

SOUTH AFRICA / JUDGMENT

Disipi v Member of the Executive Council for Health : Northern Cape Province (183/2023 ; 182/2023) [2024] ZANCHC 117 (13 December 2024) [2024] ZANCHC 117

COURT

Northern Cape High Court, Kimberley

BEFORE

MC Mamosebo

CASE / FILE NUMBER

183/2023 ; 182/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No:

183/2023

In the matter between:

KEITUMETSE JUDIA DISIPI

Respondent/Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH: NORTHERN CAPE PROVINCE Applicant/Defendant

AND

182/2023

KGOTHASO DEWI DISIPI

Respondent/Plaintiff

Heard on:

25/10/2024

Delivered on: 13/12/2024

Summary: Application: Rule 30(1) r/w 18(12) Uniform Rules of Court. Defendant seeks declarator that plaintiff's Particulars of Claim constitute an irregular step and does not comply with Rule 18(4) and (10).

ORDER

In the result the following order is made:

In Case 182/2023

1. The Particulars of Claim under Case No 182/2023 are set aside.
2. The respondent/plaintiff, Kgothatso Dewi Disipi, shall amend the Particulars of Claim dated 31 January 2023 to comply with Rule 18(4) and (10) within twenty days of the date of this order.
3. The respondent/plaintiff is to pay the taxed or agreed costs of this application, including the cost of counsel, on scale C.

In Case 183/2023

1. The Particulars of Claim under Case No 183/2023 are set aside.
2. The respondent/plaintiff, Keitumetse Judia Disipi, shall amend the Particulars of Claim dated 31 January 2023 to comply with Rule 18(4) and (10) within twenty days of the date of this order.

JUDGMENT: RULE 30(1) OF THE UNIFORM RULES OF COURT

MAMOSEBO ADJP

- [1] The plaintiffs, Kgothatso Dewi Disipi in Case No 182/2023 and Keitumetse Judia Disipi in Case No 183/2023 issued summons claiming damages against the Member of the Executive Council for Health in the Northern Cape, (the defendant), arising from the alleged negligence of the defendant's employees whilst providing treatment to Neil-Heroldt Donald Van Wyk on 13, 18 and 23 January 2015 at Dr Harry Surtie Hospital in Upington. Kgothatso is acting in his personal capacity and Keitumetse in her personal capacity as well as her representative capacity as mother and guardian of her two minor children TPD and OLD. I considered the matters conjunctively.
- [2] The defendant brought this application in terms of Rule 30(1) read with Rule 18(2) of the Uniform Rules of Court, seeking an order that the plaintiffs' Particulars of Claim dated 31 January 2023 constitute an irregular step as it does not comply with the provisions of Rule 18(4) and (10).

- [3] The plaintiffs raised two points in limine. I deal with the two points first because they may be dispositive of the application. First, the plaintiffs contend that the defendant did not file the Rule 30(2)(b) notice within the 10-day period after becoming aware of the irregularity and has further not sought any condonation for the late filing thereof. In countering these averments, the defendant furnished the following explanation that puts paid the point that the Rule 30(2)(b) was filed out of time. Despite summons having been issued on 31 January 2023 it was only served on the defendant on 15 March 2023. Ms Naledi Giemienah Mongale filed a confirmatory affidavit confirming the service date of the summons and particulars of claim by placing a date stamp of the legal services of the Department of Health dated 15 March 2023. Regard being had to the public holidays of 21 March 2023, Good Friday 7 April 2023 and Family Day 10 April 2023, the plaintiff had until 17 April 2023 to remove the cause of the complaint. At the lapse of that period, it remained open to the defendant within the 15-day period to bring the Rule 30 application. The defendant brought this application on 10 May 2023. I am satisfied that the Rule 30(2)(b) notice was filed within the prescribed limits and this point in limine stands to fail.
- [4] In as far as the second point raised that the MEC has ‘taken a further step’ in the proceedings by filing a notice in terms of Rule 35(14) on 24 April 2024 and should therefore be precluded from proceeding with the notice of application in terms of Rule 30(1) dated 10 May 2023. Erasmus[1] sheds the following light pertaining to the phrase ‘taken a further step in the cause’: A further step in the cause is some act which advances the proceedings one stage nearer to completion. Notice of intention to defend is not a further step in that sense but is merely an act done with the object of qualifying the defendant to put forward his defence. A party takes a further step in the cause by filing of a declaration, a notice of bar, a plea in response to an irregular notice of bar, a replication, or an answering affidavit, but not by filing a notice in respect of furnishing security. Steps taken in preparation of trial, such as requesting particulars for trial, serving a notice to produce, and convening and attending a pre-trial conference, are further steps in the cause.
- [5] Rule 35(14) stipulates that after appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to –
- (a) Make available for inspection within five days a clearly specified document or tape recording in such party’s possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof; or
 - (b) State in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or
 - (c) State on oath, within 10 days, that such document or tape recording is not in such party’s possession and in such event to state its whereabouts, if known.
- [6] These are the documents sought from the plaintiff by the MEC on 24 April 2023 for purposes of pleading:

1. Identity document of the plaintiff;
 2. Identity document of the deceased;
 3. Death certificate of the deceased;
 4. Unabridged birth certificate of TPD;
 5. Unabridged birth certificate of OLD;
 6. Copies of all reports on which the plaintiff's claim is based.
- [7] The question that stands to be answered is whether these documents constitute a further step in the cause and advance the proceedings one step nearer to completion and as argued by the plaintiffs the court should non-suit the defendant. Taking cue from the principle enunciated in *Arendsnes Sweefspoor CC v Botha*[2] where Shongwe JA explained:

'[18] It is trite that the rules exist for the courts, and not the courts for the rules. See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A – B; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); and *Ncoweni v Bezuidenhout* 1927 CPD 130, where it was pertinently observed that:

...'The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it and where the Rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice.

Of course, if one is absolutely prohibited by the Rule, one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.'

Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this — see *Simmons, NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case; in essence it is a matter of fairness to both parties (see *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363G – H).

- [19] With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. 'The rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process.' And rules 'are provided to secure the inexpensive and expeditious completion of litigation' and are 'devised to further the administration of justice' (see 4 LAWSA 3 ed paras 8 – 10 et seq). (See also *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A) at 369F – H.) Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see *Highfield Milling Co (Pty) Ltd v AE Wormald & Sons* 1966 (2) SA 463 (E) at 465F – G)

[8] The ambit of this rule is narrower than that of rule 35(12) see *Cullinan Holdings Limited v Mamelodi Stadsraad*[3] in that the documents are limited to those required for purposes of pleading. Mr Salie SC, invoking *Katekani Investments v MEC Human Settlements, Gauteng*[4], contended, correctly so in my view, that the documents sought would not advance the proceedings nearer to completion. It is for this reason that I find the point taken to be without merit and stands to be dismissed.

[9] Rule 18 provides that:

‘(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.

(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of his injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for –

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of –

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and

(d) Disfigurement, with a full description thereof and stating whether it is temporary or permanent.’

[10] The defendant objected to the particulars of claim and filed a notice in terms of Rule 30(2)(b) maintaining that they are not compliant with Rule 18(4) read with 18(10) and ought to be deemed to be an irregular step.

[11] These are the impugned particulars in both Case 182/2023 and 183/2023 at paras 6.9 and 6.10:

‘6.9 The post-surgery sepsis developed as a result of the negligent surgery or negligent surgical procedures and or negligent treatment in that during the first and second operation an intestine was folded and then unfolded to prevent infection transmission from the inflamed appendix and it was thought to be the cause of sepsis, however a third operation had to be performed wherein it was also discovered that one of the healthy intestines had a surgical cut confirming the real cause of the sepsis, however the patient had already passed.

6.10 The staff at the hospital owed the deceased a duty of care but failed to provide such as expected of medical professionals. The standard in which this operation was done was below par.

[12] The plaintiff alleges that the patient developed sepsis whilst under treatment of the hospital staff at Dr Harry Surtie Hospital. It is contended by the defendant that the plaintiff does not allege from which of the three surgeries the sepsis arose. Plaintiff does not specify which of the operations were the standard below par. The defendant contends that he cannot determine what the alleged cause and/or associated risk of the sepsis is, in the result he is unable to plead.

[13] Plaintiff further pleads in para 8 of the particulars that the employees at the hospital breached the terms of the agreement with the deceased and failed to examine, treat and care for the deceased with the skill, competence, diligence and care reasonably expected of doctors and other professional staff in the employ of the hospital, in that they failed:

‘to monitor the progress of the patient post-surgery; recognise the patient distress post-surgery; to take appropriate steps to address

the patient condition of declining blood pressure and the increase in the pulse rate; to refer the patient at an alternative, adequately

equipped and staffed health care facility in circumstances where they could and should have done so; and to assess, diagnose and surgically treat the deceased with the degree of skill and expertise with which they could and should have done so in the circumstances.’

[14] The defendant’s response to the aforementioned is that the plaintiff has failed to allege material facts which demonstrates that the deceased required monitoring post-surgery and that the defendant’s employees failed to monitor the progress of the deceased post-surgery; to demonstrate how the defendant’s employees have failed to recognise the deceased’s distress post-surgery; how the defendant’s employees have failed to recognise the declining blood pressure and increasing pulse rate; of the steps that should have been taken to address the patient’s declining blood pressure and increasing pulse rate and how that was the cause of his death; substantiating the necessity for a referral of the deceased to an adequately equipped and staffed health care facility, and which health care facility should the deceased have been referred to. The defendant maintains that the particulars do not contain a clear and concise statement of the material facts upon which the plaintiffs rely for their claim to enable him to plead thereto.

[15] In as far as Rule 18(10) is concerned, the defendant contends that because the plaintiffs are suing for damages they ought to set them out in such a manner as will enable the defendant to reasonably assess the quantum thereof. For example, in para 10 of their particulars, Kgothatso claims R1.2 million and Keitumetse R4 million. The plaintiffs allege that as a result of the negligent conduct of the nursing staff and or the doctors’ negligence, they have suffered damages in the stated sums comprising: (a) past loss of support, (b) future loss of support; (c) general damages: emotional shock and mental suffering; and (d) Constitutional

damages.

- [16] The defendant maintains that the plaintiffs have failed to set out the claims for damages with particularity to enable the defendant to reasonably assess the quantum thereof. The objection is that the manner in which they have pleaded lack particularity and are not compliant with Rule 18(10).
- [17] In paragraph 4.2 of the particulars, the plaintiffs allege that the deceased was the sole breadwinner and or provider for his wife and children and as such liable for the maintenance of his dependants. The particulars are silent in respect of the details pertaining to the deceased's employment including his salary at the time of death as well as the type of maintenance and support are not specified. The plaintiffs have failed to furnish the following information with particularity, the criticism went: the exact loss of support to date; what the alleged future loss of support is; how they arrived at those amounts; until which age would the loss of support be provided to the minor children but for the death of the deceased; how past medical expenses were made up; and how the amounts of R1.2 and R4 million were determined and calculated in respect of each plaintiff. See *Grindod (Pty) Ltd v Delport*.^[5]
- [18] The final complaint pertains to non-compliance with Rule 18(1) that requires that the combined summons and every other pleading must be signed by both an Advocate and an attorney or in the case of an attorney, it must be an attorney with the right of appearance in the High Court. The objection is that the papers were signed only by Ms Makula of Makula Attorneys and not by an Advocate or attorney with the right of appearance in the High Court.
- [19] The defendant submitted that as an Organ of the State it is subject to the provisions of the Public Finance Management Act 1 of 1999 and must manage the liabilities of the department effectively. The non-compliance of the plaintiffs with Rule 18 will cause the defendant prejudice because it will be unable to investigate the allegations set out in the particulars of claim and to further assess the quantum claimed to establish the value of the claim. He will also be unable to ascertain the case he has to meet and cannot, with the current pleading, ascertain whether to defend or settle the matter.
- [20] Ms Makula, for the plaintiffs, maintains that there is compliance with Rule 18(4). Relying on *Jowell v Bramwell-Jones*^[6] she submitted that the particulars must state the facts and not the evidence to be relied on at the trial. According to the plaintiffs,

the particulars set out the material facts upon which the plaintiffs rely, namely, the deceased underwent three surgical procedures for the treatment of appendicitis; the death of the deceased was caused by sepsis that arose following the surgeries; the claim asserts negligence during one or more of these surgeries which caused or contributed to the sepsis. Ms Makula, invoking *Trope v South African Reserve Bank*,^[7] argued that the reply pertaining to the quantum of damages as pleaded is sufficient and complies with Rule 18(10).

[21] It is necessary for the parties to plead with sufficient particularity to enable the other party to know and understand the case he or she or it must meet. In *HAL obo MML v MEC for Health, Free State*[8] the SCA remarked about the medical report that the pleadings were based on, as follows[9]:

‘As was to be expected the report said nothing about the cause of the injury or what, if anything could have been done by the hospital

staff to prevent the injury or ameliorate its consequences.’

[22] Following the stance adopted by the plaintiffs’ attorney pertaining to the non-compliance with Rule 18(4) requirements, the illuminating remarks by Wallis JA[10] are quoted in full:

‘[190] The necessary consequence of this was that the particulars of claim were based entirely on the imagination of the attorney who drafted them, rather than any endeavour to comply with the Uniform Rules governing pleadings. Rule 18(4) requires a pleading to contain a clear and concise statement of the material facts upon which the pleader relies for the claim, with sufficient particularity to enable the opposite party to reply thereto. The latter is obliged by rule 18(5) not to plead evasively, but to meet the point of substance. If that point does not emerge from the particulars of claim they cannot do this.

[193] Not content with this exercise in obfuscation, the pleader added a further paragraph with 18 subparagraphs of equally general allegations about the hospital staff, culminating with the allegation that they failed to prevent MML from suffering a hypoxic-ischemic incident, causing him to suffer severe brain damage, as a result of which he suffers from cerebral palsy and mental retardation, when by the exercise of reasonable skill, care and diligence they could have done so. One can allow a measure of generality in pleading allegations of negligence, but simply to allege everything the pleader can conjure up as potential negligence is unacceptable. There needs to be clarity as to the case being made and the nature of the impugned conduct on the part of the defendant, or those for whose conduct the defendant is said to be liable, who must at the least be identifiable.’

[23] The pleadings are, in my view, lacking in particularity because they do not specify the facts giving rise to the claim but comprise general statements. I am therefore persuaded that the plaintiffs in both matters have failed to comply with the requirements of Rule 18(4).

[24] The pleaded particulars relating to damages are just as vague. Ms Makula argued that the amounts of R4 and R1.2 million are but an estimate because they are yet to consult experts. She does not agree with the submission made by Mr Salie that the defendant stands to suffer prejudice. The submission by Ms Makula that the plaintiff can still amend the particulars on the date of hearing is without merit because the defendant must plead sensibly to the particulars of claim.

[25] I am equally not satisfied that the quantum of the plaintiffs' claims for damages is based on the facts as there is nothing to support the basis upon which it has been reached. The plaintiff is enjoined by the rules when claiming damages to provide sufficient information to enable the defendant to know the basis upon which that amount is founded and claimed. It follows that the defendant has made out a proper case of the plaintiff's failure to comply with the requirements of Rule 18(10).

[26] On the issue of costs, there is no reason why costs should not follow the result.

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

In Case 182/2023

In Case 183/2023

2. The respondent/plaintiff, Keitumetse Julia Disipi, shall amend the Particulars of Claim dated 31 January 2023 to comply with Rule 18(4) and (10) within twenty days of the date of this order.

MC MAMOSEBO

ACTING DEPUTY JUDGE-PRESIDENT OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the applicant/defendant: Adv. M Salie SC

Instructed by:

Robert Charles Attorneys & Conveyancers Inc

For the respondent/plaintiff: Ms EZ Makula

Instructed by:

Makula Attorneys

c/o Magoma Attorneys

[1] Erasmus, Superior Court Practice, Second Edition, Volume 2 Juta, [Service 20, 2022] D1-354

[2] Arendsnes Sweefspoor CC v Botha 2013 (5) SA 399 (SCA) paras 18 and 19

[3] Cullinan Holdings Limited v Mamelodi Stadsraad 1992 (1) SA 645 (T)

[4] Katekani Investments v MEC Human Settlements, Gauteng, unreported judgment Case No 2021/14457 delivered 1 September 2023, Gauteng Local Division, Johannesburg, para 11

[5] 1997(1) SA 342 (W) at 346G – J

[6] 1998

- (1) SA 836 (W)
- [7] 1992
- (3) SA 208 (T)
- [8] HAL OBO MML v MEC for Health, Free State 2022 (3) SA 571 (SCA)
- [9] Ibid, para 189
- [10] Ibid para 190 and 193
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