the very comprehensive arguments advanced on behalf of the plaintiffs. Those aspects are, in my judgment, apposite in the case of an exception on the grounds that no cause of action is disclosed by the pleadings, but are not appropriate for purposes of the present exception."

It appears, therefore, that the learned judge a quo was under no misapprehension as to the true nature of the exception he was dealing with in this case.

However, Mr Puckrin, who appeared for the appellants, maintaining that substance and not form should prevail, submitted that the true nature of the exception was that the particulars of claim disclosed no cause of action, and not that they were merely vague and embarrassing. A similar argument had been advanced, for the first time, when counsel for the appellants sought leave to appeal in the court a quo, and it appears from

 the

following extract from the judgment granting leave

that counsel managed to persuade the learned judge a quo

that there was substance in his argument:

> "Although the decision of this court was directed at the question as to whether it was incumbent upon the plaintiff to allege additional facts in order to clarify what was meant by the status of the bank and the position of the registrar respectively and that there was vagueness and embarrassment by virtue of the fact that no such further allegations had been made, I have come to the conclusion that the decision of this court has a further effect. If the Reserve Bank and the registrar of banks, occupying as they do a particular statutory position, have a common law duty of care towards persons such as the plaintiffs which goes further or transcends specific statutory duties then a cause of action may lie without the necessity for any further averments to be made. Moreover the plaintiffs may not wish, and indeed may not be able, to make any further averments in regard to this particular aspect. If that be so, this court's decision in regard to that aspect of the matter strikes at the plaintiff's cause of action and to that extent does have a final effect on the main action as such. It would in effect deprive the plaintiffs of a possible cause of action."

I cannot, with respect, agree with the remarks

of the learned judge that the decision of the court a quo

"has a further effect", that it "strikes at the

plaintiff's cause of action", or that "it would in effect deprive the plaintiffs of a possible cause of action". I do not believe that the appellants are unable to amplify their particulars of claim in the relevant respects. Their refusal to do so may have a detrimental effect on material aspects of their case, but cannot in my view affect or change the true nature of the order of the court a quo. I shall revert to this aspect in due course.

The appealability of the order of the court a quo depends, inter alia on whether it has a final and definitive effect. The effect of an order upholding an exception has recently been considered by this court in Group Five Building Ltd v The Government of the Republic of South Africa, represented by the Minister of Public Works and Land Affairs. (The judgment, which has not yet been reported, was delivered on 18 February 1993 in case no 400/91.) The particulars of claim in that case were held to be excipiable on the ground that they

disclosed no cause of action. One of the issues which arose on appeal was whether the trial judge, upon granting the exception, was correct in dismissing the action at the same time. In the course of his judgment Corbett CJ pointed out (at p 26 of the typed judgment) that in cases where an exception has successfully been taken to a plaintiff's initial pleading on the ground that it discloses no cause of action,

> "the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time".

This practice would apply a fortiori where an exception has been granted on the ground that the pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of - action and not its legal validity.

The following extract from the judgment of Bristowe J in Johannesburg Municipality v Kerr 1915 WLD 35, at 37, was quoted with approval in the Group Five

Building Ltd case, supra (at p 31-32 of the typed judgment):

> "As was said by INNES, C.J., in Coronel v Gordon Estate Gold Mine (1902, T.S., at p. 115) 'the effect of a successful exception is that the entire declaration is quashed,' meaning as I understand that it is an absolute bar to any relief being obtained on that declaration. But it does not take the declaration off the file or place the case in the same position as though no declaration had been delivered. Otherwise the proper order when an exception is upheld would be to extend the time for filling a declaration, not to give leave to amend. Leave to amend presupposes that there is something which can be amended. Still less can it be said that a successful exception destroys the action. If this were so then the case of Currey v Germiston Municipality (1910, L.L.R. 191), where an order for absolution under rule 41 was granted after a declaration had been successfully excepted to and had not been amended, would have been wrongly decided. It seems to me therefore that the action in the present case is still on foot and that there is a declaration in existence."

This court held in the Group Five Building Ltd case, supra, that the judge of first instance had erred in dismissing the action, and the learned Chief Justice remarked as follows in this regard (at p 28-29 of the typed judgment):

> "An order dismissing an action puts an end to the

> proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start de novo. This may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. In my opinion, it would be contrary to the general policy of the law to attach such drastic consequences to a finding that the plaintiff's pleading discloses no cause of action."

In the present matter the respondent in its notice of exception actually asked for an order dismissing the claims, but the court a quo instead granted the appellants leave to amend their particulars of claim.

Where an exception is granted on the ground that a plaintiff's particulars of claim fail to disclose a cause of action, the order is fatal to the claim as pleaded and therefore final in its effect. (Liquidators. Myburgh, Krone & Co. Ltd. v Standard Bank of South Africa Ltd and Another 1924 AD 226, at 229, 230.) Leave to amend will be of no avail to a plaintiff in such a case unless he is able to amend his particulars of claim in such a way as to disclose a cause of action. On the other hand, where an exception is properly taken on the

ground that the particulars of claim are vague and embarrassing, by its very nature the order would not be final in its effect. All that a plaintiff would be required to do in such a case would be to set out his cause of action more clearly in order to remove the source of embarrassment.

Mr Puckrin told us that the appellants are not able to amplify or amend their particulars of claim in certain respects, and added that they do not intend, in any event, to do so. He stated that they would rely on their particulars of claim as pleaded. But a party cannot, by adopting such an attitude, effectively change an order which is not final in its effect, and therefore not appealable, into one which is. A similar argument was rejected by this court in South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980(3) SA 91 (A). In that case the court of first instance upheld an exception that the plaintiff's particulars of claim were vague and embarrassing. On

appeal this court, mero motu, raised the question whether

the order was appealable. It concluded that it was not.

In the course of his judgment Miller JA held as follows

at 98 C-F:

> "Appellant's counsel's further contention that the action is 'at an end' because 'in the absence of an amendment', the action cannot be continued, is, I think, fully met by what was said by SCHREINER JA in the Pretoria Garrison case [1948(1) 8A 839 (A) ], that is that
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> '...regard should be had not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit'.
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> (At 870.) In a case decided in the Federal Supreme Court in Salisbury, CLAYDEN FJ, when considering whether an order striking out a paragraph in the plaintiff's declaration was interlocutory, held that
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> 'the decision on the application to strike out, based as it was not on the contention that the claim was unjustified in law but on the manner in which it was pleaded, was an interlocutory order'.
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> (See Harper v Webster 1956 (2) SA 495 (FC) at 504.) Notwithstanding that we are now concerned not with an application to strike out but with an exception, those words are, as Mr Kentridge, for the defendant, contends, of equal application to this case."

was also held in the S.A. Motor Industry Employers' Association, case, supra, at 96 H, (and cited with approval in Zweni's case, supra, at 532 I) that in determining the true effect of an order

> "not merely the form of the order must be considered but also, and predominantly, its effect".

The court further concluded at 97 B-C that

> "determination of the effect of the order made therefore requires examination of the true nature of the exception which the Court upheld".

Counsel for the appellants relied on these dicta in support of his submission that the order of the court a quo is final in its effect and therefore appealable.

The submission was that the respondent's exception in the present case was an attack on the appellant's cause of action. Counsel further contended that by allowing the exception the court a quo effectively erased material averments in support of the appellants' cause of action, leaving truncated and defective particulars of claim. In short, counsel contended that, though in form the

exception was based on vagueness and embarrassment, in substance it was one directed at the absence of a cause of action. To determine the validity of this submission one must examine the appellant's amended particulars of claim, the respondent's exception thereto and the judgment of the court a quo.

In the particulars of claim it is alleged that the appellants invested money with one W A Vermaas ("Vermaas") and certain companies controlled by Vermaas ("the Vermaas companies"). The estate of Vermaas was subsequently sequestrated, while the Vermaas companies were liquidated, resulting in financial loss to the appellants. The appellants' claims against the respondent are based, in the first place,- on certain unlawful foreign exchange transactions of Vermaas or the Vermaas companies. The appellants allege, inter alia, that the respondent, "by virtue of its status [or its position] as central bank", had a common law legal duty towards the appellants to prevent the occurrence of

financial loss to them as a result of such transactions.

The appellants' claims against the respondent are based, in the second place, on the allegation that Vermaas and the Vermaas companies unlawfully conducted the business of a banking institution. The particulars of claim state that the Registrar of Banks ("the Registrar") was an employee of the respondent and that he performed his duties under the control of the respondent. The appellants allege, inter alia, that the Registrar "by virtue of his position as such", and the respondent, "by virtue of its position as central bank", had a common law legal duty towards the appellants to prevent Vermaas and the Vermaas companies from unlawfully conducting the business of a banking institution..

Whether the exception was indeed well founded is not relevant to this enquiry and need not be considered. For present purposes the exception can conveniently be divided into the following three categories:

1. The exception set forth in paras 1.2 and 2.1 of the respondent's notice of exception (ad paras 6 and 8 of the particulars of claim):

The appellants conceded that the order of the court a quo upholding the exception taken in these paragraphs is not appealable. In my view this concession was correctly made.

2 The exception set forth in paras 22, 3.1, 3.2, 3.4, 3.5, 4.2, 4.3, 4.4, 4.5, 4.6, 6.1, 6.2, 7.1, 7.2, 9.1, 9.2 and 9.3 of the respondent's notice of exception (ad paras 8, 9, 10, 22.6, 22.7 and 23.1 of the particulars of claim):

The main complaint of the respondent, as set out in these paragraphs of the notice of exception, is that it is not clear what the appellants intend to convey by the expression "by virtue of its status [or its position] as central bank", particularly in relation to the alleged legal duties of the respondent. The same

applies to the expression "by virtue of his position as such" in relation to the Registrar's alleged legal duties.

It was contended on behalf of the appellants in the court a quo and in this court that the concept "status as central bank" is a notorious one. The court a quo did not agree with that submission and held (at 213B-G) that the respondent was prejudiced by this expression because it was not possible for the respondent to determine from this bald allegation the case it had to meet. In my judgment this finding did not have the effect of depriving the appellants of any cause of action; it merely required them to clarify, the expression, and thus their cause of action. I cannot, therefore, agree with the submission that the effect of the court a quo upholding the exception in this regard, was to deny the appellants the right to rely on the status of the respondent as central bank.

It is trite that a party has to plead - with sufficient clarity and particularity - the material facts upon which he relies for the conclusion of law he wishes the court to draw from those facts (Mabaso v Felix 1981(3) SA 865 (A) at 875 A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (Radebe and Others v Eastern Transvaal Development Board 1988(2) SA 785(A) at 792J-793G).

The appellants brought delictual actions based on the wrongful and negligent conduct of the respondent. The appellants accepted that they had to plead material facts which would justify the conclusion that the respondent owed them a legal duty, i.e. that the respondent's conduct was wrongful. The appellants submitted that this had in fact been done adequately, and if the respondent wished to contend to the contrary, the proper course would have been to take an exception that the particulars of claim did not disclose a cause of

action. No such exception was in fact taken by the

respondent; it never contended that the particulars of claim failed to disclose a cause of action; its objection was that it was not clear what the appellants intended to convey by the allegation that the respondent owed them a legal duty "by virtue of its status [or position] as central bank". It was not the respondent's contention that the facts pleaded by the appellants could not in law justify the conclusion that a legal duty existed; its objection was that it was not clear from the particulars of claim on which facts the appellants were actually relying for their legal conclusion, and the respondent therefore maintained that the appellants were obliged to clarify the position.

That is indeed what the court a quo decided (at 214D) in holding that it was incumbent on a plaintiff to plead with greater clarity the facts on which he wished to rely for his conclusion of law. The court a quo concluded (at 214E):

> "And if the pleadings lack sufficient clarity to enable the defendant to determine those facts and hence the case he has to meet, the pleadings are vague and embarrassing."

In the case of S.A. Motor Industry Employers' Association, supra, this court likewise had to determine the true nature of an exception to a plaintiff's particulars of claim. The exception taken in that case was that the plaintiff had not "pleaded the material facts" on which it relied for a particular averment and, because of such failure, the defendant did not know "on what basis" the plaintiff relied. The court concluded at 97C-D that the true nature of the exception in that case was "that the defendant was embarrassed by the vagueness or insufficiency of the facts averred". In my judgment the true nature and effect of the exception taken in the instant case is no different.

The exception set out in para 4.2 of the notice of exception led the court a quo to find (at 215E) that para 10.2 of the particulars of claim was also

"inherently contradictory and accordingly vague and

embarrassing". It cannot be said, in my opinion, that the exception taken in this particular paragraph of the notice is anything but an exception that the pleading is vague and embarrassing.

3. The exception set forth in paras 5.1, 5.2, 5.3, 12.1, 12.2, 12.3 and 12.4 of the respondent's notice of exception (ad paras 4, 19, 20, 27, 38 and 45 of the particulars of claim):

In paragraph 19 of the particulars of claim the appellants averred that "but for" the respondent's negligent conduct the appellants would not have suffered any damage, while in paragraph 20, read with paragraph 4, it was averred that "but for" the negligent conduct of Volkskas the appellants would not have suffered any damage. The respondent contended in its exception to these paragraphs that the averments contained in paragraph 19 were in conflict with those contained in

paragraphs 4 and 20, and were accordingly vague and embarrassing. A similar objection was set out in paragraph 12 of the notice of exception as regards paragraph 27 and 20 of the particulars of claim, read with paragraphs 4, 38 and 45.

The court a quo dealt with this aspect of the matter as follows in its judgment, supra, at 2151-216C:

> "On behalf of the excipient it is argued that the allegations in para 19 are in conflict with those in paras 4 and 20. The plaintiffs counter this by submitting that what is being alleged is a multiple causation of plaintiffs' damages. The argument overlooks the fact that para 4 qualifies all the plaintiffs' claims and paras 19 and 20 are not in the alternative. The words 'but for' used in para 4, together with the further allegation in para 20 that the plaintiff would not have suffered damage but for the second defendant's negligent conduct, are therefore open to the interpretation that the first defendant's conduct was not a cause of the damages sustained. There is, on that interpretation, also no basis for the allegation in para 21 of the particulars of claim that the first and second defendants are jointly and severally liable to the plaintiff.
>
> In my view the question as to whether there is embarrassment of a nature which prejudices the first defendant is conceivably arguable. Had this been the only basis on which an exception had been taken, it may very well not have warranted earnest consideration. However, as, in my view, the

> plaintiff's particulars of claim require correction in the other respects referred to in this judgment, I consider that the vagueness in this paragraph should also be cured."

The court a quo further held (at 217F-G) that the same ambiguity arose in respect of the other paragraphs referred to above and that it should also be cured.

The appellants did not agree with the above conclusion of the court a quo and submitted that it had misconceived the principles of causality. Be that as it may, the true nature of the exception in this respect was that the pleadings were vague and embarrassing. That is also how the court a quo viewed the matter.

It should be borne in mind that the court a quo did not dismiss the actions, but gave the appellants leave to amend their particulars of claim. By availing themselves of that opportunity the appellants can, in my view, cure the deficiencies found by the court a quo in their particulars of claim. The finding was not that the claim was unjustified in law, but that it had been

pleaded in a manner lacking the degree of clarity

required by Rule 18(4).

For the reasons set out above I therefore conclude that the order of the court a quo does not meet

the requirements of appealability set out in Zweni's

case, supra. It follows that the appeal is not properly before this court and must be struck off the roll. It also follows, one should perhaps add, that the time period afforded the appellants in the court a quo to amend their particulars of claim is to run from the date of delivery of this judgment.

The respondent asked that the costs of three counsel be allowed. I do not think that the difficulty or complexity of the case before us was so extraordinary as to warrant the employment of three counsel (Fisheries Development Corporation of SA Ltd v Jorgensen and Another 1980(4) SA 156 (W) at 172C-H).

The appeal is accordingly struck off the roll with costs, which shall include the costs consequent upon the employment of two counsel.

F H GROSSKOPF JA

JOUBERT ACJ)
KUMLEBEN JA)
HOWIE AJA) Concur.
KRIEGLER AJA)