REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

CASE NO: 09/69046

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

10/10/2014
DATE

SIGNATURE

10/10/2014

In the matter between:

MAPUTLE, MOKGAGALE THOMAS	1st Plaintiff
THWALA, SIPHO MOSES	2nd Plaintiff
KOTZE, WILLEM JOHANNES PAULUS	3rd Plaintiff
CHAUKE, MANDLAKAYISE DULY	4th Plaintiff

and

PREMIER, MPUMALANGA PROVINCIAL GOVERNMENT	1st Defendant
MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF EDUCATION MPUMALANGA PROVINCIAL GOVERNMENT	2nd Defendant

JUDGMENT

MASHILE, J:

[1] The Plaintiffs instituted action for damages emanating from their suspension from duty, which suspension is alleged was in contravention of their employment contract with the Second Respondent. The action is founded on the *acttio injuriarum* as it is alleged to be contumelious.

[2] The proceedings were characterised by various interlocutory applications, the first of which was launched by the Respondents seeking a separation of the merits and quantum as envisaged in Uniform Rule 33(4). The Plaintiffs opposed it on the ground that it would not be convenient to decide the matters discretely as the two were inextricably bound such that it would be prejudicial to them if the court were to order separation.

[3] The court considered the matter and guided by the Practice Manual of this court, ruled in favour of separation. In terms of Chapter 6.13.3.5.3 of the Practice Manual if the parties do not settle the merits of the matter there shall be an automatic separation of merits and quantum in accordance with Rule 33(4) unless the parties agree that there shall be no separation. Besides, contrary to the Plaintiffs' belief, the court held the view that it would be expedient and useful to have the two decided separately.

[4] Another application that the court had to consider was one for amendment of the plea of the Defendants in terms of Uniform Rule 28(10). The court refused this amendment and reserved its reasons for that ruling. This is an opportune moment to furnish such grounds. The application was brought after the Plaintiffs' case had commenced and the Second Plaintiff having concluded his evidence both in chief and cross examination. The Fourth Plaintiff was still on the stand giving his testimony in chief.

[5] Uniform Rule 28(10) provides:

> "*The Court may, notwithstanding anything to the contrary in this rule, at any stage* ***before*** *judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.*"

[6] The reading of the Rule appears fairly straight forward – the court may grant leave to amend at any stage before judgment. The word 'may' in the Rule insinuates that the court must be persuaded to do so and only thereafter can it exercise its discretion whether or not to grant such an amendment. Needless to mention that given that scenario, each case must therefore be determined on its own peculiar set of circumstances.

[7] It is trite that the power of the court to allow amendment is limited only by consideration of prejudice or injustice to the opponent. See Page B1-179 of *Superior Court Practice* by Erasmus, Farlam, Fichardt & Van Loggerenberg. The fact that the outcome of the amendment may result in the one party losing the case is no reason not to allow an amendment.

[8] The general approach is, it would seem, to tolerate amendments especially in instances where the application to amend is not characterised by mala fide and where such amendment will not cause injustice or prejudice to the other party. The amendment will readily be granted in particular, where the injustice or prejudice can be cured by either postponement or costs. See *Devonia Shipping Ltd v MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C), *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) and *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W).

[9] The Plaintiffs opposed the application on the basis that the granting of the amendment would be prejudicial to the Plaintiffs especially because the Second Plaintiff had concluded his evidence and could not be recalled. That being so, the Second and the Fourth, to a limited extent, will have missed the opportunity to address the issues raised in the proposed amendment. Moreover, no questions either in chief or cross-examination in respect thereof can be posed to them.

[10] Prejudice under circumstances where one witness has concluded his evidence and cannot be recalled to address issues pertaining to the proposed amendment will be inevitable if the court were to grant leave to amend. The Defendants have been aware that their plea was a denial in its entirety yet they waited until this last moment to frantically make this application. This is unacceptable.

[11] The second objection raised by the Plaintiffs is that the evidence of the Second Plaintiff concerning the articles of the Lowvelder dated 24 June 2008 was not disputed. The article alleged that the Member of the Executive Council (MEC), Mathulare Coleman, mentioned the names of the Plaintiffs in her speech to the Mpumalanga Parliament and promised that the Plaintiffs would be dealt with accordingly.

[12] I cannot agree with Counsel for the Plaintiff that the Defendants' failure to challenge this part of the evidence of the Second Plaintiff is detrimental. It would still be incumbent upon the Plaintiffs to prove that the said evidence should be admissible. The application to amend, however, cannot succeed for the reasons stated above and not because of this contention. I shall return to this matter later in this judgment.

[13] The deponent to the affidavit in support of the application to amend was signed by Ms Mthethwa. The Plaintiffs state that it is apparent that the facts to which she deposed do not fall within her knowledge. The deponent should have at least explained how that information came into her personal knowledge. In the absence of such justification, attach confirmatory affidavits. Those paragraphs, it is argued, constitute hearsay evidence and stand to be struck off. The affected paragraphs are, 9, 10, 11, 12, 13, 17, 26, 29, 30, 31, 37 and 38. The court agrees that in the absence of confirmatory affidavits supporting the allegations made in those specific paragraphs to which I have referred above, the evidence must be excluded.

[14] Lastly, the Defendants allege that, in addition to the parties agreeing on 26 April 2013 to remove the matter from the roll, they also came to an understanding that the Plaintiff would supply them with copies of the discovered documents. The Defendants deny this further agreement and contend that they provided those documents on 25 June 2013. In view of the documents being those that should have been in the possession of the Defendants anyway, it is hard to decipher why the Defendants could not proceed to prepare for the impending trial set down for 2 August 2013. Yes, the papers supplied were voluminous but their size would have been immaterial because those documents are documents which were in their possession anyway.

[15] Once the existence of the agreement of 26 April 2013 to provide copies of the discovered documents is denied and the realisation that the documents were in the possession of the Defendants at any rate, it appears that there are no reasons why the application was only brought when it was. The plea was drafted months before the trial date was agreed upon and it must have been obvious that the Defendant would be entitled to raise a defence that it was true and in the public interest that the information be published. In the absence of that explanation and for the other reasons referred to above, the court refused the amendment and the result is that the plea remained a denial with which the Defendants must stand or fall.

[16] An abridged version of the evidence led by the Plaintiffs in support of their case is that all four of them were in the employ of the Second Defendant specifically in the Supply Chain Management Department of the Department of Education, Mpumalanga, whose official head is the Second Defendant.

[17] The positions of the four Plaintiffs in the Supply Chain Management Department of the Second Defendant were as follows:

17.1 First Plaintiff was the person in charge of the finances of Supply Chain Management Department;

17.2 The Second Defendant was the head;

17.3 The Third Plaintiff was a deputy director;

17.4 The Fourth Plaintiff was a senior administrative clerk.

[18] The Second Plaintiff testified that there were several routes for scholar transport that were approved by the State Provincial Tender Board when he joined the Supply Chain Management Department of the Second Defendant. Existing along side these were quite a few routes which were approved by the MEC as the accounting officer of the department and which came as a result of the need in various parts of Mpumalanga for scholar transport to specific schools.

[19] Following this, he began the process of verifying the routes, distances and number of scholars transported. He did this to confirm payments made and to plan for an impending tender process to select service providers to supply transport services. When the process was complete, a tender method was carried out.

[20] In the interim, quite a few of the routes changed from time to time as schools closed down or opened. Needless to state that the closing down or opening up of schools would have an impact on the number of pupils being transported at any given time. Subsequent to the verification of the routes, PriceWaterhouseCoopers (PWC) was entrusted with the duty to investigate the decisive factors that were applied for the introduction of certain routes in the Waterval Boven, Belfast and Lydenburg triangle.

[21] The report established that there were certain incongruities to which the department attended. PWC was engaged on 15 May 2003 and therefore prior to the deployment of the first three Plaintiffs with the Second Defendant. The report was not final and as such no recommendations were made. Following the report, a tender process was undertaken where the routes were advertised and tenderers invited to provide transport services to the Department of Education.

[22] He testified further that an association of the operators successfully challenged the tender process in court. Consequent thereupon the Second Defendant resolved not to revise the routes even after the lapsing of the original

contract. Payment in respect of the scholar transport therefore continued to be made in terms of the original contract until the process could be finalised.

[23] He also stated that in 2006 and prior to the finalisation of the process, the routes were decentralised as they were taken away from the Supply Chain Management Department and given to the regions. From 1 April 2007, the Department of Public Works & Transport became directly accountable for the procurement of scholar transport services within the Mpumalanga Government.

[24] In 2006, the then MEC for the Department of Education In Mpumalanga, Masango, appointed Ntuli Noble Incorporated to identify:

> *"all persons (including officials) involved in, or responsible for such irregular, unauthorised and fruitless and wasteful expenditure and to make firm recommendations as regards to possible criminal or disciplinary steps... accompanied by supporting documentation."*

[25] The terms of reference furnished to Ntuli Noble Incorporated were no different from those given to its predecessor that conducted similar investigations, Groenewald. Ntuli Noble Incorporated produced an interim report in 2007.

[26] The Second Plaintiff testified that Ntuli Noble Incorporated could not conclusively demonstrate that any of the plaintiffs were involved in fraud or corruption or followed irregular process. In fact, it was the evidence of the plaintiffs that there was no part of the report that could be said to indicate that

they were responsible for any irregularities or that they were corrupt or acted in a fraudulent manner.

[27] The Plaintiffs conceded that there were certain irregularities in the process. This pertained to the procurement of scholar transport not going on tender. The association of scholar transport operators obtained a court interdict preventing this emerging tradition. The Second Defendant condoned the practice when he instructed the department to carry on with the appointment and provision of the services. This led to the appointment of Baweli Transport in December 2006 by the MEC.

[28] The computers of the Plaintiffs were seized on 4 June 2008 and on 5 June 2008, they were suspended without being afforded the opportunity to state why they should not be. The Plaintiffs testified further that on 6 June 2008 the new MEC, Mathulare Coleman, stated that the plaintiffs were corrupt, suspended and would be dealt with accordingly.

[29] The evidence of the two witnesses of the Defendants being Messrs Zwane and Ngwenya was simply admitting that they reported that they discovered fraud, corruption and irregularities but denied having mentioned the names of the plaintiffs nor insinuating that they were involved in any illegal activities involving the scholar transport. In amplification of their evidence as aforesaid, they referred the court to the statements that they released to the press.

[30] The issue upon which the court must adjudicate is to establish whether or not the Defendants, by suspending the Plaintiffs and investigating their involvement in the irregularities, injured their dignity in any manner.

[31] The *actio injuriarum* grants relief for an impairment of the person, dignity or reputation of the plaintiff, which impairment is committed wrongfully and intentionally. See *Amler's Precedents of Pleadings*, 7th Edition page 223.

[32] It is apparent from the preceding paragraph that in order for a plaintiff to succeed in an action of injury three critical requirements must be alleged and demonstrated. These are:

32.1 An intention on the part of the offender to produce the effect of his act;

32.2 An overt act which the person doing it is not legally competent to do; and which at the same time is

32.3 An aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other.

See *Dendy v University of the Witwatersrand* [2007] SCA 30 (RSA).

[33] It is trite that the onus of proof on a balance of probabilities in a civil case is on a plaintiff. Accordingly, it is the Plaintiffs in this instance who must allege and prove the existence of the three vital requisites. It is now settled that injury to dignity is tested by reference to both the subjective and objective standards. See in this respect the case of *Delange v Costa* 1989 (2) SA 857 (A) at 860I-861A. In the *Dandy* case (*supra*) Farlam JA stated:

> *"... To be considered a wrongful infringement of dignity, the objectionable behaviour must be insulting from both a subjective and objective point of view, that is, not only must the plaintiff feel subjectively insulted but the behaviour, seen objectively, must also be of an insulting nature. In the assessment of the latter, the legal convictions of the community (boni mores) or the notional understanding and reaction of a person of ordinary intelligence and sensibilities are of importance [Neethling's Law of Personality at 194-5]."*

[34] The Plaintiffs have averred in their particulars of claim that:

34.1 The First and/or Second Defendants in their capacity as Employer/s of the Plaintiffs violated the provisions of the Plaintiff's contracts of employment insofar as they have failed to adhere to the procedure concerning suspension or relocation delineated in Resolution 1 of 2003 of the PSCBC;

34.2 The First and/or Second Defendants have on numerous occasions in the press announced and made statements to the effect that:

34.2.1 There was corruption internally in respect of scholar transport matters;

34.2.2 Various Officials in the Department of Education colluded with Service Providers in respect of Scholar Transport;

34.2.3 All the schedules and/or planned routes In respect of scholar transport did not exist.

34.3 The Plaintiffs were named and known in the Press and within Mpumalanga Provincial Government as the persons who were suspended by their Employer/s arising from the allegations referred to above;

34.4 There was no basis in law for the suspension of the Plaintiffs. Their suspension constituted a breach of their Employment Contract;

34.5 The institution of a Commission of Enquiry into the allegations referred to above by the First Defendants, has subjected the Plaintiffs to further unnecessary and uncalled for scrutiny by the press and fellow employees;

34.6 The allegations made by the First and/or Second Defendants and the actions of Defendants subsequently were made wrongfully and with the intent to injure the Plaintiffs.

34.7 The Plaintiffs were humiliated and degraded by the aforementioned actions and allegations;

34.8 The Plaintiffs reputation in the community and their workplace was reduced and First Plaintiff has suffered contumelia as a result of the Defendants injurious breech of the agreement.

[35] The defence of the Defendants is one of denial in the main. The Defendants did, however, admit the names of the four Plaintiffs and that demand was made. During the course of the trial, it transpired that in addition to the above, there were more allegations that were not in dispute and these were:

35.1 The citation of the Plaintiffs and the Defendants;

35.2 The Plaintiffs were in the employ of the Second Defendant on 5 June 2008;

35.3 The Plaintiffs were suspended on 5 June 2008 on allegations that they could be involved in fraud, maladministration,

mismanagement or corruption concerning scholar transportation routes in Mpumalanga;

35.4 The applicability of Resolution 1 of 2003 of the PSCBC to the Plaintiffs;

35.5 Publication of the various newspaper articles containing the names of the Plaintiffs.

[36] As I understand it, the Plaintiffs aver that they have suffered injury to their dignity in that they were humiliated as a result of the Defendants' unlawful breach of the employment contract in particular, by failing to adhere to the procedure concerning suspension or relocation outlined in Resolution 1 of 2003 of the PSCBC.

[37] In addition, the Defendants have caused the information concerning their suspension to be published in various newspapers. The publication was made wrongfully with the intention to injure the dignity of the Plaintiffs. Furthermore, it humiliated and degraded them. All these allegations were denied by the Defendants, which meant that the Plaintiffs had to prove and support each averment with evidence.

[38] All the Plaintiffs admitted that there were irregularities relating to scholar transport. However, all of them denied that they were the cause thereof. Various parties including the MEC Masango, who was said to have vetoed the

tender process in favour of direct appointment of scholar transport service providers, were fingered as the culprits by the Plaintiffs.

[39] This is a convenient moment to consider whether or not the suspension of the Plaintiffs was done with the intention to injure their dignity. The Plaintiffs' admission that irregularities within the scholar transport existed should carry with it an acceptance that the Defendants were within their right to investigate the cause of such irregularities. Furthermore, as employees of the department that was directly associated with the irregularities, they must have been aware and prepared to be investigated.

[40] Was the act of suspending the Plaintiffs subjectively and objectively injurious? Subjectively, the Plaintiffs under these circumstances would have been advised that the action of the Defendants could be legally challenged. In view of that, the Plaintiffs would have looked forward to being vindicated by a decision of court setting aside their suspension and ordering that they be reinstated to their previous positions with the Second Defendant. The ensuing feeling under those circumstances would have been one of exultation and relief.

[41] Objectively, a reasonable person would have expected the Defendants to take steps to establish the identity of the people responsible for the irregularities. The outcome of the decision of Rabie J would have absolved them and any reasonable person would have been delighted to be cleared as opposed to feeling insulted and humiliated as a result of the suspension. In this regard, it is

enlightening to refer to the following passage By Farlam JA in the *Dandy* case (*supra*):

> "*In my opinion the reaction of a reasonable person in the position of the appellant who became aware of the manner in which the decision not to appoint him had been arrived at and that that decision could accordingly be set aside on review in consequence thereof would not have had feelings of insult and humiliation but rather feelings of elation and relief. The same applies in relation to the refusal of the reasons and the minutes. A reasonable person in the position of the appellant would have realised that the refusal was not sustainable and that the university would, if taken to court, be ordered to provide the reasons and minutes. Here again, the reasonable person's reaction would not have been one of insult and humiliation.*"

[42] When the matter was argued in court, the Defendants did not challenge the fact that various newspapers published articles about the scholar transport irregularities but they steadfastly denied that they had a share in making known the names of the Plaintiffs to the various newspapers. Once this was denied it was for the Plaintiffs to prove that the Defendants were accountable for the publication of the Plaintiffs' names in the press.

[43] The authors of the different newspaper articles did not divulge the source that furnished them with the names of the Plaintiffs. The Plaintiffs did not see it proper to subpoena those authors to give evidence before this court. Under those circumstances, I must agree with Counsel for the Defendants that evidence of the newspaper clippings attached to the particulars of claim constitute hearsay and should accordingly be excluded especially in the absence of an application to have it admitted

[44] Much was made of the fact that the Defendants did not challenge the Lowvelder article that claimed that the MEC Mathulare Coleman released the names of the Plaintiffs during her budget speech on 6 August 2008. My approach to this is that the Defendants' failure to contest the evidence during cross examination would not have cured its inadmissibility.

[45] In the result the Plaintiffs have failed to prove on a balance of probabilities that their suspension caused them injury to their dignity and that the publication of their names, which it is alleged humiliated them, was attributable to the Defendants.

[46] Turning to costs. Both parties fervently argued that the other should bear costs on the attorney own client scale. I do not think that either party made a sufficiently strong case that warrants that either of them be punished with costs at such scale. It should suffice to state that costs will follow the result.

[47] In the circumstances I make the following order:

1. The Plaintiffs' action is dismissed with costs.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	29 August 2013
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