

SOUTH AFRICA / JUDGMENT

Gibela Rail Consortium RF (PTY) Ltd v Ndobe (4241/2020) [2022] ZAGPJHC 684 (14 September 2022) [2022] ZAGPJHC 684

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala

CASE / FILE NUMBER

4241/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 4241/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
14
September 2022
In

the matter between:

GIBELA
RAIL CONSORTIUM RF
(PTY)
LTD
APPLICANT/EXCIPIENT
And
RODGERS
NDOBE
RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 14th September 2022

TWALA J

[1] The applicant, who is a defendant in the main action, brought this application against the respondent seeking an order in the following terms:

1.1 That the respondent's entire amended particulars of claim, dated 28 April 2021, be struck out for failing to disclose a cause of action and or being vague and embarrassing and or failing to comply with Rule 18 of the Uniform Rules as more fully set out in this Honourable Court's judgment dated 15 April 2021;

1.2 In the alternative to paragraph 1.1 above, that the respondent's claim be dismissed for the respondent's failure to comply with this Honourable Court's judgment dated 15 April 2021;

1.3 That the respondent pays the costs of this application.

[2] It is common cause that the respondent issued summons against the applicant in which it claimed payment of the sum of R5 million for damages it suffered as a result of the publication of a defamatory report compiled by the applicant on the manner respondent conducted itself whilst in the employ of the respondent. On receipt of the summons, the applicant filed a notice of exception and later launched an application excepting to the respondent's particulars of claim to the summons in that they do not disclose the cause of action and are vague and embarrassing. The exception was opposed by the

respondent which culminated in a judgment and order that was handed down by Malindi J on the 15th of April 2021. The order directed the respondent to amend its particulars of claim and remove the cause of complaint.

[3] In May 2021 the respondent filed its amended particulars of claim as directed by the Court order of the 15th of April 2021. Not entirely satisfied with the amendment to the particulars of claim filed by the respondent, the applicant launched these proceedings to strike out the amended particulars of claim for failing to disclose a cause of action and or being vague and embarrassing. In the alternative, the applicant sought the respondent's claim to be dismissed for failing to comply with the Court order of the 15th April 2021.

[4] It is trite that where any pleading is vague and embarrassing or lacks the averments which are necessary to sustain an action, the opposing party may deliver an exception thereto and may set it down for hearing in terms of the rules of court. In casu, the applicant obtained a Court order against the respondent which directed the respondent to amend its particulars of claim in order to remove the cause of complaint. Subsequently the respondent filed its

amended particulars of claim as directed by the Court order. The issue that serves before this Court is whether the amended particulars of claim have removed the cause of complaint as directed by the Court order and or do disclose the cause of action. If not, what are the remedies

available to the applicant.

- [5] If after the respondent has effected the amendment to the particulars of claim but they still do not disclose a cause of action, then the applicant's remedy was to lodge an objection to the amended particulars of claim. Having failed to lodge an objection to the amended particulars of claim, the applicant's other remedy was to file another exception directed to the new pleading (i.e. the amended particulars of claim) for failing to disclose a cause of action. It is a trite proposition that the applicant should first afford the other party an opportunity to remove the cause of complaint, by giving a notice of exception. The applicant has failed to give the respondent a notice excepting to the amended particulars of claim nor did it launch an application to except to the amended particulars of claim.
- [6] It is therefore not open to the applicant to simply bring an application to strike out the claim of the respondent when the respondent has filed an amendment to its particulars of claim which were held by the Court to be vague and embarrassing and lacking the necessary averments to sustain a cause of action. The irresistible conclusion therefore is that the application to strike out is premature and falls to be dismissed.
- [7] The issue that is central to the alternative relief sought by the applicant is whether the amended particulars of claim do comply with the Court order of the 15th of April 2021. It is therefore useful to restate the relevant paragraphs of the said Court order to put the matters into the correct context which are the following:

"The objections

Paragraph 22: A claim for defamation is that a defamatory statement was published about the plaintiff. In this case the respondent claims that the excipient published the report clandestinely prior to the disciplinary action against him he does not state:

22.1 who published the Report;

22.2 the method of publication and to whom;

22.3 when the Report was published or distributed;

22.4 whether fellow employees had come into possession of the report or that they reported to him what they had heard from others;

22.5 state how many employees came to hear about the contents of the Report prior to the disciplinary hearing;

22. 6 who, and how many people were responsible for generating the report;

22.7 who, and how many people were consulted with in generating the report;

22.8 who, and how many employees participated in the disciplinary hearing;

22.9 the basis for suing the excipient if an identified member(s) of the management, or any other person linked to the excipient 'leaked' the report.

Conclusion

Paragraph 33: Having considered the issues and grounds of exception above, I am satisfied that the excipient has made out a case for relief in terms of Rule 23(1). To recapitulate, vagueness and embarrassment complained about is the following:

33.1 the excipient does not know whether direct or vicarious liability is alleged. It is certainly not pleaded.

33.2 it is not pleaded who published the alleged defamatory material.

33.3 a general allegation is pleaded that publication was to other employees without identifying them if they would be called as witnesses.

33.4 considering the employer/employee relationship, and the relevant documents having formed part of a disciplinary action, whether the employer did anything beyond what is required which would strip it of any defences such as that the proceedings took place under a privileged occasion.

Paragraph 34: The details, read together with paragraph 22 must be provided.

Paragraph 36

I therefore make the following order:

1. The exception application is granted.
2. The respondent is directed to amend his particulars of claim to remove the above causes of complaint identified herein within (10) days of this order, failing which the excipient can return to Court on the same papers, supplemented as it may necessary, to seek an order dismissing the claim

3.

[8] Before embarking on the discussion of interpreting a Court order, it is salutary to remember the trite principles underlying the exception proceedings. An exception that a pleading does not disclose a cause of action or lacks the averments necessary to sustain an action strikes at the formulation of the cause of action and its legal validity. The complaint is not directed at a particular paragraph in the pleading but at the pleading as a whole, which must be demonstrated to be lacking the necessary averments to sustain a cause of action. Furthermore, it is trite that exceptions should be dealt with sensibly as they provide a useful mechanism to weed out cases without legal merit. However, an overly technical approach

should be avoided because it destroys the usefulness of the exception procedure. (See *Telematrix (Pty) Limited v Advertising Standards Authority SA* 2006 1 ALL SA 6 (SCA); 2006 1 SA 461 (SCA)).

- [9] Counsel for the applicant submitted that the amendment as pleaded does not comply with the Court order of the 15th of April 2021 in that it does not state the words used by the applicant that the respondent alleges to be defamatory. To ascertain the purpose of the Court order, the judgment should be read as a whole and not only to consider the order. The applicant agreed with the respondent that it has furnished so much information in its amended particulars of claim as if it was a founding affidavit but has failed to state the words that are alleged to be defamatory.
- [10] In the recent past, the Constitutional Court had an opportunity to deal with the issue of interpretation of documents in *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (11 June 2021) wherein it stated the following:

“Paragraph 65: This approach to interpretation requires that ‘from the outset one considers the context and the language together, with neither predominating over the other.’ In Chisuse, although speaking in the context of statutory interpretation, this Court held that this ‘now settled’ approach to interpretation, is a ‘unitary’ exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

Paragraph 66: The approach in *Endumeni* ‘updated’ the position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and knowledge at the time of those who negotiated and produced the contract.

- [11] It has been decided in a number of judgments that in interpreting a Court order or any other document, the starting point is to determine the manifest purpose of the order. The process of determining the purpose of the order involves a unitary exercise of considering the language used in light of ordinary rules of grammar, the context and purpose of the order and can only be achieved by reading and considering the whole judgment. It is plain from the judgment and order of the 15th April 2021 that the intention was to afford the respondent an opportunity to amend its particulars of claim in order to furnish such particularity and or to make such averments as to sustain a cause of action in order to enable the applicant to plead thereto without being embarrassed.

- [12] The respondent contended that it has complied with the order considering paragraph 22, 33, 34 and 36 of the judgment and the order. The respondent has given more details in its amended particulars of claim as ordered by the Court. There is no merit in the applicant's contention that the words alleged to be defamatory have not been stated in the amended particulars of claim. It is the whole report, so it was contended, that is defamatory for it was clandestinely published and contained incorrect information about the respondent.
- [13] The concern of the judgment and order of the 15th of April 2021 was that the respondent has not disclosed or mentioned the identity of the person who published the report and to whom was it published. These concerns were to be addressed and have been addressed by the amended particulars of claim. It should be recalled that the Court did not order the respondent to amend its particulars of claim to the extent that it proves the facts that are alleged therein. The respondent has furnished sufficient particularity in its amended particulars of claim and as such has complied with the Court order of the 15th April 2021. It is sufficient for the respondent to allege in its particulars of claim that the defamation was caused by the report that was compiled by the applicant and will have to lead evidence to prove such allegation. It follows ineluctably therefore that the application falls to be dismissed.
- [14] Courts have in a number of decisions emphasised the point that parties should at all times attempt to bring finality to litigation between them and that unnecessary technicalities which delay the proper ventilation of the real issues should be avoided. This is one such matter where a litigant raises technical issues which are dilatory and are intended to delay the other party from receiving the remedy it seeks without incurring further unnecessary costs. It is patently an abuse of the process of the Court which should not be countenance. Such conduct by a litigant deserves to be censured by the Court with a punitive costs order.
- [15] In *Cherangani Trade and Invest 50 (Pty) Ltd v Razzmatazz (Pty) Ltd and Another* (2795/2018) [2020] ZAFSCHC 100 (28 May 2020) the Court stated the following:

"Paragraph 20: Unnecessary technicality should be avoided during litigation as reliance thereon by a litigant is often aimed at trying to evade judgment on the merits and more often than not, the party relying on a technicality know full well that he/she does not have a proper defence on the merits."

- [16] In the circumstances, the following order is made:

1. The application is dismissed with costs on the scale as between attorney and client.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing:

29th August 2022

Date of Judgment:

14th September 2022

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