



Republic of South Africa
In the High Court of South Africa
Western Cape High Court, Cape Town

CASE NO: 4326/2009

In the matter between:

DARREN HALLIGAN

Plaintiff

and

RAITH GOURMET TRADING (PROPRIETARY) LIMITED

First Defendant

HELMUT RAITH

Second Defendant

HERBERT HERMANN

Third Defendant

MARELIZE BRITZ

Fourth Defendant

BRITZ ATTORNEYS

Fifth Defendant

COEN DE KOCK

Sixth Defendant

KENNY UYTENBOGAARDT

Seventh Defendant

ESOSA

Eighth Defendant

WOOLWORTHS (PTY) LTD

Ninth Defendant

SIMON SUSMAN

Tenth Defendant

NERINE KAHN

Eleventh Defendant

RONALD BERNIKOW

Twelfth Defendant

Judgment handed down on 31 May 2010

1. The ninth and tenth defendants (Woolworths (Pty) Ltd and Simon Susman) as well as the sixth, eleventh and twelfth defendants, being Mr Coen de Kock, Ms Nerine Kahn and Mr Ronald Bernikow, all took exception to the plaintiff's particulars of claim. The particulars of claim was drafted by the plaintiff who is unrepresented and who, despite being properly notified, failed to appear at the hearing of the exception.
2. It is at the outset convenient to point out that it is required of a party to plead – with sufficient clarity and particularity – the material facts upon which he relies for the conclusion of law he wishes the Court to draw from those facts (Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A) at 273A-B, citing Mabaso v Felix 1981 (3) SA 865 (A) at 875A-H; Uniform Rule 18(4)).
3. Uniform Rule of Court 18(4), which applies to pleadings generally, provides as follows

'(4) 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.'

4. It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it (Radebe and Others v Eastern Transvaal

Development Board 1988 (2) SA 785 (A) at 792J-793G).¹ So, for instance, Van Heerden JA held in Truter and Another v Deyssel 2006 (4) SA 168 (SCA) at paragraph [17]

“In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:

“A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.”²

(the emphasis by Van Heerden JA)

5. In Buchner and Another v Johannesburg Consolidated Investment Co Ltd 1995 (1) SA 215 (T) De Klerk J held as follows at 216I – J:

“The necessity to plead material facts does not have its origin in this Rule.³ It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the

¹ See also Arthur E Abrahams & Gross v Cohen and Others 1991 (2) SA 301 (C)

² Van Heerden JA cited MM Loubser Extinctive Prescription (1996) para 4.6.1 at 80, and the authorities there cited, in particular Evans v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838H-839A.

³ Rule 18(4)

material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based."

6. In National Union of Distributive Workers v Cleghorn & Harris Ltd 1946 AD 984 at 997 998, Schreiner JA described the function of the judge at the exception stage as *"a sifting one, namely, to stop hopeless cases from going to trial, while allowing others to proceed to their due conclusion"*
7. I state these principles at the outset as, as will appear below, the plaintiff's particulars of claim are far from clear, and the material facts required to arrive at the stated conclusions of law are mostly patently absent. Moreover the stated facts and the conclusions of law are not set out in a logical or comprehensible fashion and the reader is left to speculate whether a particular fact is linked to a particular conclusion of law. The particulars of claim are replete with opinions which are not related to any of the facts required to support such opinions.
8. The plaintiff is a trade union official. It is appropriate to repeat, fully, what the plaintiff stated with regard to the abovementioned defendants in the particulars of claim under the rubric *"Plaintiff's action"*. I do not repeat the many other allegations made against the other defendants.
9. He cites the sixth defendant, Mr Coen de Kock, as a commissioner at the Commission for Conciliation, Mediation and Arbitration ("the CCMA"); the eleventh defendant, Ms Nerine Kahn, as a director of the CCMA; and the

twelfth defendant, Mr Ronald Bernikow, as a senior commissioner of the CCMA. The tenth defendant, Mr Simon Susman is the managing director of the ninth defendant, Woolworths (Pty) Ltd.

10. In paragraph 14 of the particulars of claim the following is alleged

“On or about and during the periods 30 September 2008 to 26 February 2009, the First, Second and Third Defendants instructed their legal representatives, Fourth, Fifth, Sixth, Seventh and Eighth Defendants to wrongfully defame Plaintiff, stating on Labour Court application affidavits and heads of argument that Plaintiff represented his trade union at the CCMA arbitration – under the auspices that he was an attorney”.

11. In paragraph 15 the following is alleged

“Raith Gourmet’s directors – Mr Helmut Raith and Mr Herbert Hermann [from Germany] filed affidavits and heads of argument with their Esosa’s Mr Kenny Uytenbogaardt, their attorney, Ms Maralize Britz from Britz attorneys in Paarl, to instruct an advocate – Mr Coen de Kock [the Sixth Defendant] to state in the Labour Court on 26 February 2009 that Plaintiff was filing vexatious and frivolous actions in the Labour Court.”

12. Though it may be considered to be defamatory to say of somebody that he is *“filing vexatious and frivolous actions”*, nowhere does the plaintiff contend this to be his case.

13. In paragraph 18 the following is stated

"Plaintiff alleges that Mr Helmut Raith, Mr Herbert Hermann, Mr Kenny Uytenbogaardt, Ms Maralize Britz and Mr Coen de Kock [the Sixth Defendant] were using so-called neo-Nazis tactics to bring a tirade of defamatory allegations against Plaintiff because of the fact that he is a Gypsy from Eire".

14. Again it is not stated what the defamatory allegations were, nor who uttered them.

15. In paragraph 19 it is alleged that

"Mr Helmut Raith, Mr Herbert Hermann, Mr Kenny Uytenbogaardt, Ms Maralize Britz and Mr Coen de Kock have bribed the CCMA director – Ms Nerine Kahn and the CCMA senior commissioner, Mr Ronald Bernikow to stop Plaintiff from appearing at the CCMA because of the fact that he specialises in discriminating cases."

16. In paragraph 20 it is alleged that

"Miss Nerine Kahn, Mr Ronald Bernikow and Mr Coen de Kock have sent letters to Plaintiff stating that he cannot enter the premises of the CCMA but the CCMA is an organ of State and not a Court of law; hence their letters are null and void".

17. In paragraph 21 it is alleged that

"Mr Coen de Kock has further stated that in the Labour Court that Mr Simon Susman from Woolworths (Pty) Ltd – Ninth and Tenth Defendants respectively; have supported all the aforesaid defendants in their averments against the Plaintiff – that Plaintiff must be arrested by the South African Police Services – SAPS".

18. Paragraph 22 continues as follows

“Plaintiff alleges that Ms Nerine Kahn and Mr Ronald Bernikow have in one way or another associated themselves with the aforesaid Defendants’ corrupt activities that is unlawful and wrongful in terms of The Prevention and Combating of Corrupt Activities Act, No. 12 of 2004.”

19. The Plaintiff then continues under the rubric *“The Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)”* that *“he suffered damages from all the aforementioned defendants’ wrongful conduct in bribing SAPS members to arrest Plaintiff ...”* setting out various further allegations, including *“defaming Plaintiff to the degree of corruption and bribing certain members from the SAPS can affect a wrongful arrest on Plaintiff that is mischievous and egregious”* (paragraph 23.4).
20. The sixth, eleventh and twelfth defendants excepted on various grounds to the particulars of claim.
21. The first ground is directed at the allegations of defamation that:
 - (a) the plaintiff was wrongfully defamed *“under the auspices that he was an attorney”* (paragraph 14 of the particulars);
 - (b) there was *“a tirade of defamatory allegations against Plaintiff because of the fact that he is a Gypsy from Eire”* (paragraph 18);
 - (c) the *“defendants defamed him with slanderous contortions on his namesake and credibility”* (paragraph 26.1).

22. The defendants excepted on the basis that the plaintiff had failed to allege any facts upon which his claim of defamation was based, such as when the defamation took place, why the words uttered were defamatory of the Plaintiff and whether they were uttered with the intention of defaming the Plaintiff.
23. Defamation is the wrongful, intentional publications of words or behaviour concerning another person, which has the tendency to undermine his status, good name or reputation (Tap Wine Trading CC v Cape Classic Wines Western Cape CC [1998] 4 All SA 86 (C) at 107).
24. Neither the allegation that *“under the auspices that he was an attorney”* nor *“because of the fact that he is a Gypsy from Eire”* appears to be defamatory.
25. Nowhere does the plaintiff state what other defamatory words were used, or to whom these, or any other words were uttered.
26. In the premises the exception against the alleged defamation referred to in paragraphs 14, 18, 26.1 and 27.2(f) of the particulars of claim is well taken.
27. The second ground of exception was taken against paragraph 15 of the particulars of claim, namely that the plaintiff alleges that the sixth defendant stated in Court papers that the plaintiff was *“filing vexatious and frivolous actions in the Labour Court”*, and paragraph 20 of the particulars

of claim where the plaintiff alleges that the defendants have “*sent letters to the Plaintiff stating that he cannot enter the premises of the CCMA*”.

28. The plaintiff did not plead that it was defamatory of him to allege that he was acting in a vexatious and frivolous manner. Nor does he advance facts as to the wrongful content of the letters. *In vacuo* these allegations do not disclose causes of action.

29. In the premises the second ground of exception is also well taken.

30. The third ground of exception was against the allegations in paragraph 19 of the particulars of claim, namely that the plaintiff alleged that the sixth defendant (amongst others) bribed the eleventh and twelfth defendants:

(a) “*to stop the Plaintiff from appearing at the CCMA because of the fact that he specialises in discriminating cases; that the defendants have ‘sent letters to the Plaintiff stating that he cannot enter the premises of the CCMA’*” (paragraph 20 of the particulars of claim);
and

(b) and that they have “*in one way or the other associated themselves*” with the “*aforesaid defendants’ corrupt activities ...*” (paragraph 22 of the particulars of claim); and

(c) that “*it was clearly evident that all aforesaid defendants contorted to corrupt Plaintiff’s labour dispute because their lawyers did not have the necessary expertise and skills to cope with such claims*”.

31. It is not clear from paragraph 22 of the particulars of claim what the *"aforesaid corrupt activities"* were, nor in what manner the eleventh and twelfth defendants have *"in one way or the other associated themselves"* therewith. There is a lack of any details with regard to the corrupt activities, the manner in which the eleventh and twelfth defendants associated themselves therewith and whether negligently or intentionally. In the premises also this exception is well taken.
32. The fourth exception was taken against the allegations of bribery of members of the South African Police Service made in paragraph 23 of the particulars of claim. The statement is made against *"all the aforementioned defendants' wrongful conduct in bribing SAPS members to arrest Plaintiff"*.
33. Having previously alleged that there was a bribe of Ms Kahn (the eleventh defendant) and that the ninth and tenth defendants supported the averment that the plaintiff must be arrested by the South African Police (paragraph 21), the allegation is now made that there was a bribe of the South African Police Service's members to arrest the plaintiff (paragraph 23 of the particulars of claim).
34. This allegation, which is no more than a conclusion of law, is levelled against all the defendants. It is, for instance, not pleaded how the bribe was effected, whether in money or otherwise, by whom it was effected, nor is it pleaded which members of the South African Police Service were so bribed. Even the conclusion that there was indeed a bribe is confusing

where it is stated in paragraph 23.4 of the particulars of claim that the plaintiff suffered damages from all the defendants' wrongful conduct in, *inter alia*, "defaming Plaintiff to the degree of corruption and bribing certain members from the SAPS can effect a wrongful arrest on Plaintiff that is mischievous and egregious".

35. Again I am satisfied that the particulars of claim lack averments to sustain a cause of action against the defendants.
36. The fifth exception is aimed at the allegation of "gang related" corruption. There are no allegations of fact made which would permit the importation of the provisions of the Prevention of Organised Crime Act, No. 121 of 1998, as a cause of action. The conclusion pleaded is simply lacking in a coherent factual basis. In the premises this ground of exception is also well taken.
37. Similarly and in respect of the sixth ground of exception – where reliance is placed on the Protected Disclosures Act, Act 26 of 2000 – in paragraph 26.2 of the particulars of claim – no factual basis for reliance on the provisions of the statute is made in advancing any cause of action against the defendants.
38. I now turn to deal with the exception lodged on behalf of the ninth and tenth defendants. The exception taken by them is on the grounds that the allegations in the particulars of claim fail to sustain a cause of action against them.

39. The only direct allegations against the ninth and tenth defendants are to be found in paragraph 21 of the particulars of claim set out above. I have already dealt with some of the allegations directed at all of the defendants, which would include the ninth and tenth defendants and the deficiencies in the particulars of claim in those regards. The allegation is that the ninth and tenth defendants *"have supported the defendants in their averments against the Plaintiff – the Plaintiff must be arrested by the South African Police Services."* This is the only basis upon which the plaintiff seeks to hold the ninth and tenth defendants liable. It is self-evident that whatever Mr de Kock may have said was told to him by the ninth and tenth defendants cannot, on any possible interpretation thereof, sustain a cause of action against the ninth and tenth defendants.
40. I am in agreement with Mr Manca, who appeared on behalf of these defendants, that there is no basis either in law or in fact why these defendants should have been cited in these proceedings. In the premises the particulars of claim lack averments which are necessary to sustain an action against the ninth and tenth defendants and falls to be set aside, with costs.
41. In sifting through the particulars of claim I have to find that as presently pleaded, the plaintiff's case is a hopeless one and none of the defendants should be required to go to trial thereon.

42. In the premises I make the following order:

- (1) The plaintiff's particulars of claim are set aside.
- (2) The plaintiff is to pay the costs of the sixth, eleventh and twelfth defendants as well as the costs of the ninth and tenth defendants.
- (3) The plaintiff is given leave to file amended particulars of claim within 30 days of the date of this order if so advised.



SOLIVIER AJ