



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1460/2020

In the matter between:

SWART: IZAK JACOBUS

Respondent/Plaintiff

and

MAREE: HENDRIK JOHANNES

Applicant/Defendant

HEARD ON: 22 OCTOBER 2020

JUDGMENT BY: DANISO, J

DELIVERED ON 11 FEBRUARY 2021

- [1] This is an opposed application brought in terms of rule 30 (1) read with rule 18 (12) of the Uniform Rules of Court ¹ for the setting aside of the plaintiff's amended particulars of claim on the grounds that they constitute an irregular step.
- [2] On 24 March 2020 the respondent instituted a claim against the applicant for the payment of R2 835 000.00 in damages he allegedly sustained when he was assaulted and deprived of his personal and business equipment by the applicant on 15 April 2017.
- [3] On 26 March 2020 the applicant entered an appearance to defend and served a notice in terms of rule 30 (2) (b) in which it contended that the respondent's particulars of claim constituted an irregular step. The respondent amended the particulars of claim on 22 June 2020.
- [4] On 06 July 2020 the applicant served another rule 30 (2) (b) notice on the basis that the amended particulars of claim are still defective, they also constitute an irregular step and are also vague and embarrassing for want of compliance with rule 18 (10), 18 (12) and 23.

¹ A party to a cause in which an irregular step has been taken by another party may apply to court to set it aside

and if a party fails to comply with any of the provisions of rule 18 (12) such pleading shall be deemed to be an irregular step and the other party is entitled to act in accordance with rule 30.

- [5] The respondent has not removed the cause of the complaints. For the sake of convenience the parties are referred to as cited in the action.
- [6] The summary of the plaintiff's pleaded claim is the following: On the 15th of April 2017 he was assaulted by the defendant causing him serious head, skull and dental injuries. Subsequent to the assault the plaintiff was rendered unconscious, he was taken to Johan Heyns Clinic for medical treatment from where he was transferred to Sebokeng hospital for emergency medical treatment. During his confinement he underwent CT brain scan, X-Rays at Kopanong hospital and various surgical procedures. On 21 April 2017 he was transferred to Chris Hani Baragwanath Hospital for further treatment. The injuries with the resultant sequelae are of a permanent debilitating nature, and will remain permanent until such time as the plaintiff receives adequate treatment.
- [7] As proof of the said injuries the plaintiff has attached photographs depicting the injuries marked as *Annexures "A1" and "A2"*. The damages that the plaintiff has allegedly suffered are categorized as follows:

71. Future hospital and medical expenses, R250 000.00 for conservative treatment of the injuries and the resultant sequelae, consultations with general practitioners, dentists and/or maxillofacial surgeons, neurosurgeons, psychologists and plastic surgeons. He will also require pain medications.

7.2. R75 000.00 for past loss of earnings. The plaintiff alleges that he was employed as a sub-contractor at the time of the incident and had also secured permanent employment. As a result of the injuries and the resultant sequelae the plaintiff could not commence with his new employment. He has consequently suffered a direct loss of income of three months while recuperating from the injuries.

7.3. R1 500 000.00 for future loss of earnings and earning capacity. The plaintiff's earning capacity and productivity has been compromised by the injuries and the resultant sequelae. He is self-employed in the construction industry and any loss of productivity will consequently have a direct effect on his earnings. He is no longer able to attend to the administrative duties of his company due to the constant debilitating headaches, lack of concentration, daytime fatigue and forgetfulness occasioned by the head injury. He will be off work for hospital and medical treatments. The plaintiff will only be to quantify the claim in more detail once the medico legal reports become available.

7.4. R1 000 000.00 general damages for pain and suffering, loss of amenities of life, disability and disfigurement. The amount is a globular figure as it is not reasonably practicable to allocate an amount to each of the various sub-heads of general damages. The plaintiff experienced a considerable degree of pain and suffering due to the sequelae of the injuries and there will be further pain and suffering when surgeries, medical and hospital treatments are performed.

7.5. R10 000.00. for the replacement value of the cell phone which was lost during the incident and the tools and construction equipment which remained in the defendant's position.

- [8] To arrive at an appropriate determination of this issue I must have regard to the principles laid down in *Jowell v Bramwell-Jones and others* **1998 (1) SA 836 (W)** at 901F where the court held that rule 18(4) requires that a plaintiff shall furnish only those particulars which are strictly necessary to enable the defendant to plead.
- [9] An application premised on rule 30 read with Rule 18(10) entails a determination as to whether the particulars of claim contain sufficient particulars not to only enable the defendant to plead but to also reasonably assess the claim, decide whether to defend the action or even to make a tender. The application should succeed only if there is prejudice related to proceeding with litigation.²
- [10] Notwithstanding the fact that the court may be of the opinion that the proceeding or step is irregular or improper, the court may set aside the pleading in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make such order as to it seems meet.³

² Metropolitan Lewensverskeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O).

³ Rule 30 (3) confers the court with wide discretionary powers to grant a party an opportunity to amend his particulars having regard to the circumstances of the case and equity.

[11] Rule 18(10) relates to pleadings based on damages and it provides that: “a plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount if any, is claimed for-

(a) Medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of –

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do so);

(ii) the enjoyment of amenities of life (giving particulars; and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.”

[12] I now turn to deal with a summary of the defendant's complaints below:

Complaint directed at the plaintiff's amended particulars in respect of the claim future hospital and medical expenses

[13] In the section 30 (2) (b) notice the defendant complains that the plaintiff has failed to set out the damages in a manner that would enable the defendant to reasonably assess the quantum in that, the duration of the injuries and/or disabilities and/or future medical treatment has not been set out contrary to rule 18 (1).

[14] The plaintiff submitted that the particulars in relation to the nature, extent, duration and the sequelae of the injuries have been pleaded adequately to the extent of the information that has been gathered from consultations with the plaintiff, photographs of the injuries and the hospital records. Due to the severity of the injuries the plaintiff will require conservative treatments, surgeries including consultations and treatment by various medical specialists. The plaintiff is at this stage unable to plead the precise hospital and medical costs that he will incur as he has not yet been assessed by medical experts.

[15] I'm in agreement with the plaintiff. The nature and extent of the injuries and disfigurement sustained by the plaintiff has been sufficiently set out in the amended particulars of claim to enable the defendant to reply thereto.⁴ The injuries and their severity are

⁴ Paragraphs 5 to 7 of the amended particulars of claim.

also discernible from the photographs attached to the amended particulars of claim as *Annexures* “A1” and “A2”.

- [16] The plaintiff may plead the various heads of damages separately if it is practicable to do so. The plaintiff is not required to plead damages with precision and accuracy but to set out the facts upon which he relies for the claim (the *facta probanda*) to enable the defendant to reply thereto not evidence (the *facta probantia*). The complaint is without merit and it is accordingly dismissed.

Complaint directed at the plaintiff's amended particulars of claim for past and future loss of earnings and earning capacity

- [17] The defendant contends that the plaintiff's amended particulars of claim in this regard are vague, embarrassing, ambiguous and insufficiently detailed. In paragraph 8.2.1 it is alleged that shortly before the incident the plaintiff had secured permanent employment and as a result of the injuries he could not work for approximately three months and he consequently suffered a loss of income. Then in paragraph 8.3.1.1 and 8.3.1.3. it is stated that the plaintiff is self-employed as a sub-contractor and his company suffered a loss of profit and earnings occasioned.
- [18] The defendant continues to state that the plaintiff's amended particulars of claim are contradictory and vague thus excipiable. The nature of the sub-contractor work that the plaintiff alleges he used to do prior to the injuries and the nature of the work that he is able to do post the injury has not been set out. The plaintiff has also failed to set out the duration of the loss of past earnings, his

diminished earning capacity and the estimated loss of future earnings. The amounts claimed are also not quantified as the plaintiff has also not set out the details of his remuneration and/or loss of profit. The defendant is accordingly embarrassed and is unable to plead thereto.

[19] On the other side, the plaintiff is adamant that the amended particulars of claim are not excipiable. The plaintiff sustained a loss with regard to past and future earnings as he was self-employed as a sub-contractor and was about to start a new job before the injury. His position changed from being a self-employed sub-contractor to securing a job then back to self-employment.

[20] It is trite that a plaintiff must allege and prove the extent of his past loss as well as the amount of damages to be awarded. In *Hersman v Shapiro and Company* **1926 TPD 367** at 379 per Stratford J the court held:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages."

[21] With regard to a claim for future loss of earning capacity a comparison of what the plaintiff would have earned had the injury not occurred, with what a claimant is likely to earn thereafter is essential. See *Road Accident Fund v Kerridge* **2019 (2) SA 233** (SCA) in paragraph 40.

- [22] In *casu* the plaintiff has not set out the details of the work that he did as a sub-contractor. The duration of the period he was self-employed, the income earned and the loss pursuant to the injuries is not pleaded. Similarly, the particulars with regard to in what capacity he was employed at the new job, the nature of the work, the remuneration and the work that he is able to do post the injury are not pleaded.
- [23] In *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 the court held that when considering exceptions the court must assume that the facts alleged in the particulars of claim are correct, and consider the pleadings as a whole no additional facts may be adduced by either party.
- [24] In this matter the allegations alluded to by the plaintiff are indeed vague. The vagueness is of such a nature that it will affect the defendant's ability to plead. I find the defendant's exception meritorious and I will uphold the complaint and grant the plaintiff an opportunity to remove the cause of complaint by amending the offending particulars.

Complaint directed at the plaintiff's claim for general damages

- [25] The defendant complains that the plaintiff has not particularised the physical and/or social amenities that have been affected by the injuries and in what manner. The plaintiff has also not set out a full description of the alleged pain and suffering and the disfigurement and/or scarring. There is also no indication whether

those injuries, loss of amenities and the scarring are temporary or permanent and how the amount claimed is arrived at.

[26] The plaintiff is of the view that the amended particulars of claim conform with the rules pertaining to pleading. More information will be furnished once the plaintiff has been medically assessed and the medico legal reports are available.

[27] The averments necessary to sustain a claim for general damages in respect of pain and suffering, loss of amenities of life and disfigurement are succinctly encapsulated in Rule 18 (10) (b) and (d). The plaintiff must specify whether these ailments are temporary or permanent and which injuries caused them. I accordingly hold that the defendant's complaint in this regard is also meritorious. The defendant's complaint is upheld and the plaintiff is granted an opportunity to remove the cause of complaint by amending the offending particulars.

Conclusion and costs

[28] It is by the plaintiff's design that the parties are embroiled in these proceedings. The plaintiff disregarded the rule 30 (2) (b) notice to remove the cause of the defendant's complaints.

[29] The defendant having succeeded substantially with the application I'm inclined to grant the costs in favour of the defendant.

[30] In the premises, I make an order in the following terms:

- (a) The defendant's complaint against the plaintiff's amended particulars in respect of the claim for future hospital and medical expenses is dismissed.
- (b) The defendant's complaint against the plaintiff's amended particulars of claim in respect of the claim for past loss of earnings and future loss of earnings and earning capacity is upheld.
- (c) The defendant's complaint against the plaintiff's amended particulars of claim in respect of the claim for general damages is upheld.
- (d) The plaintiff is afforded an opportunity to amend the particulars of claim within 10 (ten) days from the date of judgment.
- (e) The plaintiff to pay the costs of the application.

N S DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

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Instructed by:

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c/o Phatsoane Henney Attorneys

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