

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

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

6.9.2012

DATE

SIGNATURE

Date: 6.9.2012

Case Number: 34337/2011

In the matter between:

MARY-CATHERINE MADEKUROZWA

Plaintiff

and

UNIVERSITY OF PRETORIA

Defendant

and

PROF SOLEY JT

First Third Party

DR VAN STADEN SL

Second Third Party

PROF. BOOTH KK

Third Third Party

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

Introduction

[1] On 17 June 2011 the plaintiff, a professor in the fulltime employment of the defendant, issued summons for an order declaring the defendant's institution of disciplinary action against her to be unlawful, invalid and in contravention of section 3 of the Protected Disclosures Act, Act 26 of 2000 ("the Act").

[2] The relief claimed, emanates from the defendant's decision on 21 April 2011, to institute disciplinary proceedings against the plaintiff. The defendant's decision is based on a letter written by the plaintiff on 11 September 2009, which letter was, according to the averments contained in the plaintiff's particulars of claim, sent to the defendant's Transformation Committee. The plaintiff alleges in the particulars of claim that the information in the letter shows or tends to show unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 and as a result falls within the ambit and scope of the protection afforded by the Act.

[3] The defendant defended the action and served its plea on 15 June 2011. On 18 May 2012 and with leave of this court, the defendant served a Notice to Third Parties, in terms of the provisions of Rule 13 of the Uniform Rules of Court, on the third parties.

[4] The Third Party Notice is premised on an action instituted in the Labour Court under case number J579/2011 by the third parties against the defendant (as first respondent) and the plaintiff (as second respondent). The following relief is, *inter alia*, claimed by the defendant against the third parties:

'15.1 An order declaring that the Plaintiff's letter of 11 September 2009 is a "protected disclosure" for which it would be unlawful for the Defendant to take disciplinary steps against the Plaintiff;

15.2 An order declaring that the Plaintiff made the allegations contained in her aforementioned letter, including the allegations of racism against the Third Parties, in good faith and in the reasonable belief of their truthfulness;

15.3 An order granting such further or alternative relief as may be found appropriate;'

[5] The third parties filed a plea to 'PLAINTIFF'S AND DEFENDANTS' (sic) CLAIMS' and raised, *inter alia*, a special plea of *lis alibi pendens*. The plea is premised on the facts and allegations that form the subject matter of the third parties' claim against the plaintiff and the defendant in the Labour Court.

[6] The third parties pray for the following relief:

'Accordingly, the Plaintiff's claim against the Defendant should be stayed pending the outcome of the Third Parties' claim against the Plaintiff and the Defendant, alternatively, should be transferred by the High Court to the Labour Court to be heard

together with the Third Parties' claim against the Defendant under Labour Court case number J579/2011'

[7] At a pre-trial conference held on 17 August 2012, the parties agreed that only the special plea will be argued on the trial date and that the action will be postponed *sine die* with no order as to costs.

Lis alibi pendens

[8] The requisites of a plea of *lis alibi pendens* are trite, and are conveniently summarised by Harms in ***Amler's Precedents of Pleadings***, Seventh Edition, 263 as follows:

- '7.1 pending litigation;
- 7.2 between the same parties;
- 7.3 based on the same cause of action;
- 7.4 in respect of the same subject matter.'

[9] It is evident from the third parties' Statement of Claim filed in the Labour Court that there is pending litigation between the third parties and the plaintiff.

[10] The plaintiff did, however, not cite the third parties as defendants in this action. The third parties were joined by the defendant and in terms of the provisions of Rule 13(7) of the Uniform Rules of Court, the defendant becomes the "plaintiff" and the third parties the "defendants".

[11] In the premises, no *lis* exists between the plaintiff and the third parties. (See *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E); *Swart v Scottish Union & National Insurance Co Ltd* 1971 (1) SA 384 (W); *Geduld Lands Ltd v Uys* 1980 (3) SA 335 (T).

[12] Mr. Mostert, who appeared on behalf of the third parties, contended that the finding in this respect in the cases referred to above, has been overruled by the judgment of the Supreme Court of Appeal in *MCC Contracts (Pty) Ltd v Coertzen and Others* 1998 (4) SA 1046 (SCA). The passage on which Mr. Mostert relies in support of this contention appears at page 1049 I - 1050 B and reads as follows:

"However, in reaching it the Judge reasoned (at 169b-c) that because, on certain authority, there is no lis between a plaintiff and a third party 'two "separate actions" each with its own set of pleadings came into existence - one between the plaintiff and the defendant and one between the latter and the third party'.

With that analysis, with respect, I do not agree. The Rule was designed to avoid a multiplicity of actions and to consolidate, in specified circumstances, a multiplicity of issues between a number of litigants, all in a single action. It reads accordingly. Whether or not a lis does arise between the plaintiff and a third party (and conceivably one could, if regard is had to subrules (7) and (8) and even if separation of issues occurs pursuant to subrule (9), the Rule provides for only one action and that action is necessarily the one begun by the plaintiff."

[13] I do not agree with Mr. Mostert's interpretation of the passage. Firstly, the passage criticises the court *a quo*'s finding that a joinder in terms of Rule 13 creates two separate actions. With *this* finding Howie JA did not agree. Secondly, the provisions of Subrules (7), (8) and (9) referred to by Howie JA, do not apply to the pleadings in the present matter.

[14] Even if I am wrong in this regard, I am of the view that the litigation in the Labour Court and the litigation in the present matter is not based on the same cause of action.

[15] The plaintiff is cited in the Labour Court action as follows:

'The Second Respondent has been joined to these proceedings as a result of her direct and substantial interest and in consequence of the fact that the Orders sought may affect her rights'

[16] The pleadings in the Labour Court does not contain any cause of action against the plaintiff nor is any relief sought against the plaintiff.

[17] Although the third parties' Statement of Case filed in the Labour Court relies, *inter alia*, on the contents of the letter written by the plaintiff on 11 September 2009, the letter is merely referred to in order to sustain a cause of action against the defendant.

[18] Mr Mostert, however, argued that a broader test should be applied in determining the causes of action between the plaintiff and the third parties in

the two actions. He argued that all facts and allegations contained in the third parties' Statement of Case should be taken into account in determining whether the causes of action are the same.

[19] In essence, if I understood Mr. Mostert's argument correctly, he submitted that the same subject matter will need to be determined by both courts. In support of this contention, Mr. Mostert argued that the third parties' Labour Court claim against the plaintiff and the defendant with respect to the status of the letter dated 11 September 2009 is *inter alia* based on substantially the same question of whether or not the defendant is or was legally obliged to institute disciplinary proceedings against the plaintiff.

[20] I do not agree with this argument. The subject matter test is only considered once it is established that both cases are based on the same cause of action between the same parties. (See *Williams v Shub* 1976 (4) SA 567 (C)).

[21] In the premises, the third parties' special plea of *lis alibi pendens* cannot succeed.

Costs

[22] Mr. Mpofu, who appeared on behalf of the plaintiff, requested that a punitive costs order on an attorney-and-client scale be granted against the third parties. Mr. Mpofu argued that such an order is justified in view of the

third parties' conduct in the Labour Court and more specifically by virtue of the fact that certain allegations made by them in their answering affidavit in respect of a pending application to stay the Labour Court Proceedings, are in direct conflict to the allegations contained in their special plea.

[23] I am, however, not convinced that the reasons advanced by Mr. Mpofu justify a punitive cost order.

[24] The following order is made:

1. The Third Parties' special plea of *lis alibi pendens* is dismissed;
2. The Third Parties are ordered to pay the plaintiff's and the defendant's costs, which costs shall include the costs of Senior Counsel;
3. The action is postponed *sine die*.


N. JANSE VAN NIEUWENHUIZEN
ACTING JUDGE OF THE HIGH COURT

CASE NUMBER: 34337/11

DATE OF HEARING: 27 August 2012

ON BEHALF OF THE PLAINTIFF: ADV. D. MPOFU

INSTRUCTED BY: Cliffe Dekker Hofmeyr

ON BEHALF OF THE DEFENDANT: ADV. A.J. FREUND SC

INSTRUCTED BY: Anton Bakker Attorneys

ON BEHALF OF THE 1ST, 2ND AND 3RD THIRD PARTIES: ADV. M.
MOSTERT

INSTRUCTED BY: Du Toit Attorneys & Labour Law Practitioners

DATE OF JUDGMENT: 10 September 2012