



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 352/2021

Before: The Hon. Mr Justice Binns-Ward

Hearing: 13 October 2021

Judgment: 13 October 2021

In the matter between:

RICHARD JOSEPH

Plaintiff/Respondent

and

CITY OF CAPE TOWN

First

Defendant/Excipient

NICO DE COCK

Second Defendant/Excipient

WENDY DANIELS

Third Defendant/Excipient

JUDGMENT

BINNS-WARD J:

[1] According to his particulars of claim, which were drafted by an attorney with right of appearance in the High Court who has since withdrawn as attorney of record, the plaintiff, Mr *Richard* Joseph, is a traffic officer in the employ of the City of Cape Town. He has sued the defendants for compensation in damages in the sum of R4 556 086,30, comprised of R56 086,30 for *'past loss of two months' earnings and medical expenses ... as per the Salary Advice and Medical Accounts annexed ... marked Annexures "I", "J", "K"* and R4 500 000 for *'(g)eneral damages for pain and suffering (as pleaded hereinabove)'*. The aforesaid damages are alleged to have been *'suffered ... as a direct result of the charges, dismissal and defamation'*.

[2] Annexure "I" to the particulars of claim is a salary advice issued to the plaintiff by the City of Cape Town in respect of the month of May 2018. It reflects that the plaintiff earned a monthly salary of R20 848, and that in that month he was received additional emoluments in respect of 'standby days' bringing his gross earnings for the month to R25 485,62 before deductions. Annexure "J" is an account rendered to the plaintiff from a dental surgeon for certain dental work including what appears to be at least one, possibly two, tooth extractions done during June 2018 on one *Enrique* Joseph, whose date of birth is given as 14 April 2013. An amount of R2649,30 was invoiced in terms of the said account. Annexure "K" is an account rendered to the plaintiff by an anaesthetist in the amount R2 465,76. It would appear that the account relates to attendances by the anaesthetist in relation to the aforementioned dental work on *Enrique* Joseph. Quite what significance the dental treatment rendered to the child *Enrique* Joseph bears on the plaintiff's claims for special or general damages is not elucidated in the particulars of claim.

[3] It may be discerned from the particulars of claim – which, as should already be apparent, are far from a model of clarity - read with the annexures thereto that the aforementioned *'charges'* relate to disciplinary proceedings instituted by the City against the plaintiff in respect of his absence from work on 1 January 2018 and his failure to produce a doctor's certificate in substantiation of his claim to have been sick that day. The plaintiff was allegedly subject to a 'Directive (Instruction) 01/2017' that (according to the content of annexure H to the particulars of claim, which was the finding of the internal appeal tribunal in the plaintiff's aforementioned disciplinary proceedings) *'demanded from staff based in Area East to bring a sick certificate from a medical practitioner when booking off sick during the festive season which included 01 January 2018'*.

[4] The ‘dismissal’ for which damages are claimed appears to relate to the sanction imposed on the plaintiff at first instance in the aforementioned disciplinary proceedings. The first instance disciplinary tribunal, having found the plaintiff guilty in respect of the charge related to his failure to provide a doctor’s certificate, held that he should be summarily dismissed, which duly happened, subject, of course, to his right of appeal. As appears from the pleading, the plaintiff’s appeal was successful and the disciplinary conviction and the sanction of summary dismissal were set aside. That much is apparent from annexure “H” to the pleading, which is incorporated by reference in paragraph 12 of the particulars of claim.

[5] The City being an organ of state, it was necessary, in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, for the plaintiff to give notice of his intention to institute the action for damages against it. The plaintiff annexed a copy of the relevant notice as annexure “L” to the particulars of claim. The notice contains the following statement (in para 8 thereof): *‘Although he was later reinstated and the municipality compensated him for the loss in income for the two months, this reflected badly on his credit profile and coupled with interest for non-payment’*. There are no allegations in the particulars of claim that provide insight into the plaintiff’s credit profile or how his disciplinary proceedings ‘reflected badly’ on it. There is also no particularity to give substance to the phrase ‘coupled with interest for non-payment’. The only corresponding allegation in the body of the pleading is at paragraph 15, in the following terms:

‘Although the Plaintiff was later reinstated by the First Defendant, the Plaintiff was unable to service and attend to his medical expenses, credit accounts, coupled with interest accrued due to non-payments on the Plaintiff’s accounts severely affected the plaintiff’s credit profile and resulted in severe financial stress which the affected the Plaintiff’s health.’

[6] The ‘defamation’ claim is founded on the following allegations in paragraph 13 of the particulars of claim:

‘Despite the Plaintiff’s dismissal being set aside the levelling of the charges against the Plaintiff by the First Defendant, alternatively Second Defendant, further alternatively Third Defendant greatly impaired his good name and good standing as it was the subject of talk withing (sic) the Traffic Service Department and thereby impairing the dignity of the Plaintiff and defaming the Plaintiff’s good name’

[7] The City is cited in the action as the first defendant. The second defendant is employed by the City as a principal inspector in the Traffic Services Department. The third defendant is an inspector at another office of the department.

[8] The defendants have delivered a notice of exception to the plaintiff's particulars of claim on six separate grounds.

[9] The first ground is that inasmuch as the plaintiff claims compensation in damages for defamation, the particulars of claim fail to disclose a cause of action. It is alleged that the pleading fails to contain sufficient averments to sustain a cause of action for defamation inasmuch as:

1. *The plaintiff has failed to set out words or statements alleged to have been used by the defendants.*
2. *The plaintiff has failed to allege that such words or statements are defamatory; and*
3. *The plaintiff has failed to allege that the defendants or any of them published any defamatory words or statements, or any particulars of any publication at all.*

[10] It is trite that anyone claiming damages for defamation must set out the words alleged to have been used by the defendant, or at least describe the substantive import of the allegedly defamatory statement. The plaintiff has failed to do so. The first ground of exception must accordingly be upheld.

[11] The second ground of exception is that the plaintiff has alleged that the first defendant is vicariously liable for the allegedly wrongful acts of the second and third defendants (i) without making any allegations in the pleading that would sustain a cause of action against either the second or the third defendant and (ii) '*in addition and in any event a claim against First Defendant based on vicarious liability, and a simultaneous claim of personal liability on the part of the Second and Third Defendants are mutually exclusive as pleaded*'.

[12] In my judgment, the first of the two bases on which the second ground of exception is raised is good. There are no allegations in the pleading that make out a cognisable claim against the second and third defendants, and accordingly a foundation for the first defendant's alleged vicarious liability has not been established on the face of the pleading. I do not think there is any merit in the second basis for second ground of exception. In a case where there is reason to hold an employer vicariously liable for the wrongdoing of an

employee, such liability will always be co-extensive with that of the employee. The second ground of exception will therefore be upheld on the first of the two aforementioned bases upon which it has been raised.

[13] The third ground of exception is directed at what appears to be the plaintiff's claim for damages in respect of the allegedly malicious institution of disciplinary proceedings against him – the claim for '*charges*' and '*dismissal*' to use the terminology of the pleading. The defendants contend that the plaintiff has failed to plead an essential element for such a claim, being the institution of the proceedings by the defendants without a reasonable and probable cause. I think the objection is well taken. It is clear from the pleaded facts that the plaintiff was in breach of the aforementioned Directive (Instruction) 01/2017. That the plaintiff was ultimately acquitted, based on the appeal tribunal's finding that the disciplinary tribunal of first instance should have held that he had a reasonable excuse for being non-compliant, does not, without more, imply or establish the absence of a reasonable cause for the institution of the proceedings. The third ground of exception will accordingly also be upheld.

[14] The fourth ground of exception is that the pleaded claim for compensation for two months' loss of income is vague and embarrassing because it appears from the plaintiff's representatives' letters to the defendants, which are annexed to the pleading, that the City had already made good the plaintiff's lost income following on the reversal on appeal of the sanction of summary dismissal. I refer in this regard to my description of the relevant part of the pleading in paragraph [5] above. I agree that the pleaded claim for loss of income is vague and embarrassing for the reason raised in the defendants' complaint. It is not at all clear what the alleged basis for the claim is.

[15] The fifth exception is directed at what appears to be an allegation in support of the plaintiff's claim for damages for malicious prosecution, viz. the allegation in paragraph 17 of the pleading that the defendants '*were under a duty to prevent such unjust allegations being brought against him*'. The defendants complain that there is no pleaded basis for the existence of the alleged duty. They say that the pleading is vague and embarrassing in the result. I think there is substance in this complaint too.

[16] Firstly, it is difficult to reconcile the pleaded allegation with the fundamental basis of the claim, which is that the defendants instituted the proceedings, rather than they caused someone not cited as a defendant to do so.

[17] Secondly, and this is by no means clearly apparent on the pleading, if the allegation was made in support of some sort of innominate delictual claim of an Aquilian action character, one not falling into the niche of malicious prosecution which is brought under the *actio iniuriarum*, then the defendants justifiably complain that no basis for the existence of the alleged duty in law has been pleaded. The facts upon which the existence of the duty and its alleged breach rest must appear in the pleading. A conclusion of law pleaded in a vacuum is not good enough to sustain a claim. The matter pleaded in paragraph 17 does render the pleading vague and embarrassing. The breach of a duty in law is ordinarily associated with the wrongfulness element in an Aquilian action. The allegation therefore does not appear to be relevant to either the defamation or the malicious prosecution claims, which do not resort under the Lex Aquilia. If it were intended to support a third head of claim, it is not clear what that head is. The fifth ground of exception will therefore be upheld.

[18] The sixth ground of exception was framed as follows:

‘In paragraphs 20 and 21 of the particulars, Plaintiff claims “damages” arising from the “charges, dismissal and defamation”.

Plaintiff fails to plead which alleged damages are attributable to (1) the charges; (2) the dismissal; and (3) the defamation. Stated differently, it is not apparent from the particulars which cause(s) of action resulted in which damages.

Moreover, successful claims for defamation or malicious proceedings entitle a plaintiff to payment of delictual “damages”. Such damages are not, however, -

- 1. loss of income or “medical expenses”; or*
- 2. “general damages for pain and suffering”,*

as claimed in paragraph 21 of the particulars.

The particulars are consequently vague and embarrassing.’

[19] The points are well taken. It is by no means clear what precisely the nature of the pleaded claims is. The pleading seems to be directed at advancing a claim for malicious prosecution and defamation, but, for some of the reasons already canvassed, even that is not certain. The resulting confusion is compounded by the plaintiff’s failure to plead severally the quantum of the damages he claims in respect of what may be discerned as a multiplicity of claims. The pleading falls signally short of compliance with Uniform Rule 18(10), which requires ‘a plaintiff suing for damages to set them out in such manner as will enable the

defendant reasonably to assess the quantum thereof'. I consider that the resultant vagueness is sufficiently prejudicial to the defendants to justify their having raised an exception. The sixth ground of exception is therefore also upheld.

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

1. The defendants' exceptions to the plaintiff's particulars of claim are upheld with costs.
2. The plaintiff is afforded 15 days within which to deliver amended particulars of claim.

A.G. BINNS-WARD
Judge of the High Court

Excipients' counsel:

Nick de Jager

Excipients' attorneys:

John MacRobert Attorneys

Tableview

Brevity Law

Cape Town

No appearance for the Plaintiff/Respondent.