IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case no: 18563/18

In the matter between:

JOHANNES FREDERICK VAN NIEKERK	First to Eighty
AND 88 OTHERS	Ninth Plaintiffs

and

THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE	First Defendant
THE MUNICIPALITY OF MOSSEL BAY	Second Defendant
THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL	Third Defendant

Coram: Norton AJ

Heard: 18 August 2020

Delivered: 15 October 2020

JUDGMENT

Norton AJ

[1] The plaintiffs instituted an action on 28 September 2018 seeking damages in the amount of R184 827 303.98 against the defendants, jointly and severally, on the ground that the defendants 'were negligent and breached their respective duties of care and/or statutory duties', in respect of a housing development in Seemeeu Park, Hartenbos in which the plaintiffs acquired land and, in the case of some of the plaintiffs, developed or erected dwellings on the land.

[2] The third defendant delivered an exception to the plaintiffs' particulars of claim on 30 January 2019, following which the plaintiffs gave notice of their intention to amend their particulars, and delivered amended particulars on 17 July 2019.

[3] The third defendant delivered an exception to the amended particulars on 5 September 2019, following which the plaintiffs gave notice of their intention to amend their amended particulars, and delivered further amended particulars on 23 October 2019.

[4] On 8 November 2019 the third defendant delivered a notice in terms of rule 30(2)(b) of the Uniform Rules of Court identifying three causes of complaint in the further amended particulars (the particulars) and affording the plaintiffs an opportunity to remove the causes of complaint within 10 days, failing which application would be made for the setting aside of the particulars.

[5] The plaintiffs failed to remove the causes of complaint and the third defendant on 11 December 2019 instituted this application in terms of rule 30(1) of the Uniform Rules for an order setting aside the amendments in the particulars as an irregular step on the grounds that the particulars do not comply with, first, rule 18(4), and second, rule 18(10) of the Uniform Rules.

The setting aside of an irregular step in terms of rule 30

[6] Rule 30(1) of the Uniform Rules provides that 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(3) provides as follows:

> '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…and grant leave to amend or make any such order as to it seems meet'.

[7] In determining the appropriate relief, the court has a discretion which must be exercised judicially on a consideration of all the circumstances and what is fair to both sides (*Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) 596A), and may refuse to set aside an irregularity which has not caused substantial prejudice to the other party (*Soundsprops 1160 CC and Another v Karlshavn Farm Partnership and Others* 1996 (3) SA 1026 (N) 1033A-B.).

Non-compliance with rule 18

[8] Rule 18(12) of the Uniform Rules provides that '[i]f a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30'.

[9] In *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W) 470H-I Cloete J held that prejudice is prima facie established if the pleading which is challenged does not comply with the provisions of rule 18 requiring specified particulars to be set out.

The grounds on which the setting aside of the particulars is sought

Non-compliance with rule 18(4)

[10] The third defendant contends that the particulars do not comply with rule 18(4) of the Uniform Rules in that they contain reference to voluminous annexures without identifying the material facts in those annexures which are relied upon.

[11] Rule 18(4) provides as follows:

> '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.'

[12] It has been held that a pleading should not include extensive excerpts from and references to other documents (*Heugh and Others v Gubb* 1980 (1) SA 699 (C) 702A-C) and observed that annexing to particulars of claim reports running to 52 pages 'hardly provides' a 'clear and concise statement' as contemplated by the rule (*Doyle v Sentraboer (Co-Operative) Ltd* 1993 (3) SA 176 (SE) 181E).

[13] In this case the particulars contain references to annexures which run to more than 500 pages. The references to the annexures are vague and the particulars do not identify the precise facts relied upon in the relevant annexures.

[14] The following are examples of the references to annexures in the particulars:

- 'With reference to the duties and obligations of the third Defendant (NHBRC) see Annexure A16.'

- 'The first defendant had the statutory duties to receive, evaluate and issue approvals (records of decisions) of all applications for land use changes as listed in the regulations from time to time ***see Annexure A14.****'*

- 'Notwithstanding the aforesaid, the first defendant had a duty of care and statutory duties which *inter alia* entailed that **see Annexure A14.'**

[15] For the most part, documents appear to have been annexed to the particulars as evidence in support of averments in the particulars. While this might be permissible in application proceedings, where evidence is put before the court in the form of affidavits and documents, it is not appropriate in action proceedings. Even in application proceedings, the portion of a document on which reliance is placed, and the case sought to be made on the strength of it, must be identified in the affidavit. As the Supreme Court of Appeal observed in *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) para 43:

> 'In motion proceedings, the affidavits constitute both the pleadings and the evidence…, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[16] Inasmuch as some of the annexures comprise legislative instruments, their attachment to the particulars is also inappropriate.

[17] The vague references in the particulars to a wide range of annexed documents do not contain a clear and precise statement of the material facts upon which the plaintiffs rely and do not comply with rule 18(4). The prejudice to the defendants, in understanding the case which they must meet and in pleading to the particulars, is significant.

Non-compliance with rule 18(10)

[18] The third defendant contends that the particulars do not comply with rule 18(10) in that they do not set out the damages claimed in such a manner that their quantum can be reasonably assessed.

[19] Rule 18(10) provides that a plaintiff suing for damages 'shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof'.

[20] In *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) 346F-G Blieden J pointed out that the requirements and purpose of rule 18(10) are different to those of rule 18(4), and that rule 18(10) -

> `enjoins any party claiming damages to provide sufficient information to enable the opposing party to know why the particular amount being claimed as damages is in fact being claimed'

[21] The respondents claim damages in the very specific total amount of R184 827 303.98.

[22] The damages claimed in respect of individual plaintiffs are also very specific, but are pleaded as estimates and not supported by any information which enables the defendants to assess why the particular amount is claimed. The form in which individual plaintiffs' damages are pleaded is evident from the pleading in respect of the damages alleged to have been suffered by the first to fourth plaintiffs:

‘87.1 First – Fourth Plaintiffs

87.1.1.1 General information

Erf number 16921 erf size: 803 m2

Transfer date: 30/7/2009

87.1.1.2 The plaintiffs already sustained damages due to soil conditions.

87.1.1.3 Estimated claim:

Minus insurer’s claim	R1 042 009.38
Total claim:	**R3 458 440.65**

[23] The particulars disclose no information which enables the defendants even to begin to assess the quantum of the damages claimed. None of the component parts of the total amounts claimed are itemised. This is particularly remarkable in circumstances where the amounts claimed are not rounded off, but specified to the last cent.

[24] What is expected of plaintiffs in pleading damages in a case such as this was explained in *Getz v Pahlavi* 1943 WLD 142 at 146 in respect of an amount of £450 claimed for the restoration of premises:

> 'I do not think that it is possible to generalise about the particulars that should be furnished of the cost of restoration in a case like the present. It is obviously desirable that *the defendant should be informed of the cost, estimated or actual, of the several items of restorative work* in order that he may be in a position to tender or plead in excuse where this is possible. On the other hand, in some cases it may be unreasonable to require a separate allocation of different items of

> work because in the ordinary course they would be done together as a single job. If that is the position it is open to the plaintiff to say so. In the present case the plaintiff has stated that the £450 is an estimate but *it is not reasonable to suppose that an estimate of the cost of the several different kinds of repair or replacement work to be done was arrived at without itemisation. The £450 must be a lump sum, a total made up of a number of items which the plaintiff will seek to establish at the trial.* The plaintiff does not set up the case that he is not in a position to analyse the sum of £450. His statement that it is an estimate does not excuse him from giving further particulars; *unless it is a pure guess it must be an estimate based on a collection of detailed estimates*. I find it unnecessary to decide whether the damages claimed are "general" or "special"; the substance of the matter is that *the details of how the £450 is made up ought, if possible, to be in the defendant's hands at the pleading stage, and there is no reason to doubt that the plaintiff is in a position to supply them*.' (Emphasis added)

[25] The particulars plainly do not meet the requirements of rule 18(10). The plaintiffs' failure to provide the defendants with the information which they require to assess the quantum of the damages claimed has occasioned significant prejudice to the defendants.

The relief sought in terms of rule 30

[26] I have found that the particulars do not comply with rule 18(4) or rule 18(10) and that in each instance their non-compliance has occasioned significant prejudice to the defendants.

[27] Non-compliance with rules 18(4) and 18(10) is, in terms of rule 18(12), deemed to be an irregular step in respect of which the affected party is entitled to seek relief under rule 30.

[28] The plaintiffs have put up two grounds (other than disputing non-compliance) on which they resist the relief sought under rule 30.

[29] The first ground is that relief should not have been sought under rule 30 in circumstances where the third defendant has also (one week after delivering its notice in terms of rule 30(2)(b)) delivered a notice of exception in respect of the particulars. This ground is without merit, as the courts have accepted that if a pleading is excipiable and also does not comply with the provisions of rule 18, the affected party has two remedies and can note an exception *and* apply in terms of rule 30 for the setting aside of the pleading (*Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing en Andere* 2001 (2) SA 790 (T) 796C-D).

[30] The second ground is that the plaintiffs filed a notice of intention to amend the particulars (on 31 July 2020, as an attachment to their answering affidavit in this application) after the third defendant instituted its application in terms of rule 30(1), and in the light of the new notice of amendment 'the application has become completely moot'. This ground too lacks any merit.

[31] The particulars which are challenged as an irregular step in this application are the particulars delivered on 23 October 2019. While the plaintiffs were (a) entitled to file a notice of intention to amend the

particulars within ten days of receiving the third defendant's notice in terms of rule 30(2)(b); and (b) entitled, after receiving notice of this application, to canvass proposed amendments to the particulars as a means of settling the application, they were not entitled, after receiving notice of this application, to take any formal steps to amend the particulars pending the determination of the application.

[32] In the application before me there is a live dispute (see *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21) the determination of which is required for the further conduct of the plaintiffs' action in accordance with this court's rules. There is no question of the application having been rendered moot.

[33] I am of the view that in all the circumstances the appropriate relief is to strike out those portions of the particulars which constitute an irregular step, and grant the plaintiffs leave to amend the particulars within a specified period.

[34] The plaintiffs have tendered the costs occasioned by this application, on a party and party scale, up to 11 August 2020. The third defendant seeks an order that the costs of the application (in its entirety) should be paid by the plaintiffs on an attorney and client scale. This is a punitive scale which is justified only where it would be 'just and equitable in the circumstances of a particular case' and where a party's conduct (including conduct which amounts to an abuse of the process of court) is 'extraordinary and worthy of a court's rebuke' (*Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) paras 222 and 226).

[35] The plaintiffs have been inordinately dilatory at every stage in the conduct of this application. After the application was instituted on 11 December 2019, the plaintiffs failed to file a notice of intention to oppose the application, as a result of which the application was set down for hearing on an unopposed basis on 28 January 2020. The plaintiffs filed a notice of intention to oppose the application on 23 January 2020, three court days before the hearing date.

[36] In terms of an order handed down by agreement on 31 January 2020, the plaintiffs were to file their answering affidavit by 31 March 2020. The plaintiffs failed to do so, and on 14 May 2020 sought (and obtained) the indulgence of the third defendant to file their answering affidavit on 14 June 2020. The plaintiffs once again failed to file their answering affidavit in time, and once again sought (and obtained) an indulgence, this time to file their answering affidavit by 30 June 2020. When the plaintiffs failed to comply with their own deadline, the third defendant was driven to bring a chamber book application to compel the filing of the plaintiffs' answering affidavit by 1 August 2020.

[37] Having regard to the plaintiffs' persistent disregard for the rules and orders of this court and the prejudice occasioned to the third defendant, I am satisfied that a costs order on an attorney and client scale is justified.

[38] The following order is made:

(a) The following parts of the particulars of claim filed by the plaintiffs on 28 September 2018 constitute an irregular step and are struck out:

(i) All the annexures to the particulars of claim;

(ii) All the references to annexures in the particulars of claim, including the references in the following paragraphs (including sub-paragraphs and further sub-paragraphs thereof): paragraph 66; paragraph 67; paragraph 69; paragraph 70; paragraph 72; paragraph 73; paragraph 74; paragraph 75; paragraph 78; paragraph 81; and paragraph 87;

(iii) Paragraph 87 (including sub-paragraphs and further sub-paragraphs thereof) of the particulars of claim.

(b) The plaintiffs are given leave within 20 court days from the date of this order to amend their particulars of claim.

(c) The plaintiffs shall pay the costs of the application on an attorney and client scale.

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Michelle Norton

Acting Justice of the High Court

Western Cape Division

APPEARANCES

For Plaintiffs:	R J De Beer Instructed by Lourens Attorneys, Brits c/o Combrink Attorneys Inc Cape Town
For Third Defendant:	R Jaga SC (with him N Mayosi) Instructed by Robert Charles Attorneys & Conveyancers Cape Town