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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **7th February 2020** Signature: _____

CASE NO: 2019/2776

DATE: 7TH FEBRUARY 2020

In the matter between:

A, D

Plaintiff

and

MARAIS, EUGENE

First Defendant

STEPHENS, JONATHAN

Second Defendant

EUGENE MARAIS ATTORNEYS

Third Defendant

MARAIS STEPHENS ATTORNEYS

Second Respondent

Coram: Adams J

Heard: 11 November 2019

Delivered: 7 February 2020

Summary: Civil procedure – application to amend particulars of claim in terms of Rule 28(4) of the Uniform Rules – delictual claims for damages based on the duty of care – whether amendment will introduce excipiable particulars of

claim, which would be vague and embarrassing – not prejudicial to defendants – plaintiff granted leave to amend

ORDER

- (1) The plaintiff is granted leave to amend her particulars of claim as set out in her notice of intention to amend dated the 2nd April 2019.
 - (2) The plaintiff shall effect this amendment within ten days from date of this order.
 - (3) There shall be no cost order relative to this application for leave to amend.
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JUDGMENT

Adams J:

[1]. A central issue in this opposed application by the plaintiff for leave to amend her particulars of claim relates to whether or not the proposed amendment of the particulars of claim would render same excipiable. The first and third defendants ('the defendants') contend that the proposed amended particulars of plaintiff's claim would be susceptible to an exception on the basis that it would be vague and embarrassing, which, in turn, would prejudice them.

[2]. The plaintiff applies for leave to amend her particulars of claim in accordance with Uniform Rule of Court 28(4). The first and third defendants oppose the application. They contend that if the proposed amendment of the plaintiff's particulars of claim is allowed, they (the first and third defendants) would be embarrassed by the vague and embarrassing amended particulars of claim, and that they would suffer prejudice as a result of such vagueness and embarrassment.

[3]. The summons in this action and the plaintiff's particulars of claim were seemingly issued on the 2nd of January 2019. Shortly thereafter the summons was served on the defendants, who entered appearances to defend during

February and March 2019. On the 12th of March 2019 the first and third defendants caused to be delivered a notice to remove causes of complaint in terms of rule 23(1) and rule 30(2). In terms of this notice, the first and third defendants complained that the plaintiff's particulars of claim are vague and embarrassing and that it constituted an irregular step. There were in total twelve complaints by the first and third defendants, and these complaints related mainly to manner in which the plaintiff pleaded her case and the way in which her cause of action had been formulated. The first complaint, for example, is that the plaintiff's particulars of claim, rather than being a clear and concise statement of the material facts upon which the plaintiff relies for her claim, as required by rule by rule 18(4), is 'an Iliad of cacophonous dreck and is thus irregular as envisaged in terms of rule 18(12)'. Also, so the defendants complained, the plaintiff pleaded evidence, when she was obliged to plead only *facta probanda*. The defendants also contend that the plaintiff had not complied with the provisions of rule 18(10) in that she had not quantified her claim properly. The defendants furthermore complained that the plaintiff in her particulars of claim makes vexatious, scandalous and irrelevant allegations.

[4]. I interpose here to mention that in this action the plaintiff is not legally represented. She seemingly drew up the papers herself. The particulars of claim, which understandably is not a model of clarity and precise pleading, runs into some eighty eight pages and, as rightly contended by the defendants, often reads like an affidavit containing evidence.

[5]. The plaintiff's cause of action is based in delict. The defendants *in casu* represented her erstwhile husband in a divorce action instituted by her during October 2007. The divorce was finalised during August 2012, and it is the case of the plaintiff that the delay in the finalisation of the divorce, which delay brought with it extra costs for the parties and great pecuniary losses for their accrued estates, was as a direct result of the culpable and unlawful conduct on the part of the defendants. Additionally, so the plaintiff alleges, the conduct of the defendants caused her immense emotional and psychological trauma. All of this, the plaintiff claims, caused her damages in respect of which the defendants are liable in law to compensate her.

[6]. In a nutshell, the plaintiff alleges that, although there was no contractual relationship at any stage between her and the defendants, they owed her a legal duty of care not to cause her the harm which they had in fact caused her over the duration of the divorce proceeding. They failed to discharge that duty, thus causing her patrimonial and non-patrimonial damages, which they should now pay.

[7]. In her particulars of claim the plaintiff gives details and particulars of the conduct of the defendants during the course opposed divorce proceedings. There are repetitions abound and the particulars contain numerous examples, repeated more than twice, of conduct on the part of the defendants which, according to the plaintiff, is unbecoming of an attorney and officers of the court. In between the many exposés and at times too detailed narrations of events the plaintiff would from time to time allude to a crucial aspect of her case, which, in my view, gives a hint of the case the plaintiff intends presenting. For example, para 7.8 of the particulars read as follows:

‘The plaintiff pleads that there was a duty of care owed by the defendants to the plaintiff and the plaintiff and Mr A’s children, which was breached, causing irreparable financial harm to the plaintiff (and therefore her children).’

[8]. As I indicated above, the defendants gave notice to the plaintiff to remove certain causes of complaint. I have already alluded to some of those complaints above. There were also general complaints relating the fact that the plaintiff’s particulars of claim contain legal argument and the fact that the plaintiff made reference to settlement negotiations during the divorce proceedings, which, according to the defendants, is impermissible. Then there’s also an allegation that the particulars are contradictory in that on the one hand the plaintiff pleads that the defendants do not owe her a duty of care, whilst, in the same breath plaintiff states that her case is based on the duty of care owed to her by the defendants.

[9]. In an endeavour to address the above complaints by the defendants, the plaintiff on the 2nd of April 2019 delivered notice of intention to amend her particulars of claim. The defendants objected to the proposed amendment on the basis that the amendments do not cure the causes of complaint mentioned

in the rule 23 (1) notice. The objection is therefore based on the fact that, according to the defendants, the proposed amendment would still render the particulars vague and embarrassing and therefore excipiable. It bears emphasising that, if regard is had to the defendants' notice of objection to the proposed amendment, the defendants oppose the plaintiff's proposed amendment on the basis that the proposed amended particulars of claim would introduce allegations which are vague and embarrassing, as does the present particulars of claim. What the defendants say is that the proposed amendment would render the plaintiff's particulars of claim excipiable on the grounds set out in its notice of objection and in those circumstances the amendment ought not to be allowed.

[10]. In *Moaki v Reckitt & Colman (Africa) Limited*, 1968 (3) SA 98 (A), the court held that the pleading in question in that matter lacked both clarity and conciseness. It was more in the 'nature of a rambling preview of the evidence proposed to be adduced at the trial than a statement of the material facts relied upon as a basis for the relief claimed by the appellant'.

[11]. I do not believe that this description of pleadings finds application in the present matter. As I said, the plaintiff's particulars of claim, whilst not a model of clarity and precise pleading, do set out the facts which constitute the premises for the relief sought. It is trite that a delictual claim based on a duty of care, which is a legal conclusion, is dependant to a large extent on the facts in the matter. The plaintiff has set out in detail (maybe at times too much detail) the facts and the circumstances which she believes gave rise to that duty of care which form the basis for her claim for damages against the defendants. In my view the relief prayed for does indeed flow from facts alleged by the plaintiff.

[12]. In its amended form, the particulars of claim broadly set out the plaintiff's claim as follows: the facts in this matter, particularised in detail, give rise to a duty of care on the part of the defendants not to cause the plaintiff damages. The most notable of those facts is that the defendants are attorneys and officers of the court. They have a legal duty to act honestly and conduct themselves in an irreproachable manner. The fact that they acted for the plaintiff's husband in

the divorce does not mean that they could act to the detriment of the plaintiff. The defendants have failed, so the plaintiff pleads, to discharge that duty, which caused her harm.

[13]. It is trite that a court should endeavour to look benevolently instead of over-critically at a pleading, and it must be looked at as a whole. If there is any uncertainty in regard to a pleader's intention an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable. In that regard see: *Amalgamated Footwear & Leather Industries Jordan & Co Ltd*, 1948 (2) SA 891 (C) at 893.

[14]. Amendments will always be allowed unless the application to amend is *mala fide*, or unless such an amendment would cause an injustice to the other side which cannot be compensated by costs. In other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed. *In casu*, there are no allegations by the defendants that the plaintiff is acting *mala fide*. I am not persuaded that the defendants will be prejudiced by intended amendment; or that they would suffer any injustice.

[15]. I am therefore of the view that the plaintiff should be granted leave to amend. There is no merit in the defendants' objection to the proposed amended particulars of plaintiff's claim.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[17]. The plaintiff, in applying for leave to amend her particulars of claim, was asking for an indulgence from the court. This means that she (the plaintiff) is liable to pay the cost of the application for leave to amend.

[18]. The defendants, on the other hand, should pay the cost of the opposition to the application. This cost order would however be cancelled out to a greater or lesser extent by the cost order to which the plaintiff is entitled.

[19]. In any event, the plaintiff is not legally represented in these proceedings and therefore is not entitled to recover any legal fees other than actual expenses and expenditures incurred in the litigation.

[20]. I am of the view that no order as to cost shall be fair, reasonable and just to all concerned. Therefore, in the exercise of my discretion I intend granting no order as to costs.

Order

Accordingly, I make the following order:-

- (1) The plaintiff is granted leave to amend her particulars of claim as set out in her notice of intention to amend dated the 2nd April 2019.
- (2) The plaintiff shall effect this amendment within ten days from date of this order.
- (3) There shall be no cost order relative to this application for leave to amend.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	11 th November 2019
JUDGMENT DATE:	7 th February 2020
FOR THE PLAINTIFF / APPLICANT:	In Person
INSTRUCTED BY:	In Person
FOR THE FIRST AND THIRD DEFENDANTS / RESPONDENTS:	Adv H P Van Nieuwenhuizen
INSTRUCTED BY:	Dybala Attorneys