



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

CASE NUMBER: 18320 / 2019

In the matter between:-

HYMIE ZILWA

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF TRANSPORT AND
PUBLIC WORKS**

First Defendant

MINISTER OF POLICE

Second Defendant

Coram: Wille, J

Heard: 11th of March 2021

Delivered: 18th of March 2021

JUDGMENT

WILLE, J:

Introduction

[1] This is an opposed application about some exceptions filed by the first and second defendants. The parties will be referred to as they have been cited in the action proceedings. The first and second defendants will be referred to as the defendants, unless specifically otherwise indicated. The defendants filed exceptions to the plaintiff's particulars of claim on the basis that such particulars of claim were vague and embarrassing and also lacked the necessary averments to sustain a cause of action.

[2] The plaintiff at the outset contends that the exceptions as filed by the defendants are defective in that same do not comply with the rules of the court.¹ The argument is that rule 18(1) provides that a combined summons and every other pleading, except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who has rights of appearance in terms of section 4(2) of the Act.²

¹ The Uniform rules of court

² Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995)

[3] It is so that when an attorney signs a pleading, not as an individual, but on behalf of a firm representing a litigant, it is incumbent upon that attorney to sign the pleading twice. The attorney must sign once in his capacity as the certified attorney and then once again on behalf of the firm of attorneys. The reference to section 4(2) should also now be read with reference to section 25(3) of the Legal Practice Act.³

[4] The exceptions filed by the defendants are both signed by the 'Office of the State Attorney' representing the defendants in terms of the State Attorneys Act.⁴ An exception is a pleading and therefore falls to be signed by both an advocate and an attorney or by an attorney enjoying the requisite certified rights of appearance.⁵ The exceptions in this matter are not signed by an attorney who exhibits that he has the necessary certified rights of appearance and they are also not signed by an advocate. The plaintiff submits that the exceptions as currently formulated are a nullity⁶, alternatively are fatally defective.⁷

[5] The defendants themselves in turn raise a technical point in connection with the signature of the particulars of claim on behalf of the plaintiff. The essence of this objection is that the attorney who signed the particulars of claim merely stated that he was so certified, but makes no reference to the actual legislation empowering him to do so. In my view, specific reference to the fact that the attorney was so certified, is sufficient.

³ Section 119 (3) of Act 28 of 2014

⁴ Act 56 of 1957

⁵ *Haarhoff v Wakefield* 1955(2) SA 425 (E)

⁶ *Lancino Financial Investments (Pty) Ltd v Bennett* 2006 JDR 249 (T)

⁷ *Icebreakers NO. 83 (Pty) Ltd v Medi Cross Healthcare Group (Pty) Ltd* 2011 (5) SA 130 at (D)

Factual Matrix

[6] In summary, the plaintiff's cause of action against the defendants is that he was unlawfully arrested in Laingsburg (for allegedly exceeding the speed limit), by traffic officers whilst in their course and scope of employment with the first defendant and similarly thereafter unlawfully detained by members of the second defendant.

[7] The plaintiff was detained from 17h00 until 23h00 and thereafter released. The plaintiff's claim is for unlawful arrest and for special and general damages suffered as a result thereof. The claim is against the defendants, jointly and severally, the one paying the other to be absolved. The liability of both of the defendants is for the unlawful and wrongful conduct of their employees' whilst acting in the course and scope of their employment. These claims are potentially under the provisions of sections (1) and (2) of the State Liability Act.⁸

Discussion

[8] The second defendant objects to the plaintiff's particulars of claim on the basis that the plaintiff fails to provide sufficient particularity in connection with the involvement of the second defendant's employees with his arrest and detention and as a result, the second defendant is unable to meaningfully answer to the plaintiff's claims as currently formulated.

⁸ Act 20 of 1957

[9] The plaintiff contends for the position that the second defendant is sued in these proceedings for the actions of the police pertaining to his unlawful detention. The particulars of claim aver that the first defendant's employees arrested the plaintiff, while the second defendant's employees thereafter unlawfully detained the plaintiff.

[10] Another ground of objection raised by the defendants is the averment that there is no clarity in the plaintiff's cause of action, nor is there clarity as to whether it is the first defendant's members or the second defendant's members that are implicated in the cause of action against them. It is clear from the formulation of the particulars of claim that the employees of the first defendant are implicated with the arrest of the plaintiff, whereas the employees of the second defendant are implicated with the plaintiff's subsequent detention.

[11] The second defendant also avers that the plaintiff has failed to set out his alleged damages in such a manner so as to enable the second defendant to reasonably assess the quantum thereof as required by the court rules.⁹ On this score, the plaintiff tabulated the quantum of his damages as follows: he set out exactly how much he has claimed for his unlawful arrest: he set out how much he has claimed as general damages: he set out how much he has claimed for *contumelia* and he sets out how much he has claimed as a result of his unlawful detention. Finally, he also sets out his special damages as listed under (3) separate headings.

⁹ Rule 18 (10)

[12] To this end it is trite that there is no obligation on the plaintiff to plead evidence. The defendants are in a position to plead to the plaintiff's averments in connection with the quantum of his alleged damages. If they believe that the amounts claimed are unreasonable or do not accord with previous awards made in cases of a similar nature then they are clearly in a position to plead accordingly.

[13] The final objection raised by the defendants is the allegation that the National Prosecuting Authority was not cited as a party to these proceedings. The argument is that no cause of action is accordingly disclosed. In contrast to this, the plaintiff submits that in our adversarial system it is for the parties to set out and define the nature of their disputes and it is for the court to adjudicate upon those disputes.¹⁰ I agree.

[14] The plaintiff in this case is at liberty to determine the extent of the claims that he intends to pursue and against whom such claims are to be directed. The fact that the plaintiff has not cited a particular person does not necessarily make his claim the subject of an exception. In any event, on a reading of the material before me, the defendants will have some difficulty in raising the shield of a non-joinder or a misjoinder in connection with the alleged failure to cite the National Prosecuting Authority as a party to the action.

[15] In summary, the defendants raise similar grounds of objection in their exceptions to the plaintiff's particulars of claim. When the court is faced with an exception on the basis that a pleading is vague and embarrassing, a two-fold enquiry applies, namely: that

¹⁰ *Fischer v Ramahlele* 2014(4) SA 614 (SCA)

the court must first consider whether the pleading lacks particularity to such an extent that it is vague and if there is vagueness, the court must then ascertain whether such vagueness causes embarrassment of such a nature that the excipient is prejudiced.¹¹

[16] The onus to establish these requirements rests with the excipient. The approach to be adopted is that an exception should not be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged.¹² Besides, an exception that a pleading is vague and embarrassing must strike at the formulation of the cause of action and not at its validity. Accordingly, it falls to be directed at the whole cause of action and not at a particular paragraph within the pleaded cause of action.¹³

[17] An exception must of a matter of law go to the root of the entire claim and more importantly, the onus rests squarely on the excipient to persuade the court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action would be disclosed.¹⁴ Put in a different way, an exception will be upheld only, if no possible evidence led on the pleadings can sustain a cause of action.¹⁵

[18] The object of an exception is to dispose of the case or a portion thereof in an expeditious manner.¹⁶ This is a procedure designed to obtain a decision on a point of law

¹¹ *Hlophe v South African Reserve and Another* 1992(3) SA 208

¹² *Francis v Sharp and Others* 2004 (3) SA 230 (C)

¹³ *Nel and Others NNO v Mc Arthur and Others* 2003 (4) SA 142 (T)

¹⁴ *Francis v Sharp* 2004 (3) SA 230 (C)

¹⁵ *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA)

¹⁶ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A)

which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at trial. If it does not have this effect, the exception should not be upheld.¹⁷

[19] The test to be applied is somewhat diluted in connection with an exception advancing that a pleading is vague and embarrassing. Prejudice is the threshold in this latter case and an exception will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged.¹⁸ The onus is on the excipient to show both vagueness amounting to embarrassment and the embarrassment, in turn, amounting to prejudice.

[20] The objections¹⁹ filed by the defendants, in my view have not been properly signed in accordance with the court rules and fall to be struck out. Fortunately, I do not however have to make a definitive finding in this connection because the facts and circumstances upon which the plaintiff intends to rely at the hearing of the trial action have been sufficiently pleaded and the defendants know exactly what case they have to meet at the trial.

[21] In all the circumstances, I am of the considered view that the particulars of claim, as formulated, disclose a valid and proper cause of action against the defendants and I am also of the view that the particulars of claim are not vague and embarrassing. Put in another way, the defendants know exactly what case they have to meet at the trial.

¹⁷ *Miller v Bellville Municipality* 1971 (4) SA 544 (C)

¹⁸ *Leviton v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C)

¹⁹ In the defendants' notices of exception

[22] In the result, the following order is made:

1. That the exceptions are dismissed
2. That the defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of and incidental to the exception proceedings (*including the costs of two counsel where so employed*), on the scale as between party and party, as taxed or agreed.

E D WILLE

**Judge of the High Court
Western Cape Division**