**REPUBLIC OF SOUTH AFRICA**

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

**CASE NUMBER: 2019/38998**

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

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**K.E. MATOJANE** **15 FERUARY 2022**

In the matter between:-

**RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA** First Applicant
(First Plaintiff in the Main Action)

**KUSASA TAKA CONSULTING PROPRIETARY LIMITED** Second Applicant
(Second Plaintiff in the Main Action)

**HERMANN FELIX ERDMANN** Third Applicant
(Third Plaintiff in the Main Action)

**CHARLINK KIRK** Fourth Applicant
(Fourth Plaintiff in the Main Action)

**STACKY JANSEN (nee Davidson)** Fifth Applicant
(Fifth Plaintiff in the Main Action)

and

**ELECTRONIC MEDIA NETWORK** Respondent
(Defendant in the Main Action)

*This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 15 February 2022.*

**JUDGMENT**

**MATOJANE J:**

[1] This is an application by the plaintiffs for leave to amend the particulars of claim in the pending action for defamation after the defendant had raised several grounds of objection to the plaintiffs notices to amend their particulars of claim. The defendant object to the proposed amendments.

**Background**

[2] The applicants, as plaintiffs, instituted action against the respondents as defendants for alleged defamation. It was alleged that the defendant, in its "Carte Blanche" programme, published defamatory materials against the plaintiffs on three separate occasions, namely:

2.1 On 15 November 2015 ["the 2015 broadcast"]

2.2 On 27 November 2016 ["the November 2016 broadcast"]

2.3 On 1 October 2017 ["the October 2017 broadcast']

[3] The first plaintiffs' accept that reliance on the 2015 broadcast prescribed during November 2018 in the hands of the liquidators. The action is in respect of the November 2016 and October 2017 broadcasts which allegedly reiterated the statements made in the 2015 broadcast.

[4] The defendants have, on two occasions, objected to the claim and to the plaintiff's efforts to amend the particulars of claim on the basis that even if the particulars of claim were amended in the manner proposed by the applicants, the particulars of claim will be excipiable because the proposed amendments are not clear resulting in the defendants not knowing what case it is called upon to meet.

[5] In the second notice of objection, the defendant raised ten grounds of objection regarding the lack of clarity and particularity in the plaintiffs pleading. Dissatisfied

with the second objection, the applicants brought this application seeking leave to amend from this court.

The court is called upon to determine whether or not the envisaged amendments would (or would not) result in an excipiable pleadings.

**The Legal Framework**

[6] Rule 28 of the Uniform Rules allows a party to amend its pleadings where there is no objection to the proposed amendment. However, where a proper objection has been noted, the party seeking amendment should approach the court for a leave to amend. The court will always allow an application for amendment unless the application to amend is mala fide.

[7] In *Moolman v Estate Moolman*[1], a locus classicus for amendment of pleadings, the court said:

> "..... The practical Rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

[8] The court has the discretion to grant or refuse the amendment, which must be exercised judicially. For the court to exercise its discretion in favour of granting an amendment, the seeker must demonstrate a measure of good faith and must offer a reasonable explanation for why the amendment is required. The court must then weigh the reasons or explanation given by the applicant for the amendment against objections raised by the opponent, and where the proposed amendment will prejudice the opponent or would be excipiable, the amendment should be refused. In Trans-Drakensburg Bank v Combined Engineering (Pty) Ltd,[2] the court said:

> "Having already made his case in his pleadings, if he wishes to change or add to this he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment

[1] Moolman v Estate Moolman 1927 CPD 27,29

[2] 1967 (3) SA 632(D) at 640H. See also Krogman v Van Reenen 1926 OPD 191 at 194 -195

which has no foundation. He cannot place on record an issue of which he has no supporting evidence where evidence requires or save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

**The Plaintiffs Pleaded Case**

[9] The plaintiffs contend that their claim is founded on defamation under the *action injuriarum* and nothing more. In the course of advancing its claim for defamation, the plaintiffs rely on the alleged a breach of Rule 28.3.2 ("the Rule") of the Broadcasting Complaints Commission of South Africa's ("BCCSA") Code of Conduct for Subscription Broadcasting Service Licenses ("the Code"). The code provides that a person whose views are to be criticised in a broadcast programme must be given a right of reply to such criticism.

[10] The plaintiffs allege that they were defamed in the broadcast because the statements relied upon were critical of the plaintiffs and the defendants failed to give any of the plaintiffs a right of reply before broadcasting and have accordingly breached the Rule.

[11] It is unclear how the introduction of the Rule and the Code in the particulars of claim advances a case of defamation under *actio injuriarum* as the breach of the Rule and the Code is a breach of contract between the defendant and the BCCSA and the remedies for that breach are within the jurisdiction of the BCCSA.

[12] In my view, the pleadings do not comply with the requirements set out in Rule 18(4). Rule 18(4) provides that:

> "Each pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto".

[13] In Trope v South African Reserve Bank,[3] it was explained that:

> "It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side

[3] 1993 (3) SA 264 at 273A, Lewis v Oneanate (Pty) Ltd and Another 1992 (4) SA 811 at 817 F-G

to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical, and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of the particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading. The ultimate test, however, must in my view still be whether the pleading complies with the general Rule enunciated in Rule 18(4) and the principles laid down in our existing case law."

[14] The respondents correctly, in my view, submits that the existence of the Rule and its alleged breach have nothing whatsoever to do with the cause of action based on defamation. Reliance on the Rule will require an investigation by the court into matters concerning "a controversial issue of public importance" which falls within the jurisdiction of the BCCSA. Such investigation will offend the need to exhaust internal remedies and deference to administrative agencies.

[15] In my view, the particulars of claim in the form they would be if amended would prejudice the defendant as it is not clear whether the plaintiffs claim is based on delict or contract or both. The pleading do not contain sufficient particularity to enable the defendant to plead thereto without being embarrassed as it is not clear what case the defendant is required to meet. The application for amendment falls to be dismissed on this ground alone.

[16] It is trite that in order for an exception to succeed, the defendant must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it, and the Court should not look at a pleading 'with a magnifying glass of too high power'[4].

[4] Southernpoort Developments (Pty) Ltd v Transnet LTD 2003(5) SA 665 (W)

**The First and Second Objections**

[17] In paragraphs 11 and 12 of the particulars of claim, the plaintiff alleges that the First plaintiff, as it was entitled to do, complained to the BCCSA in respect of the 2015 broadcast and the November 2016 broadcast. This complaint to the BCCSA came after the defendant allegedly breached the Rule relating to affording the plaintiffs a right of reply to the broadcasts.

[18] Only the first plaintiff lodged the complaint with BCCSA in respect of November 2016 and not in respect of the 2017 broadcast, and the second to fifth plaintiffs are not alleged to have lodged complaints. The respondent points out that it is not clear from the particulars of claim how the alleged breach of the Rule had a bearing on the second to fifth plaintiffs when they did not lodge a complaint with the BCCSA. It is also not clear how the alleged breach of the Rule has any bearing on the October 2017 broadcast as the first plaintiff did not lodge a complaint in respect of this broadcast.

[19] I conclude that the proposed amendment will not cure the objection raised by the defendant.

**The Second Ground Objection**

[20] It is alleged in paragraph 7.4.8.2 of the particulars of claim that the plaintiffs were at all material times entitled to the protections afforded by section 192 of the Constitution. It is not clear what protections embodied in section 192 were allegedly breached. Section 192 of the Constitution imposes an obligation on the Legislature to establish an independent authority to regulate broadcasting in the public interest and ensure fairness and a diversity of views broadly representing South African society.

[21] The breach of section 192 of the Constitution does not have anything to do with the cause of action based on defamation. The proposed amendments are accordingly vague and embarrassing and or fail to disclose a cause of action.

**The Fourth Ground of Objection**

[22] It is alleged in paragraph 7.4.6 of the particulars of claim that the defendant was bound by the Code of conduct and disciplinary mechanisms of the BCCSA and in paragraph 7.4.8.2 that the plaintiffs were entitled to protections afforded by the Code and the Rule.

[23] The BCCSA has not ruled on the matter, and the breach of the Rule is not actionable by the plaintiffs. The proposed amendments are vague and embarrassing.

**The Fifth Ground of Objection**

[24] Only the first plaintiff lodged a complaint with the BCCSA in respect of the 2016 broadcast, and the BCCSA declined to adjudicate on this complaint. The plaintiffs allege in paragraph 19.3.2 of the particulars of claim that there was a premature publication of the November 2017 and October 2017 statements because the BCCSA had not adjudicated on the first plaintiff's complaint. The plaintiffs by this allegation concede that a breach of the Code fell to be determined by the BCCSA, which has not occurred. None of this has anything to do with a cause of action based on defamation.

**The Sixth and Seventh Grounds of Objection**

[25] In paragraph 19.2 of the particulars of claim, the plaintiffs plead that:

> "19.2 Acting unreasonably, and in breach of the Rule, more particularly in that:
>
> 19.2.1 The issues raised in the broadcast were controversial matters of public interest *inter alia* in that they included allegations of the misappropriation of public funds by the plaintiffs for their private benefit;
>
> 19.2.2 The broadcast was critical to the plaintiffs:
>
> …

[26] The plaintiffs allege that their cause of action is founded on the *actio injuriarum* but have failed to plead how a breach of the Rule gives rise to a damages claim for defamation. It is not clear whether the alleged breach of the Rule on its own constitutes a separate cause of action and on what basis the breach of the Rule forms part of the law of defamation.

**The Eighth Objection**

[27] This objection has been conceded.

**The Ninth Ground of Objection**

[28] In paragraph 19.3.1 of the particulars of claim, the plaintiffs allege that the "defendant failed to observe the *audi alteram* rule which required the defendant – as a reasonable broadcaster – to listen to both sides of the story before broadcasting it".

[29] It is not clear from the particulars of claim whether the reliance on *audi alteram Partem* is separate from the breach of clause 28.3.2 of the Code and if so, on what basis does the audi rule form part of a claim for defamation and how on what basis the obligation arose.

**The Tenth Ground of Objection**

[30] In paragraph 27 of the particulars of claim it is alleged that the defendant's conduct in opposing the complaint before the BCCSA "serves in aggravation of the damages suffered by the plaintiffs."

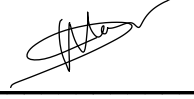
[31] The plaintiffs have not pleaded any facts to show how the defendant's opposition and defence before the BCCSA serve in aggravation of the damages suffered by the plaintiffs. Without facts to support the allegation, the defendant is unable to provide a proper defence to the allegations.

**Conclusion**

[32] The plaintiffs proposed amendments if permitted will still render the particulars of claim excipiable because they will be vague and embarrassing and fail to disclose a cause of action to the prejudice of the defendant.

[33] In the result the following order is made:

1. The application is dismissed with costs including the costs of two counsel.



**K.E MATOJANE**
*Judge of the High Court*
*Gauteng Division, Johannesburg*

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| **Judgment**: | 15 February 2022 |
| **For Applicants**: | S.C Kirk-Cohen SC (with G.S.S Khoza) |
| **Instructed by**: | Lionel Murray Schwormstedt & Louw<br>c/o Fullard Mayer Morrison Inc |
| **For Respondent**: | G Marcus SC (with M Musandiwan) |
| **Instructed by**: | Webber Wentzel |