



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: BHISHO]**

CASE NO.: 472/2020

In the matter between:

LIZO MTWAZI

Plaintiff

AND

MEC FOR EDUCATION

First Defendant

DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

MINISTER OF POLICE

Third Defendant

JUDGMENT

NORMAN J:

[1] The plaintiff instituted an action against the MEC for Education as first defendant, the Director of Public Prosecutions cited as second defendant and the Minister of Police as a third defendant. The first and second defendants

have pleaded to the particulars of claim and this application does not involve them.

[2] The third defendant objected to the particulars of claim and filed in that regard a notice in terms of Rule 30(2)(b) wherein he complained that the plaintiff's particulars of claim dated 12 August 2020 were irregular. The irregularity was based on the following grounds that:

- 2.1. In terms of Rule 18(4) of the Uniform Rules of Court 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.
- 2.2. The allegations made by the plaintiff in paragraphs 12 and 13 to the effect that the members of the police service unlawfully induced third parties to implicate the plaintiff in the commission of an alleged crime and that they persisted with investigating the plaintiff without just cause after the charges were withdrawn.
- 2.3. It also referred to paragraph 14 wherein an amount of R365 000.00 is claimed for damages suffered and the amount of R3 million for *contumelia*, deprivation of freedom and discomfort.
- 2.4. In this regard, the third defendant alleged that plaintiff has not set out material facts showing that the conduct of the third defendant caused him to incur such costs and/or that there are no facts justifying the damages being sought for *contumelia*, and or deprivation of freedom.

[3] It was also alleged that the plaintiff failed to set out material facts establishing a link between the damages sought and the conduct of the members of the service. In this regard the particulars of claim, according to the third defendant do not comply with the provisions of Rule 18(4) and are thus irregular. They further contended that the non-compliance with the provisions of that rule is *prima facie* prejudicial to the third defendant and it afforded the plaintiff ten days within which to remove the cause of complaint.

[4] The notice was issued on 28 September 2020 and it had been served on the plaintiff on 25th September 2020. Plaintiff did not react to the plaintiff's notice and on 23 October 2020 the third defendant brought an application in terms of Rule 30(1) wherein he sought the following orders:

- "1. That the plaintiff's/respondent's particulars of claim filed under Case No. 472/2020 be declared an irregularity for non-compliance with Rule 18(4) of the Uniform Rules of Court.
2. That the plaintiff's particulars of claim be set aside.
3. That the plaintiff be directed to deliver amended particulars of claim which comply with rule 18(4) in so far as its claim relates to the third defendant within ten (10) days of receipt of the order sought herein.
4. That failing delivery of the amended particulars of claim within the period referred to in paragraph 3 within the period referred to in paragraph 3 above, the plaintiff shall be ipso facto barred from doing so and the third defendant may, on the same papers duly amplified, if necessary apply for the plaintiff's claim to be dismissed.
5. That plaintiff is ordered to pay the costs of this application."

[5] The application was brought on notice and was supported by an affidavit deposed to by the third defendant's legal representative. The affidavit repeated the contentions raised in the rule 30 notice and it is not necessary for me to repeat them herein. The third defendant contended that the failure by the plaintiff to comply with the provisions of Rule 18(4) is prejudicial to him because the third defendant is not certain of the legal and factual basis of the plaintiff's claim and is unable to plead thereto. He sought an order in terms of the notice.

- [6] The application was duly served on the plaintiff and he simply filed a notice to oppose and nothing else. He had been afforded 15 days within which to file an answering affidavit. He failed to do so.
- [7] Ms Booysen appeared for the third defendant as the applicant and Mr Poswa appeared for the plaintiff as the respondent. Ms Booysen submitted that there has been compliance with the provisions of Rule 6 in that the application itself was brought on notice and it was supported by an affidavit. She further submitted that on the issue of the non-compliance with Rule 18(4), she referred the court to the decision of **McKenzie v Farmers Corporative Meat Industries Ltd**¹ where the court held that “*the particulars of claim must contain every fact which would be necessary for the plaintiff to prove in order to support his right to the judgment of the court*”.
- [8] She further submitted that the facts that must be set out must be such that the relief prayed for flows from them and can properly be granted otherwise the particulars of claim will be excipiable for failure to disclose a cause of action. In this regard, she relied on **Buchner v Johannesburg Consolidated Investments Co. Ltd**².
- [9] She submitted that a closer scrutiny of the pleadings shows that plaintiff failed to set out the material facts showing that the conduct of the third defendant caused him to incur legal costs and/or to suffer damages as claimed. The plaintiff also failed to establish a link between the damages claimed and the conduct of the members of the South African Police Services. She submitted that in this case the third defendant has acted properly in that he did not ignore the irregularity as if it was a nullity but instead he applied to court to

¹ **McKenzie v Farmers Corporative Meat Industries Ltd** 1922 AD 16 at 23.

² **Buchner v Johannesburg Consolidated Investments Co. Ltd** 1995 (1) SA 215 (T) at 217 E.

have it set aside. In this regard, she relied on ***Gibson & Jones (Pty) Ltd v Smith***³. She submitted that the third defendant is entitled to costs of the application.

[10] Mr Poswa, on the other hand, submitted that it was not necessary for the plaintiff to respond to the application because the application was out of time since it was only heard two years later. He submitted that because of the delay and failure on the part of the third defendant to apply for condonation for the late filing of the application, this court should refuse the relief sought. On that basis alone, he argued, the court should deprive the third defendant of his costs.

[11] He submitted that Rule 30 is time bound and a party is obliged to comply with the time frames set out therein. In this regard, he referred to Rule 30(2)(b) and (c) where ten days is set out for the cause of complaint to be removed. A period of fifteen days is set after the expiry of that period to enable the party with a complaint to deliver the application. He further submitted that the third defendant did not simply seek to set aside those paragraph that relate only to the third defendant but sought to set aside all the particulars of claim. He relied on ***SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw N.O.***⁴ that the object of Rule 30(1) was to ensure that any hinderance to the future conduct of litigation is removed.

[12] He submitted that the third defendant could easily deny the allegations made but it was not necessary for it to bring this application. In this regard, he submitted that the court should dismiss the application with costs. He further submitted that if the court is inclined to grant the relief sought relating to

³ ***Gibson & Jones (Pty) Ltd v Smith*** 1952 (4) SA 87 (T).

⁴ ***SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw N.O.*** 1981 (4) SA 329 (O) at 333 G-H.

irregular proceedings, the court must still deprive the third defendant the costs of the application because of its failure to seek condonation in circumstances where the delay was inordinate. He further argued that the application was filed prematurely and for that reason the application should be dismissed.

- [13] In reply, Ms Booysen conceded that because only a few paragraphs relate to the third defendant the court may not set aside all the particulars of claim but only the paragraphs relating to the third defendant.

Discussion

- [14] *Erasmus in Superior Courts Practice*⁵ states that the necessity to plead material facts does not have its origin in the rules of court but it is fundamental to the judicial process that the facts have to be established. The court, on the established facts applies the rules of law and draws conclusions as regards the rights and obligations of the parties. A summons that propounds the plaintiff's own conclusions and opinions instead of the material facts is defective⁶.

- [15] Rule 18(4) reads:

“18 Rules relating to pleading generally

1.

2.

3.

4. *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.*”

- [16] The plaintiff alleged in relation to the third defendant the following:

⁵ Erasmus Superior Court Practice 2nd Edition, Volume 2, under Rule 18 (4)

⁶ ***Buchner v Johannesburg Consolidated Investment Company Ltd*** 1995 (1) SA 215 (T); see also ***Moaki v Reckitt & Colman (Africa) Ltd and another*** 1968 (3) SA 98 (A) at 102 A: where the Appellate Division held that facts and not evidence must be pleaded and the subrule makes it clear that material facts only should be pleaded.

- “9. As a result of the first defendant’s conduct plaintiff was arrested by members of the third defendant and held in custody for seven days until he was granted bail and prosecuted for fraud and money laundering charges in the Magistrates Court at Zwelitsha where later charges were withdrawn on 28 September 2019.
10.
11.
12. Members of the third defendant unlawfully induced third parties to implicate plaintiff in the commission of an alleged crime.
13. Members of the third defendant, without just cause, persisted with investigating the plaintiff after the charges were withdrawn.
14. Plaintiff suffered damages as a result of the defendants’ conduct in the sum of R3 365 000.00 for contumelia, deprivation of freedom and discomfort suffered by the plaintiff.”

[17] Although there are detailed facts given where the allegations relate to the first and second defendants, no such detail is given where the allegations are directed at the third defendant.

[18] In **Graham v McGee**⁷ the court held that: *“the facts set out by a pleader must constitute the premises for the relief sought i.e. they must be such the relief prayed for flows from them, and can properly be granted. Otherwise the summons will be excipiable as disclosing no cause of action.”* The plaintiff is also expected to set out details of the relief he seeks.

[19] Having had regard to all these factors I find that there is merit in the application. It is only the extent of the relief sought that will be affected by the order I intend to make. The reason why all the allegations in the particulars of claim cannot be set aside is because the first and second defendants have already delivered their pleas. Therefore, issues between plaintiff and those defendants have crystallised and joined.⁸ This rule 30 application cannot be extended to affect their cases. Most importantly it will not be in the interests of justice to set aside the allegations relating to them, especially where the

⁷ **Graham v McGee** 1949 (4) SA 770 (D) at 778.

⁸ **Potgieter v Rondalia Assurance Corporation of SA Ltd** 1970(1) SA 705 (N) at 710A

Rule 30(2)(b) notice specifically addressed the third defendant's complaints only.

[20] On the condonation issue, and as aforementioned the rule 30 (2) (b) notice and the application were delivered on 28 September 2020 and 23 October 2020, respectively. Plaintiff was given 10 days in terms of the notice to remove the causes of complaint. The ten days expired on 12 October 2020. The fifteen days for bringing the application would have lapsed on 02 November 2020. Mr Poswa correctly submitted that the application was brought prematurely. However, he linked the period relating to condonation to the date of the hearing of the application, that with respect has no bearing on the time frames set out in Rule 30.

[21] The insurmountable difficulty that faced the plaintiff is that he remained supine although he had knowledge that the application was brought three days earlier than the period prescribed in rule 30. Plaintiff had been properly served with the notice and the application. He simply filed a notice to oppose and did not file an answering affidavit to the founding affidavit. A date for the allocation of the hearing of the application was requested from the registrar on 29 January 2021, the same day that the request was served on the plaintiff. Clearly there was ample time for the plaintiff to take whatever steps he wished to take to protect his interests. He failed to do so. Ms Booysen submitted that the court should condone such non- compliance because it was raised in argument.

[22] Plaintiff also failed to file an answer to the allegations made by the third defendant in the rule 30 application. Those facts alleged by the third defendant remain uncontroverted. He also failed to demonstrate any

substantial prejudice to it as a result of the three days as aforementioned. Considering the circumstances of this case, it will be fair to both parties to ensure continuation and progress of this litigation by granting condonation albeit sought from the Bar⁹, especially where the objection was not raised in accordance with the rules of court.

Costs

[23] For these reasons, even though the relief that was sought was broad, there would be no justification to deprive the third defendant of his costs. Ms Booysen correctly conceded that the court cannot grant the entire relief that is being sought. I accordingly find no reason to depart from the normal rule that costs should follow the event.

ORDER

[24] In the circumstances I accordingly grant the following Order:

24.1 That the plaintiff's particulars of claim in so far as they relate to the third defendant and the allegations made in paragraphs 12, 13 and 14 are accordingly declared to constitute an irregularity for non-compliance with Rule 18(4) of the Uniform Rules of Court.

24.2 That those paragraphs (12, 13 and 14) in the particulars of claim are set aside in so far as they relate to the third defendant.

24.3 Plaintiff is directed to deliver the amended particulars of claim which comply with the provisions of Rule 18(4) in so

⁹ *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595.

far as the claim relates to the third defendant within ten (10) days of receipt of the order sought herein.

24.4 Failing delivery of the amended particulars of claim within the period referred to in paragraph 3 above, plaintiff shall be *ipso facto* barred from doing so and the third defendant may, on the same papers, duly amplified, if necessary, apply for the plaintiff's claim to be dismissed.

24.5 That the plaintiff is ordered to pay costs of this application.

T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on : 30 November 2023
Judgment Delivered on : 05 December 2023

Appearances:

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