In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No:16925/2021

In the matter between:

PETER FLENTOV **Plaintiff**

and

GARY NEIL TRAPPLER **First Defendant**

DENIS LESLIE DYASON **Second Defendant**

SEAN CROOKSON **Third Defendant**

PAUL S JACOBSON **Fourth Defendant**

JUDGMENT – APPLICATION TO STRIKE OUT: 06 FEBRUARY 2023

LEKHULENI J

[1] For the sake of completeness, the parties are cited as in convention. The plaintiff issued summons against the four defendants claiming damages based on seven different causes of action, all of which are based on defamation. The defendants, in particular the first defendant, defended the action and also instituted this interlocutory application in which he seeks an order striking out paragraphs 6 to

10 of the plaintiff's particulars of claim in terms of the provisions of Rule 23(2)(a) of the Uniform Rules. The first defendant also seeks a cost order against the plaintiff on a punitive scale, including counsel costs.

[2] The impugned paragraphs in the particulars of claim that the first defendant is complaining about state as follows:

'[6] On or about 19 February 2020, the first defendant was accused of and/ or implicated in the commission of a criminal offence, when he allegedly slashed two tyres of a motor vehicle leased by a local Green Point resident, Ms Thandi Mgwaba ("Ms Mgwaba") and which vehicle was parked opposite or near the first defendant's residence at 1[…] S[…] Street, Green Point, Western Cape.

[7] The first defendant was arrested by the South African Police Service ("SAPS") on 20 February 2020 and released on 21 February 2020.

[8] It is the standard practice of the GPNW and/or some of its members, including the plaintiff, to report all local incidences of crime on two or more community WhatsApp chat groups ("the *WhatsApp* chat groups"), without necessarily naming the individuals involved.

[9] The abovementioned:

9.1 alleged offence involving Ms Mgwaba; and

9.2 the first defendant's arrest;

Were reported, by the plaintiff, on 20 February 2020 on the *WhatsApp* chat groups, without naming the first defendant. A copy of the posts of the plaintiff is annexed hereto, marked as annexure PF1.

[10] After his release on 21 February 2020, *post* his arrest, the first defendant himself published, on different dates and via different social media platforms, the fact that he was arrested by the SAPS pursuant to the alleged offence involving Ms Mgwaba, as pleaded above.'

[3] On 11 November 2021, the first defendant delivered a notice in terms of Uniform Rule 23(2)(a) in which he gave the plaintiff notice to have paragraphs 6 to 10 of the plaintiff's particulars of claim struck out on the basis that these paragraphs are scandalous alternatively, vexatious alternatively, irrelevant. On 2 December 2021, the plaintiff delivered a notice in terms rule 23(2)(a) in which the plaintiff indicated that he does not intend to amend his particulars of claim as paragraphs 6 to 10 thereof, are neither scandalous, vexatious, nor irrelevant. On 25 January 2022, the first defendant launched this application and sought an order to strike out paragraphs 6 to 10 of the plaintiff's particulars of claim as he alleges that these paragraphs are scandalous and irrelevant.

[4] Rule 23(2) of the Uniform Rules which deals with striking out applications provides as follows:

'(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)*(f)*: Provided that —

(a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and

(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.'

[5] At the hearing of this application, Mr Fehr, who appeared for the first defendant, contended that the plaintiff's claims that the first defendant defamed or

humiliated and degraded him is set out under four separate headings in his particulars of claim, namely; claim A, B, C and E. In respect of each claim, the plaintiff sets out what he considers the offending statements made by the first defendant about him. Counsel contended on behalf of the first defendant that paragraphs 6 to 10 of the plaintiff's particulars of claim do not relate to the plaintiff's claims against him. These paragraphs, so the argument went, relate to an alleged criminal act which in no way relates to the alleged defamation or injuria allegedly suffered by the plaintiff. Mr Fehr submitted that to prove defamation or injuria, the plaintiff must show that the first defendant published defamatory and harmful material about the plaintiff. To this end, paragraphs 6 to 10 of the plaintiff's particulars of claim relate to an alleged criminal act which is irrelevant to a claim for defamation. Counsel further submitted that it would be prejudicial for the first defendant to plead to these allegations which may be an ongoing criminal matter.

[6] The plaintiff on the other hand, denied that the impugned paragraphs of his particulars of claim are irrelevant or vexatious. Mr Corbett who appeared on behalf of the plaintiff in this application, asserted that the allegations in respect of which evidence will be admissible at the trial are all pleaded in paragraphs 6 to 10 of the plaintiff's particulars of claim. Mr Corbett submitted that even if the contents of paragraphs 6 to 10 were irrelevant, it could not be denied that the allegations therein sketch out a history to the acts of defamation of the second defendant, against the plaintiff. Counsel further asserted that in terms of our law, irrelevant matters pleaded as history will not be struck out.

[7] It is trite that immaterial and irrelevant allegations should be struck out, especially when they advance damaging, vague, and unsubstantiated allegations regarding a party's conduct. See *University of Free State v Afriforum and Another* 2017 (4) SA 283 (SCA). A decision on whether or not to strike out is discretionary in nature. See *Rail Commuter's Action Group v Transnet Ltd* 2006 (6) SA 68 at 83E. The key consideration is that of prejudice. In *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) para 76, the court observed that allegations that are scandalous or vexatious may, in the court's discretion, be struck out of a pleading, only if the court is satisfied that the applicant for the striking-out will be prejudiced in the conduct of his defence if the application is not granted. Notably,

‘irrelevant’ for the purpose of Rule 23 means irrelevant to an issue or issues in the action. All that concerns the court is whether or not the passage or passages sought to be struck out is relevant to raise an issue on the pleadings. If the court doubts the relevancy of any matter, such matter will not be struck out. See *Golding v Torch Printing and Publishing Co. (Pty) Ltd and Others* 1948 (3) SA at 1090.

[8] I have considered the contents of paragraphs 6 to 10 of the plaintiff’s particulars of claim, and I am not persuaded at all that the impugned allegations are either irrelevant, scandalous, or vexatious. In my view, they are pivotal to the plaintiff's claim against the first defendant. It can hardly be said that these averments have been pleaded merely for abusing or prejudicing the first defendant. The first defendant asserts that the plaintiff is using his particulars of claim to defame and lie about him in regard to his action proceedings, and that this is clearly prejudicial to him because it could create a negative impression about him in the mind of the trial judge. I disagree.

[9] It must be stressed that the plaintiff's case against the first defendant in claim A is based on an affidavit the first defendant made in his application for a protection order against the plaintiff at Cape Town Magistrate's Court. That statement was attached to the plaintiff’s particulars of claim. In that affidavit, the first defendant freely and voluntarily disclosed to the court the allegations referred to in paragraphs 6 to 10 of the plaintiff’s particulars of claim. In particular, the first defendant stated in that affidavit that ‘partly as a consequence of the plaintiff’s cooperation with the complainant in the vandalism matter, and partly as a result of the plaintiff’s association with an alleged regional director of the EFF Western Cape, he was arrested on the evening of 20 January 2020 and held in police custody until the following morning when he was taken to court’. In my view, paragraphs 6 to 10 of the particulars of claim cannot be said to be irrelevant and vexatious as the first defendant, in addition to the above, published on different social media platforms the fact that he was arrested pursuant to the alleged offence preferred by Ms Mgwaba.

[10] The first defendant listed the reasons for his application in his founding affidavit. Among others, the first defendant stated that the allegations in motion proceedings must be limited to the facts necessary for the plaintiff to rely on to prove

his case. Furthermore, the first defendant avers that these paragraphs have the potential to harm his reputation in the eyes of the trial judge. To my mind, even if this court were to strike out paragraphs 6 to 10 of the particulars of claim, these allegations would inevitably come to the attention of the trial judge. These paragraphs are the substratum of the plaintiff's case. The affidavit in support of the first defendant's application for a protection order is the provenance of the plaintiff's case against the first defendant. It is expected that this affidavit attached to the summons will be discovered during the trial proceedings and will definitely come to the trial judge's attention.

[11] In my opinion, the impugned allegations are relevant to the issue to be determined by the court at the trial. As correctly pointed out by the plaintiff's counsel, the issue in Claim A, is whether the first defendant defamed the plaintiff by deposing to an affidavit, pursuant to which a protection order was granted in the first defendant's favour against the plaintiff. Furthermore, the issue is whether the second defendant defamed the plaintiff by deposing to an affidavit pursuant to which a protection order was granted in the second defendant's favour against the plaintiff. Significantly for present purposes, the issue is whether those allegations relate to the alleged actions of the plaintiff, which led to the first defendant being arrested in respect of a criminal offence against Ms Thandi Mgwaba.

[12] The test to determine relevance to the issues at hand discussed above, is whether or not admissible evidence could be led at the trial on the impugned allegations in paragraphs 6 to 10 of the particulars of claim. If evidence on certain facts (on the impugned allegations) would be admissible at the trial, those facts, cannot be regarded as irrelevant as pleaded. See *Golding v Torch Printing and Publishing Co. (Pty) Ltd and Others* 1948 (3) SA at 1090.

[13] To this end, I agree with the views expressed by Mr Corbett that there can be little doubt that to determine the issue in claim A, evidence will be admissible at the trial about whether the first defendant was arrested on 20 February 2020 and released on 21 February 2020. Admissible evidence will be led to determine whether it was standard practice of the Green Point Neighbourhood Watch and or its members, including the first defendant, to report local incidences of crime on

WhatsApp chat without necessarily naming the individuals involved and whether the plaintiff reported the alleged offence and the first defendant's arrest without naming the first defendant.

[14] In my view, admissible evidence will also be led at the trial in respect of the allegations pleaded in paragraphs 6 to 10 of the particulars of claim. The impugned allegations in my opinion, are relevant to the issue and they should stand. Furthermore, it cannot be denied that paragraphs 6 to 10 of the summons set out the history of the alleged acts of defamation of the plaintiff. These paragraphs set out how the chronology of events unfolded until the alleged defamatory statements were made against the plaintiff. It is indisputable that it was pursuant to the arrest of the first defendant which led to the publication of the allegedly defamatory statements against the plaintiff. It is trite that the pleading of history for the sake of clarification is permissible in law. It is also a basic principle of our law that a history of a case is permissible as an introduction to allegations founding the cause of action. See *Ahlers NO v Snoeck* 1946 TPD at 594; *Rail Commuter's Action Group v Transnet Ltd* 2006 (6) SA 68 at 83E.

[15] On a conspectus of all the facts placed before this court, I am of the view that the first defendant's application must be dismissed. No case was made out for the relief sought. The plaintiff sought an order dismissing the first defendant's application with costs on an attorney and client scale since the first defendant has not advanced any substantive case either in fact or in law which justified the order sought. The plaintiff also contended that he has been put to incur unnecessary expenses.

[16] It is a trite principle of our law that a court considering an order of costs exercises a discretion that must be exercised judicially. *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC). I believe that a punitive costs order against the first defendant is not warranted. More so, the scale of attorney and client sought by the plaintiff against the first defendant is extraordinary. It should be reserved for cases where it can be found that a litigant conducted himself in a clear and indubitably vexatious and reprehensible manner. See *Plastic Converters Association of South Africa on behalf of Members v National Union of Metal Workers of SA* [2016] 37 2815 (LAC) para 16.

[17] In my view, it cannot be said that the first defendant's application is dishonest or vexatious and that he engaged in conduct that amounts to an abuse of the court process that would warrant an award of costs on an attorney-client scale against him. See *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8.

ORDER

[18] In the result, the following order is granted:

18.1 The first defendant's application to strike out paragraphs 6 to 10 of the plaintiff's particulars of claim is hereby dismissed with costs. Such costs to include the costs of counsel.

LEKHULENI JD
JUDGE OF THE HIGH COURT