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IN THE HIGH COURT OF SOUTH AFRICA

(REPUBLIC OF SOUTH AFRICA)

PRETORIA

CASE NO: 4475/2014

DATE: 12 NOVEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

HENRED FRUEHAUF (PTY) LTD

1ST APPLICANT

t/a HENRED FRAEHAUF TRAILERS

REG NO. 1998/012938/2007

WILLEM WILLIAMS

2ND APPLICANT

And

DIANA ELS

RESPONDENT

ID: [...]

In re:

DIANA ELS

PLAINTIFF

ID: [...]

And

HENRED FRUEHAUF (PTY) LTD

1ST DEFENDANT

t/a HENRED FRAEHAUF TRAILERS

REG NO. 1998/012938/2007

WILLEM WILLIAMS

2ND DEFENDANT

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicants, in the application, seek an order as follows:

- “1. That the respondents summons and particulars of claim issued under Case number 4475/2014 in the above Honourable Court, be declared an irregular step and set aside;
2. That the Respondent be ordered to pay the costs of this application;
3. Further and/or alternative relief. ”

BRIEF FACTS

[2] On 21 January 2014 the respondent instituted an action against the applicants (Defendants) for damages allegedly suffered when Wayne Wolmarans (the deceased) with whom she was in a common law relationship died allegedly as a result of the negligence of the first and/or second applicant (defendant). The respondent sued in her personal capacity and in her representative capacity. She, in her particulars of claim, claimed payment of R200.000.00 and R400.000.00 respectively for past and future loss of support. On 4 February 2014 the applicants gave notice of their intention to defend the action. On 17 February 2014 the applicants served and filed a notice in terms of Rule 30 (2) (b) of the Uniform Rules of Court. The applicants complained that the respondent's summons and particulars of claim did not comply with the provisions of Rules 18(4), 18 (10) and 18 (11) of the Rules of the Court. The respondent was afforded 10 days within which to remove the causes of complainant. On 20 March 2014 the applicants launched an application in terms of Rule 30 (1) praying for an order as follows:

1. That the respondent's summons and particulars of claim issued under case no. 4475/2014 be declared an irregular step and be set aside, and

2. That the respondent be ordered to pay the costs of the application.

The application is opposed by the respondent. The matter was initially on the roll of 8 April 2014. On 2 April 2014, the matter was removed from the roll by notice. It then served before me on 21 October 2014 when judgment was reserved.

THE ISSUES

[3] The issue to be determined is whether the applicants have made out a case to be entitled to the relief that they seek.

THE RULES

[4] The Rules that are key to the application that applicants have referred to are Rules 18(4), 18 (10), 18 (11), 30 (1) and 30 (2) (b),

Rule 30 (1) provides:

“(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside”

Rule 30 (2) (b) provides:

“(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

(a)

(b) the applicant has, within ten days of becoming aware of the step by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days.”

Rule 18 (4) provides:

“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.”

Rule 18 (10) provides:

“(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant

reasonably to assess the quantum thereof’

Rule 18 (11) provides:

“A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death.

AN IRREGULAR STEP

[5] An irregular step as envisaged in the sub-rule is a step which advances the proceedings one stage nearer completion. See **Cyril Smiedt (Pty) Ltd v Lourens 1966 (1) SA 150 (O) at 152E and Market Dynamics (Pty) Ltd t/a Brian Ferris v Grogor 1984 (1) SA 152 (W) at 153C.**

PLEADINGS

[6] A pleading is a written statement of a cause of action or defence. Its purpose is to define the issues between the parties and not to obscure them. In that way the other party is properly informed of the case that he or she has to meet. A pleading, in terms of Rule 18 (4), must contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading with sufficient particularity to enable the opposite party to reply thereto.

[7] In terms of Rule 27 (3), the court may on good cause shown, condone any non-compliance with the rules.

Rule 30 (3) provides that:

“(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.”

Holmes, AJA in **Northern Assurance Co. Ltd v Somdaka 1960 (1) SA 588 (A) at 595B** pointed out that the discretion which the court has is indicative of the fact that “it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity.” See also **Soundprops 1160 CC and Another v Karlshavn Farm Partnership and Others 1996 (3) SA 1026 (N) at 1034A-D.**

[8] Adv S P Swart in the heads of argument, and Adv Strydom in argument in court, pointed out that the court, in proper cases, may overlook irregularities which do not prejudice the other party. This is correct. See Soundprops case (supra). To succeed, therefore, in an application such as the present, prejudice has to be demonstrated.

[9] It was submitted, on behalf of the respondent, that the applicants' affidavit needs to disclose the necessary allegations upon which they rely for their complaints. It was further submitted that where the merits are not settled, unless the parties agree that there shall be no separation, separation of the merits and quantum in accordance with Rule 33 (4) becomes automatic. See Practice Manual North Gauteng High Court page 27 paragraph 6.13.

[10] Mr Minaar for the applicant, submitted that the respondent's particulars of claim, as contended for by the applicants, constitute an irregular step and that the notice, in terms of Rule 30 (2) (b), contains the irregularity complained of in paragraphs 1-6.

[11] Ms Strydom, for the respondent, submitted and stood by the heads of argument which evince that paragraphs 1,2 and 3 of the applicant's notice in terms of Rule 30 (2) (b) contain a repetition of the provisions of Rule 18 (4), 18 (10) and 18 (11) and fail to demonstrate any complaints. Paragraphs 4 and 5, it was further submitted, relate to paragraph 11 of the particulars of claim and are restatements in the negative of the provisions of Rule 18. The submission seems to have merits. The applicants also contend that the respondent failed to plead the date of birth of the deceased.

[12] The respondent contends that it is incumbent upon the applicants to specify in clear and concise terms the particulars of the irregularity or impropriety that they complain about. It was further submitted on behalf of the respondent that the court may dismiss an application which does not show the prerequisite prejudice in an application such as the applicants'."

[13] According to Ms Strydom, save to state that the applicants are unable to plead, the applicants have failed to specify the details relating to the alleged non-compliance with Rule 18. Ms Strydom further submitted that the aim of the application was to delay the finalisation of the matter, as according to her, the complaints raised by the applicants are in no way such that the applications cannot plead. I agree.

[14] It is contended on behalf of the respondent that the applicants appear to be alleging that "the clear and concise statement of the material facts upon which the respondent relies for his claim and the quantification thereof", should be contained in one paragraph. This, according to Ms Strydom, cannot be the meaning of Rule 18. There is merit in the submission.

[15] Regarding the quantification of the respondent's claims by the respondent, and the assessment thereof by the applicants, it is contended that it was not necessary to quantify the claims in any other detail as the amounts are just estimates. This, because the amounts may change as a result of, inter alia, expert evidence and the progress of the child at school. Mr Minaar, in this regard also so conceded. The appointment of an actuary at a very early stage and at the cost of the respondent to do a calculation, it is contended, may not be

that helpful particularly if regard is had to the change in the circumstances that has been referred to in this paragraph. See the yet to be reported case of **Motswai v RAF (766/13) [2014] ZASCA 104 (29 August 2014) at [50]**. The applicants, it is contended, may dispute the amounts in their plea as they, in all probability, will do. The submission, in my view, is correct.

[16] Paragraph 6 of the applicants' notice states that the respondent failed to plead the date of birth of the deceased. The complaint, according to the respondent, is technical in nature and discloses no prejudice.

A view is held on behalf of the respondent that the date of birth of the deceased is well within the knowledge of the applicants. It must be remembered that the deceased was employed by the first applicant. The employment itself although not clearly set out suggests that the first applicant must, indeed, be having the information that the applicants complain about. Ms Strydom, for the respondent, handed up a copy of a letter addressed to the respondent's attorneys by the applicants' attorneys. Mr Minaar for the applicants, submitted that the letter together with a copy of another letter addressed to the respondent by the Compensation Commissioner should be regarded as inadmissible evidence. The documents, no doubt, as the matter proceeds, will be discovered by the respondent. The applicants cannot deny that the respondent was employed by the first applicant. The documents merely serve to strengthen the fact that the first applicant employed the deceased and that therefore the applicants will have wanted to have the deceased's date of birth on his file. Failure to strictly, comply with Rule 18 (11) in the circumstances of this case, in my view, is condonable and is condoned.

[17] The applicants' heads of argument, and for the first time, disclose what the respondent's particulars of claim ought to have contained, namely, the date of birth of the deceased; the deceased's income; profession or occupation and position at the time of his death; the deceased's educational qualifications and any known or immediate prospect; the deceased's physical shortcomings or characteristics that would have had an impact on his income and any other factors that would have an influence on contingencies. These, in my view, are aspects which the applicants would have reasonably known by virtue of the deceased's employment with the first applicant.

[18] It is noteworthy that each case is treated on its merits and circumstances. However, it must be borne in mind that the cause of action must appear from the factual allegations made. This presupposes that the pleading must be lucid, logical and intelligible. The pleading has to have sufficient particularity by identifying and defining the issues to enable the other party to reply thereto. **See Gusha V Road Accident Fund 2012 (2) SA 371(SCA) at 374C-D.**

[19] The respondent, in terms of rule 18(10), is not expected to set out a claim in such a manner that the applicants are able to determine whether the respondents assessment of quantum is correct. The applicants

have to work out a reasonable assessment of damages suffered by the respondent. **See Reid NO v Royal Insurance CO Ltd 1951 (1) SA 713(T).**

[20] Ms Strydom submitted that the respondent has made out a clear case in that the deceased had been employed by the first applicant. This is evident from the contents of paragraph 4 of the particulars of claim. The first applicant, too, cannot deny that the deceased was employed by it at the time of his death. Ms Strydom submitted that the claims are based on vicarious liability of the first applicant *vis a vis* the second applicant. The liability, according to the respondent and her legal team, is based on negligence and not employer - employee relationship.

[21] Mr Minaar submitted that the applicants were prejudiced in that they cannot make their proper assessment of the respondent's claims and pay into court whatever amount they may regard as reasonable in the circumstances of the case due to non compliance with Rule 18 by the respondent. This, according to Ms Strydom, is irrelevant and does not assist the applicant. I agree.

[22] The respondent's case is that the particulars of claim contain sufficient particularity to enable the applicants to plead thereto. The respondent, according to Ms Strydom, is called upon to respond to complaints which do not have sufficient particulars to enable her to reply thereto. The submission has substance. Ms Strydom further submitted that Rules 21 and 35 (2) of the Uniform Rules of Court are there to assist the applicants should the need arise. I agree.

[23] The particulars of the respondent's claims, in my view, are such that the applicants are properly informed of the case that they have to meet. They are indeed, lucid, logical and intelligible to enable the applicants to plead. The applicants, in my view, have not made out a case to be entitled to the relief that they seek. Their application should fail.

[24] In the absence of opposition, the late filing of the Replying Affidavit is condoned.

[25] I, in the result, make the following order.

The application is dismissed with costs.

M.W MSIMEKI

JUDGE OF THE NORTH

GAUTENG HIGH COURT

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INSTUCTED BY: MCINTYRE & VAN DER POST ATTORNEYS

COUNSEL FOR THE RESPONDENT: ADV. K STRYDOM

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DATE OF HEARING: 21/10/2014

DATE OF JUDGMENT: 12/11/2014