BAIKEPI v KGALAGADI BREWERIES 2005 (2) BLR 32 (HC)

Citation: 2005 (2) BLR 32 (HC)

Court: High Court, Lobatse

Case No: Civil Trial No 1282 of 1999

Judge: Kirby J

Judgement Date: May 28, 2002

Counsel: H M Sikhakhane for the appellant. J Carr-Hartley for the respondent.

Flynote

Practice and procedure - Absolution from the instance - Application - Principles on which absolution granted - Court to find that reasonable court could not find for plaintiff upon evidence adduced.

Headnote

The plaintiff claimed damages from the defendant arising from his alleged ingestion of pieces of glass contained in a can of beer manufactured by the defendant. The plaintiff alleged that the defendant had been negligent in failing to have its beer cans properly inspected for foreign matter before filling them.
No claim was made for medical expenses or loss of amenities of life, but claims were made for general damages for pain, suffering, D anxiety and shock and special damages for loss of business. At the conclusion of the plaintiff's case, the defendant applied for absolution from the instance.
Held: (1) Absolution from the instance would be granted at the close of the plaintiff's case only if the court found that a reasonable court could not find for the plaintiff upon the evidence adduced. Muir v January [1990] B.L.R. 388 E applied.
(2) No basis had been laid for the quantification of the claim for special damages for loss of business. The plaintiff had further been unable to pinpoint his own damages for loss of business as opposed to those of the company he worked for.
(3) Damages for nervous shock would not be awarded for insignificant temporary emotional disturbance having no material effect on a person's welfare. Liability should not be imposed where the defendant's conduct merely caused unpleasant emotions of relatively short duration which had no substantial effect on the well-being of the victim. Boswell v Minister of Police and Another 1978 (3) SA 268 (E) applied.
(4) There was no medical evidence as to any substantial physical or psychological effect on the plaintiff of the G shock suffered. No medical evidence had been adduced to link the physical condition of the plaintiff with the drinking of the subject beer. In the circumstances, no reasonable court would make an award of damages on the strength of the evidence adduced by the plaintiff. Defendant absolved from the instance.

Case Information

Cases referred to:
Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (SCA)
Boswell v Minister of Police and Another 1978 (3) SA 268 (OK)
Muir v January [1990] B.L.R. 388
Muzik v Canzone Del Mare 1980 (3) SA 470 (C) CLAIM for special and general damages. The facts are sufficiently set out in the judgment.
H M Sikhakhane for the appellant.
J Carr-Hartley for the respondent.

Judgement

KIRBY J: B
In this action the plaintiff claims damages in the sum of P730 000 from the defendant, Kgalagadi Breweries (Pty) Ltd, arising, he says, from his ingestion of pieces of glass contained in a can of beer manufactured by the defendant. The plaintiff alleges in his particulars of claim that the defendant was negligent in failing to have its beer cans properly inspected for foreign matter before filling them. The claim for P730 000 is broken down into C the following categories:
Severe shockP90 000

Severe fear of dyingP200 000
Severe pains and vomitingP180 000
Severe gastro-enteritisP170 000
Loss of businessP90 000
There is no claim for medical expenses and no claim for loss of amenities of life. In effect there are two categories claimed: general damages for pain, suffering, anxiety and shock; and special damages for loss of business.
The plaintiff gave evidence on his own behalf and called two witnesses, in order to establish his cause of action E and his damages. He testified that he purchased a tin of Hansa beer, manufactured by the defendant, at the Travel Inn Bottle Store. He carried this outside where, in the presence of an acquaintance, he snapped open the can closure and commenced to drink from the can. On his third swallow he became aware of something strange in the drink. He coughed up the object and spilled it into his hand. It was, as he described it, a 'piece of bottle' - a F very small sliver of clear glass of dimensions approximately 1mm x 5mm. An employee of the Travel Inn (who was not called to testify) took the piece of glass and the opened can, and offered to replace the beer. He apparently checked the can for other pieces of glass, but the plaintiff could not say whether he found any. He then provided a letter for the plaintiff to take to the hospital, so that he could be treated. The letter was produced, G and makes reference to 'some glasses in the drink' (sic). Since he was not called, and the plaintiff did not observe any glass other than the single sliver, this is hearsay evidence and I disregard it. Neither the can nor the piece of glass was produced in evidence.
After the incident the plaintiff said he was 'very worried' and he was advised to go to the hospital, which he did. At Extension 2 Clinic he queued from 5pm until midnight when he saw a doctor. He stated that he could not explain H properly because he was experiencing stomach pains. The doctor gave him medication, some pills and a white medicine and referred him for X-ray. After he swallowed the pills and medicine he got a runny stomach. He went to the toilet and then felt better. From an interview the plaintiff gave to a local newspaper, which he admitted under cross-examination, it is apparent that he was given a laxative by the doctor. The X-ray staff were not available, and the plaintiff was only A able to be X-rayed some days later. He received the results the following Thursday, which, he said, revealed that no foreign bodies had been detected. Although the plaintiff produced a copy of his outpatient's card, the doctor who treated him and filled it in and was not called to explain it, and it is of little evidential value. He was also given a sick leave note for 22 to 24 January 1999, that is, expiring on Sunday. It was the evidence of the B plaintiff that on the night of the incident he could not sleep as he had pains. The following Friday he felt he was healed. Before that there were still pains in his stomach.
It will be noted that in his evidence in chief the plaintiff referred only to being 'frightened' on the night of the incident. It was only under cross-examination, when he was taxed as to his allegations in the particulars of claim C of 'severe shock, severe fear of dying, severe pains and vomiting, and severe gastro-enteritis', that he belatedly added these to his list of symptoms and effects. No medical evidence was led to establish any illness, or medical or psychosomatic condition from which he may or may not have suffered.
Finally, the plaintiff claimed that he worked for a company Bee Pee Agents (Pty) Ltd, which was in the estate D agency business. Property sales were booming, and as it was his company, he suffered severe losses, upon being away from work, of over P30 000. No accounts or breakdown was furnished, nor was any basis whatever laid for this claim, which I observe is only one third of the sum claimed under this head in his summons. Under cross-examination the plaintiff admitted that as an employee of the company he was entitled to paid sick leave, E although being a director he did not pay it to himself, and that any damages for loss of business were suffered by the company. It was suggested to him that the sliver of glass could have been resting on the lip of the can before it was opened. This he denied.
The plaintiff's first witness, Stephen Rasimpe, confirmed that he was present when the plaintiff drank from the offending beer can and then spat out what he had swallowed. He then saw a small piece of glass in the plaintiff's F hand. He left soon afterwards, but called on the plaintiff on the next Monday. The plaintiff said he was not feeling well, and he looked sick. He said he was unwell from the glass he had drunk in his beer.
The plaintiff's final witness, Andrew Rantiritlane, was a police officer, who knew the plaintiff and happened to go to the Extension 2 Clinic at 1am on the night of 22 January 1999 in the course of his duties. He found the plaintiff G lying there on a bench. He appeared sick, and said he had stomach problems caused by a beer he had drunk. His stomach was running.
That concluded the plaintiff's case.
The defendant's counsel, Mr Carr-Hartley, then made application for absolution from the instance, and it is with that application that this ruling is concerned.
Absolution from the instance will be granted at the close of the plaintiff's case only if the court finds that a reasonable court could not find for the plaintiff upon the evidence adduced. See Muir v January [1990] B.L.R. 388.In this case, the question to be posed is could a reasonable court find for the plaintiff in damages on the evidence he has adduced, either: (a)for loss of business; or(b)for pain, suffering, anxiety and shock.
As to the special damages for loss of business, this claim can be quickly disposed of. No basis whatever has been laid for the quantification of such a claim, nor has the plaintiff been able to pinpoint his own damages for loss of business, as opposed to those of the company. He admitted that it was actually the company which lost B the business, and that he was entitled to be paid sick leave to compensate him for his own loss as an employee, albeit as a director, or even sole director. This is certainly not one of those exceptional cases when the court would be justified in lifting the corporate veil and regarding a company merely as a personification of its sole shareholder.
Here there is no evidence of shareholding save for the plaintiff's ipse dixit that it is 'his' company.
In respect of the claim for damages for loss of business the defendant is accordingly entitled to absolution from the instance.
While the case is an extremely borderline one, to say the least, I am prepared to find in favour of the plaintiff that a

reasonable court could just conceivably, in the absence of any rebuttal from the defendant, find, on his D evidence, that the plaintiff ingested a piece of glass contained in a can of beer manufactured, filled and sealed by defendant, and that a presumption of negligence could arise there from. But that is not sufficient to avoid an order of absolution from the instance. For this the court must also find that a reasonable court could award damages to the plaintiff as a result of the consequences to him of ingesting that piece of glass.
The law relating to the claiming of general damages for pain, suffering, anxiety and shock, is, I believe, now well established. The Roman Dutch law in this regard was thoroughly canvassed by the Court of Appeal of South Africa in Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (SCA).
The principles there stated are equally applicable in our jurisdiction. The report is in Afrikaans, but the ratio is referred to both in The Law of South Africa (1st re-issue) vol 9 para 11, and in Boberg The Law of Delict vol 1 p 176. The principle is that damages for nervous shock will not be awarded for insignificant temporary emotional disturbance having no material effect on a person's welfare. Whether the effect is material will depend upon the G facts of each case.
Thus in Boswell v Minister of Police and Another 1978 (3) SA 268 (E) at p 273, it was said that:
'... liability should not be imposed where the defendant's conduct merely caused unpleasant emotions of relatively short duration which had no substantial effect on the well being of the victim. Recovery should be limited to instances where H serious physical or psychic injury results from the emotional distress.'
In that case a policeman falsely informed a guardian that her ward had been killed resisting arrest. The shock had a substantial effect on her health. It caused her to collapse and lose consciousness. She became weak and had to be assisted, which condition endured for a month. Her health was impaired from nervous shock. This result A was considered substantial enough to earn damages of R750 in the currency of that country.
A case of greater relevance to the present matter was Muzik v Canzone Del Mare 1980 (3) SA 470 (C).
In that case negligence was admitted when a restaurant served a customer mussels contaminated by so-called 'red tide' poison. The customer suffered temporary partial paralysis and was admitted to hospital where he was B placed on a drip. He could not walk or dress himself. This condition endured for two to three days after which it passed. The defendant testified, as in this case, that he was 'scared'. He claimed damages under three heads: for hospital expenses (which were admitted), for loss of amenities of life for a period of seven days and for pain, suffering, anxiety and shock. Here there is no claim for hospital expenses, nor for temporary loss of amenities of C life.The judge held, on the authority of Bester's case (supra), that there was no evidence to support a conclusion that the defendant's negligence caused the plaintiff any physical or mental impairment, or that it affected his bodily well being in any way. Further the effect, such as it was, was only for a short duration. It followed that the plaintiff had failed to prove that he suffered any recoverable damage under this head - namely that of pain, suffering, D anxiety and shock.
Mr Sikhakhane conceded that the above summary of the law was correct, but argued that a reasonable court might give the plaintiff something in the circumstances of the case for the discomfort, distress and shock he suffered, albeit for a period of comparatively short duration.
I am unable to agree. There was no medical evidence whatever as to any substantial physical or psychological effect upon the plaintiff of the shock. Nor has any medical evidence been adduced to link his physical condition with drinking of the subject beer. On his evidence his runny and aching stomach was a likely effect of the purgative administered by the doctor rather than of ingesting glass fragments, and the X-ray revealed no foreign F bodies in his stomach. He no doubt experienced unpleasant emotions but that is not sufficient upon which to ground an award of damages.
As a result I am satisfied that no reasonable court would make an award of damages on the strength only of the evidence adduced on behalf of the plaintiff, and his claim for damages of P730 000 (or indeed for any smaller sum) cannot be sustained.
In result I make the following order:
(1)The defendant is absolved from the instance.
(2)The plaintiff is to bear the costs of the action.
Claim for damages dismissed.