

In the matter between:

PROFESSOR MARGARET ORR

First Applicant

APSA

Second Applicant

and

UNISA

Respondent

REASONS FOR ORDER

FRANCIS J

1. On 12 May 2004 after having heard arguments about an application to amend the respondent's response to the applicants statement of claim I made the following order:

"The application to amend the statement of response by the insertion of paragraph B3 is refused with costs which include the costs of two counsel."

I indicated to the parties that I would provide the reasons for the order that I had made. These are my reasons.

2. On 11 May 2004 while the respondent was making submissions on the *res judicata* application which application was dismissed in a separate judgment on 12 May 2004, it filed an application to amend its response to the applicants' statement of claim in the following respect:

"5. By amending its statement of response, further by the insertion of the following paragraph:

B3. 3.1 The Apportionment of Damages Act 34 of 1956 ("the Act") applies to the First Applicant's High Court case against Motimele.

3.2 This Act seeks to regulate the legal position where two or more people are jointly or severally liable in delict for the same damage.

3.3 By virtue of the present application and the relief claimed, the Applicants contend that the Respondent is jointly and severally liable in delict with Motimele for the damage the latter caused to her.

3.4 *In terms of the said Act, the First Applicant had an election to sue both Motimele and the Respondent in the same action in the High Court action or anyone of the two.*

3.5 *By suing Motimele and thereafter obtaining a final judgment against him, the Respondent was, in terms of this Act, absolved from any liability to the First Applicant.*

3.6 *The Second Applicant has no substantial interest in the present proceedings except in a representative nature as the First Applicant was its member.*

3.7 *Accordingly, the Second Applicant's interest in the current proceedings, (in the event that the point in limine being upheld) becomes nugatory.*

3.8 *In the premises, the Respondent submits that the application be dismissed with costs."*

3. The proposed amendment invokes the provisions of the Apportionment of Damages Act 34 of 1956 ("the AOD"). The application to amend was opposed by the applicants on three basis namely that the proposed amendment could not apply to the relief that the applicants are seeking; that the claims are not delictual and that the proposed amendment is excipiable in that it was not alleged that no notice was given either by the applicants or Motimele to the respondent.

4. The respondent contended that in terms of the AOD the order made by the High Court against Motimele discharged whatever liability for compensation the respondent had towards the applicant. The interests of the second applicant are intertwined with that of the first applicant. However, to the extent that they may have an interest in the non-pecuniary relief claimed, it has become moot. In the present case, the first applicant agreed to discharge Motimele's liability towards her when she accepted the money he had tendered (with prejudice), including costs, which settlement was made an order of court. Accordingly, in terms of the Apportionment of Damages Act, that judgment also discharged whatever liability the respondent had towards the second applicant.

5. The preamble to the AOD reads as follows:

“To amend the law relating to contributory negligence and the law relating to the liability of persons jointly or severally liable in delict for the same damage, and to provide for matters incidental thereto.”

Section 2(1) provides that: *Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as a joint wrongdoers) may be sued in the same action”.*

Section 2(2) provides that:

“Notice of any action may at any time before the close of pleadings in that action be given -

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action,

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action”.

Section 2(3) provides that:

“The court may on the application of the plaintiff or any joint wrongdoer in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.”

4(a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of subsection (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(b) If no notice is under paragraph (a) or (b) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under subsection (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of subsection (2).

2(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff..”

6. I had found in my earlier judgment dealing with the *res judicata* amendment that it is trite that an amendment will not be allowed if it will render a pleading excipiable. I do not deem it necessary to refer to the authorities since these can be gleaned from paragraphs 7 and 8 of that judgment.

7. I had also found in my judgment that claim that the applicants had instituted in the High Court against Motimele was based on the common law delicts of assault, *injuria* and defamation. The only relief that the first applicant claimed was an amount of general damages.

8. The applicants made two claims against the respondent in this Court during 2001. The first is one for unfair discrimination and harassment and the second one is for constructive dismissal. I had found in my earlier judgment that the claims that the applicants instituted in this Court were statutory claims. The first is under the Employment Equity Act 55 of 1998 (“the EEA”) and the second under the EEA or alternatively the Labour Relations Act 66 of 1995 (“the LRA”). The two claims are entirely based on causes of action that do not exist at common law. The two claims are for relief not available at common law. Both claims are *inter alia* based on the respondent’s liability for Motimele’s conduct. But neither claim is entirely based on its liability for his conduct. Both of them are also based on the respondent’s own conduct which is itself constituted unfair discrimination and unfair constructive dismissal.

9. The claims before this court are not delictual claims even though that part of the relief the applicants are seeking is compensation. All the relief the first applicant claims in the first claim is relief under the EEA. She claims a declaratory order in terms of section 50(1) and/or section 50(2); a public apology in terms of section 50(1) and/or section 50(2); compensation in terms of section 50(1)(d) and (e) and/or section 50(2)(a) and (b), and an order that the respondent takes certain preventive steps in terms of section 50(2)(c). I have set out the relief that the first applicant is seeking in respect of claim 2 in my earlier judgment. The claims do not involve the question of contributory negligence but are statutory

claims. The provisions of the AOD apply only to delictual claims. The AOD do not apply to the relief that the applicants are seeking and to to the claims that are before this Court.

10. The application should fail for another reason namely that it is not alleged in the application to amend that the applicants or Motimele did not give notice to the respondent of the action in the High Court. The proposed amendment is therefore excipiable.

11. Both parties sought the costs of two counsel against the other. There is no reason why costs should not follow the result which includes the employment of two counsel.

12. It was for these reasons that I made the order referred to in paragraph 1 above.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : W TRENGOVE SC WITH N FOURIE INSTRUCTED BY
CHEADLE THOMPSON & HAYSON INC

FOR THE RESPONDENT : M KHOZA AND T NGCONGWANE INSTRUCTED BY
MALULEKE SERITI MAKUME MATLALA INC

DATE OF HEARING: 11AND 12MAY 2004

DATE OF ORDER : 12 MAY 2004

DATE OF REASONS : 13 MAY 2004