DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

05/05/2020
DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

Case No: 804/2018

UNION FOR POLICE SECURITY AND CORRECTION ORGANISATIONS	**PLAINTIFF**
AND	
SOUTH AFRICAN CUSTODIAL MANAGEMENT	**FIRST RESPONDENT**
KHENSANI CORRECTIONAL SERVICES	**SECOND RESPONDENT**
JOHAN WAGENAR	**THIRD RESPONDENT**

JUDGEMENT

AML PHATUDI J

INTRODUCTION

[1] The plaintiff instituted an action against the defendants on claims based on alleged breaches of constitutional rights. The defendants defends the matter. The defendants excepted. The plaintiff applied to amend its particulars of claim. The defendants objected to the plaintiff's intention to amend. Kgomo J granted the plaintiff leave to amend with costs following the event.

[2] The plaintiff then filed its amended particulars of claim. Again, the defendants served their notice of intention to except. In compliance to the notice, the plaintiff served the defendant with its amended particulars of claim dated 4 July 2019.The defendant excepted. This is the exception to

the said amended particulars of claim. The defendants contend that the particulars of clam are excipiable on the basis that the particulars of claim fails to disclose causes of action in three main areas. They are: (i) allegation of breaches of constitutional rights in delict based on the alleged breaches of the constitution and (ii) a claim for defamation. I now deal with each exception separately.

Facts on allegations of breaches of Constitutional Rights:

[3] The applicant alleges in the amended particulars of claim that the first defendant entered into a private partnership with the South African Department of Correctional Services (DCS) for purposes of operating Kutama Sinthumule Correctional Facility at Louis Trichardt, Limpopo.

[4] On or about September 2014, DCS set up a "task team" to investigate and address various employment related irregularities taking place at Kutama. The task team found that employees employed by the first and second defendants were receiving smaller pension fund contributions as compared to those employed by DCS. The team concluded that the first and second defendants were obliged to make some percentage contribution towards their employees' pension fund as that of the Department of Correctional Services employees. The meeting held between the first and second defendants and Executive Committee (Exco) of the plaintiff with a view to implement the task team's recommendations, did not bear any fruit. Instead, sixteen (16) Exco members of the plaintiff were dismissed on the allegations that they were participating in an unprotected strike. The Exco members contend that they were dismissed for participating in the lawful activities of the trade union.

[5] The Plaintiff asserts in the particulars of claim that 'during the period of 21 December 2017 to the end of February 2018, its Exco members,

guided by the Organisational Rights Agreement (ORA) and in terms of section 12 of Labour Relations Act, requested permission from the first and second defendants to enter the workplace in order to communicate with its member and to serve their interest. The requests were refused and/or not granted by the first and second defendants and further by their defendant who was acting within his scope of employment with the first and second defendants and further by the third defendant who was acting within his scope of employment with the first and second defendant.'

[6] The plaintiff further asserts that its Exco "requested an opportunity to conduct meetings with its members after working hours at the workplace and the said request were rejected and/or denied by the defendants. The defendants' aforementioned conduct was wrongful and constituted an infringement of the plaintiff's and its members' fundamental rights as enriched in the constitution more particularly sections 23(1) and (2) and section 17 of the Constitution".

[7] Added thereto, the plaintiff alleges that "when the defendants refused the plaintiff access to the workplace as required, the defendants knew or ought to have known that the plaintiff will suffer damages including lots of membership and loss of subscription fees. Further, that "the defendants' conduct must be declared inconsistent with the constitution and therefore unlawful as required by section 172(1) (a) of the Constitution. The plaintiff is thus entitled to the appropriate relief for the violation of its fundamental rights as envisaged in section 38 of the constitution. The honourable court should decide as to what would be appropriate relief to protect and enforce the plaintiff rights as enriched in the constitutions".

LAW

[8] An exception proceeding is regulated in terms of Rule 23 of the Uniform Rules of this Court. It may be raised where any pleading is vague and embarrassing or lacks averments, which are necessary to sustain an action or defence[1], the opposing party may except thereto in accordance with the prescribed rules.

[9] Froneman J penned in *Pretorius v TPF*[2] that in deciding an exception, a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents. It may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.[3]

[10] It is trite law that litigants must plead facts and not the law. Where a litigant intends to rely on a provision of the law or statute, it is not necessary to state its provision. All that is necessary is to formulate all the facts necessary to prove his claim within that statute.

[11] It is common cause that the plaintiff relies on a statute and the infringement of its member's fundamental rights as enshrined in the Constitution. The principle of subsidiary thus applies. The Constitutional

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[1] Rule 23 (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub rule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

[2] 2019 (2) SA 37 [15]

[3] Ibid para[15]

Court through the pen of Jafta J in *Mbatha v University of Zululand* developed the principle of subsidiary as follows:

> "Where legislation has been passed to give effect to a right in the bill of Rights, a litigant is not permitted to rely directly on the constitution for its cause of action."[4]

[12] Emphasising the point, Khampepe J et al quoting Ngcobo J in New Clicks opined that "where... the Constitution requires parliament to enact legislation to give effect to the constitutional rights guaranteed in the constitution, and the parliament enacts legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides".[5]

Evaluation

[13] In its amended particulars of claim, the plaintiff state that

'17. During the period of 21 December 2017 to the end of February 2018, the plaintiff through its Executive Committee Members, guided by the Organisational Rights Agreement and in terms of section 12 of the Labour Relations Act requested permission from First and Second defendants to enter workplace in order to communicate with its members... The requests were refused and/or not granted by [Defendant]...'

18. The plaintiff through its Executive Committee Members further requested an opportunity to conduct meetings with its members after working hours at the workplace and the said request were rejected and/or denied by the [defendants].

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[4] 2014 (2) BCLR 123 (CC) and see as well: Sali v National Commissioner of South African Police service and Others 2014 (9) BCLR 997 (CC); O; Regan J in Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (cc) and quoted with majority judgement penned by Khampepe, Madlanga Nkabinde JJJ and Theron AJ, in my Vote Counts v Speaker at the National Assembly and Others 2016 (1) SA 132 (cc) para [161] it is worded "Where the legislation has been enacted to give effect to a right, a litigant should rely to that legislation in order to give effect to a right or alternatively challenge the legislation as being inconsistent with the constitution".

19. The Defendants aforementioned conduct was wrongful and constituted an infringement of the plaintiff's and its members' fundamental rights as enshrined in the Constitution more particularly

19.1 Section 23 (1) of the constitution which provides that...

19.2 Section 23(2) of the constitution, which provides that...

19.3 Section 17 of the constitution provides that ...

20. Having regard to the conduct of the defendants referred above, and to the infringement of the plaintiff's and the plaintiff's members' fundamental rights, the plaintiff be granted appropriated relief for violation of its fundamental rights as envisaged in section 38 of the Constitution...'

[14] Counsel for the recipient submits that the principle of subsidiarity renders it impermissible for the plaintiff to directly invoke the Constitution as the plaintiff seek. In rebuttal, the plaintiff's counsel submits, with his elbow bookmarking at paragraph [50] of the *Pretorius* case that "the application of the principle of subsidiarity in relation to the Labour Relation Act is complex." He further submits that the Constitution does not, like in some instance, require national legislation to give effect to rights in section 23 of the Constitution. In his latter submission, counsel misquotes paragraph [50] of *Pretorius* case.

[15] Froneman J penned at paragraph [50] that "[t]he Constitution in some instances, like with the rights of access to information and just administration action, requires national legislation to give effect to these rights. The same requirement is not made in section 23. The Labour Relation Act itself, however, sets that as one of its object."

[16] The objects, among others, set to be that of Labour Relation Act, is to regulate the organisational right of trade unions and to promote employee participation in decision-making through the establishment of

workplace forums. Section 12 of the Labour Relation Act is prescriptive. The plaintiff does not challenge either section 12 or legislation (Labour Relation Act) as being inconsistent with the constitution.

[17] Cameron J, in the minority judgement and acceded thereto by the majority in My Vote Counts[6] states that "the principle of subsidiarity puts litigants to a choice especially, where legislation has been enacted to give effect to a right, to either (i) rely on that legislation in order to give effect to the right or (ii) challenge the legislation as being inconsistent with the constitution."[7] Khampepe J et al, in their majority judgement, penned, quoting from *Sandu* case that "If ... legislation is wanting in its protection of the Section 23(5) right in the litigants view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provisions would be to fail to recognise the important task conferred upon the Legislature by the Constitution...[8]

[18] In *Pretorius* case, the applicant in the Constitutional Court (plaintiff in court a quo) instituted an action against Transnet and its current pension funds. The claim was based on the ground that Transnet was obliged to take over the predecessors to pay over to the new pension funds. Transnet failed to pay the funds over. In coming to the *ratio decidendi* at paragraph [50], the court in Pretorius stated that Labour Relation Act tabulated the "fair labour Practice Rights" of only those enjoying the benefit of formal employment. The issue of payment of pension fund is not one of those provided for under fair labour practice rights protected by the Labour Relation Act- thus the court's (Pretorius) finding that the principle of subsidiarity in relation to the Labour Relation Act and other labour legislation is complex. Due to the complexity of the rights not provided for in terms of Labour Relation Act, the principle of subsidiarity does not

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[6] My Vote Counts v Speaker of National Assembly and Others (CCT121/14)[2015]ZACC31(30 September 2015) 2016(1)SA132(CC)

[7] My Vote Counts-Para[70]

[8] My Vote Counts-Para[163]

apply. The plaintiff relies on that *ratio decidendi* in its submission that the exception be dismissed. I do not agree.

[19] The facts in this case is that the plaintiff , through its Executive Committee Members guided by Organisational Rights Agreement and in terms of Section 12 of the Labour Relation Act, requested permission to enter the workplace in order to communicate with its members and to serve their interest. The paragraph drafted with the elbow bookmarking the provisions of section 12 of Labour Relation Act.

[20] Labour Relation Act makes provision for the procedural hooks on remedies it provides (section 115 of Labour Relation Act). The plaintiff failed to challenge the constitutionality of section 12 of Labour Relation Act or that the legislation falls short of the Constitutional standard (Sandu case). The plaintiff fails to pass the principle set by Ngcobo J in New Clicks. The principle is that "where... the constitution requires parliament to enact legislation to give effect to the constitutional rights guaranteed in the constitution, and parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the constitution without alleging that the statute in question is deficient in the remedies that that it provides."

[21] In my view, the plaintiff failed in its particulars of claim to challenge the Constitutional validity of either the Labour Relation Act or section 12 it refers to in its pleadings. The principle of subsidiarity requires that the plaintiff should have done so. The exception falls to be upheld.

Factual background in respect of the defamation claim

[22] Let me first refer to the factual background. The plaintiff requested (through Mr Raseboba's email) during the period of 21 December 2017 to

the end of February 2018, requested permission from the first and second defendants to enter the workplace in order to communicate with its member and to serve their interest. The plaintiff alleges that Mr Bahula (acting on behalf of first and second defendants) defamed the plaintiff when responding to Mr Raseboba's email by emailing the response to Frikkie Janse Van Rensburg. The contents of the response that are alleged to be defamatory to the plaintiffs are that,

> "The application is disapproved;
>
> ORA (organisational Rights Agreement) is cancelled"

[23] Counsel for the excipients submits, on the one hand, that there is no innuendo referred to or pleaded. The meaning of words must be interpreted as ordinary meaning given to the statement. He opines that the cause of action lacks an essential element of claim for defamation, being that the alleged statement may be of a defamatory nature and be reasonably capable of conveying to a reasonable reader, a meaning that defames the plaintiff. He further opines that the communique between Bahula and Van Rensburg constitutes an internal communication from one employee of defendant to another. On the other hand, Counsel for the plaintiff submits that the plaintiff established all elements to found an action for defamation.

Law

[24] The law of defamation developed in South Africa is based on the *actio injuriarum.* It affords a right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another.

[25] The pen of O' Regan J in *Khumalo and Others v Holomisa*[9] outlined the element of the delict of defamation "as (a) the wrongful (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff." The plaintiff does not have to establish every one of those elements. All that the plaintiff has to establish is a statement that is defamatory.

[26] Brand AJ (as he then was) in *Le Roux v Dey*[10] indicates that the plaintiff has to proof at the outset is the publication of defamatory matter concerning himself or herself. He states that 'statements may have primary and secondary meaning. The primary meaning is the ordinary meaning given to the statement in its context by a reasonable person. The secondary meaning is a meaning other than the ordinary meaning, also referred to as innuendo, derived from special circumstances that can be attributed to the statement only by someone having knowledge of the special circumstances'.

[27] An innuendo is a term used to show that the party suing was the person about whom the nasty statements were made. Put differently, it is an insinuation from a statement about a person that is derogatory in nature.

[28] Brand AJ further states that '[a] plaintiff seeking to rely on an innuendo must plead the special circumstances from which the statements derive its secondary meanings.'[11] The plaintiff in casu does not rely on innuendo because it has not been pleaded. All the plaintiff pleads is that the words **"the application is disapproved; Organisational Rights Agreement is cancelled"** is defamatory. I cannot agree more with excipients' counsel that the statements or words pleaded cannot be defamatory when considering the meaning a

[9] (2002 (5) SA 401 CC)
[10] (2011 (3) SA 274 (cc)
[11] Le Roux

reasonable reader of ordinary intelligence would attribute to the statement.

Evaluation

[29] Perhaps, as a point of departure, one should follow the principle set by Brand AJ in Le Roux where he stated that 'where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two stage enquiring is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether the meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning, which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one'.[12]

[30] The objection test to be applied is 'what meaning a reasonable reader of ordinary intelligence would attribute to the statement.'[13]In applying the test, what is the meaning a reasonable reader of ordinary intelligence would attribute to **"the application is disapproved and Organisational Rights Act is cancelled?"** Let me paraphrase. The plaintiff alleges in his particulars of claim that the '...defendants published and/or wrote a comment to.... Van Rensburg in response to... Rasebotsa's (plaintiff) email... wherein... the plaintiff requested access to the workplace...' The response thereto was "the application is disapproved; Organisational Rights Organisation is cancelled"

[31] Applying the objective test set by Brand AJ in Le Roux, I am afraid that the meaning a reasonable reader of ordinary intelligence would attribute to the words the plaintiff alleges are defamatory, would, in my view, of an ordinary response to the request made. A reasonable reader

[12] Le Roux
[13] Ibid

of ordinary intelligence would in my view, infer that the word "request" as used in the plaintiff's claim, was used as an "application" which was turned down by a response: "The application is disapproved." In every "application or request" made in common parlance of life, one expects either a negative or positive response. The response the plaintiff got is a negative one. Obviously, a negative response does not normally augur well with its recipient. A negative response does not per se amount to defamatory statement unless published in a mockery or caricature way.

[32] In my evaluation of the words and consideration of submissions made in respect of the words the plaintiff alleges to be defamatory, I find that the plaintiff failed to plead an innuendo to that effect. I find no other secondary meaning attributed to the words alleged to be defamatory other than the meaning of an ordinary response a reasonable reader of ordinary intelligence would attribute to the statement.

[33] The second issue to determine is whether the meaning is defamatory. I am afraid it is not. I am unable to attribute any defamatory meaning to the statement "The application is disapproved and/or ORA (organisational Rights Agreement) is cancelled". The exception falls to be upheld.

Costs

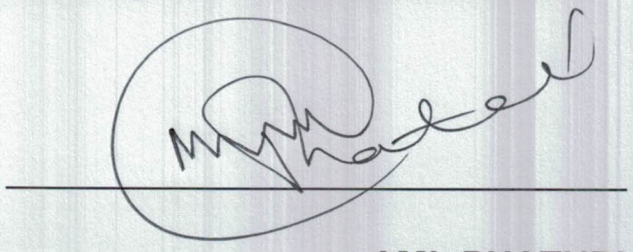
[34] It is trite law that costs follow the event. The excipient (Defendants) succeeds in all exceptions raised. The Excipients/Defendants are thus entitled to their costs. The issues raised are indeed complex. The complexity of the matter warrants appointment of two counsels or two attorneys.

[35] I thus make the following order

ORDER

35.1 The Excipients' exceptions are upheld with costs including the costs of two counsel where employed.

35.2 The plaintiff is ordered to amend the particulars of claim within 10(ten) days from the date of this order. Thereafter, the normal civil procedures regulating trial proceedings be followed to the letter.



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JUDGE OF THE HIGH COURT

Counsel for plaintiff:	Mr. S.O Ravele with Ms Khosa
Instructed by S.O Ravele attorney	
Thohoyandou	
Counsel for the Defendant (Excipient)	Adv. Mutau SC with Adv. Khoza
Instructed by Norton Rose Fulbright	
Judgment	14 April 2020
Handed down electronically	05 May 2020
Plaintiff:	soravele@soravele.co.za
Defendants:	mohammed.chavoos@nortonrosefulbright.com

CASES

(1) Le Roux v Dey 2011 (3) SA 274 CC

(2) Pretorius V TPF 2019 (2) SA 37 CC

(3) My Vote Counts v Speaker 2016 (1) SA 132 CC

(4) Telematrix (PTY) LTD v Advertising Standards Authority SA 2006 (1) SA 461 SCA

(5) Khumalo and Others v Holomisa 2002 (5) SA 401 CC