

SOUTH AFRICA / JUDGMENT

Hargey and Another v Moosagie (2188/2021) [2022] ZAECQBHC 11 (26 May 2022) [2022] ZAECQBHC 11

COURT

Eastern Cape High Court, Gqeberha

BEFORE

O H Ronaasen

CASE / FILE NUMBER

2188/2021

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, GQEBERHA

Case No.: 2188/2021

Date Heard: 14 April 2022

Date Delivered: 26 May 2022

In the matter between:

DR TAJ HARGEY

First Plaintiff

THE OPEN MOSQUE Second Plaintiff

and

MOHAMMED AADIEL MOOSAGIE

Defendant

Judgment

RONAASEN AJ

Introduction

- [1] In July 2021 the plaintiffs instituted action against the defendant claiming damages from him on the strength of allegations that he had defamed them.
- [2] The particulars of claim, as originally formulated, attracted a notice in terms of rule 23(1) of the Uniform Rules in terms of which the defendant identified various causes of complaint which he contended rendered the particulars of claim vague and embarrassing, alternatively, that the particulars lacked the averments necessary to disclose a cause of action.
- [3] The plaintiffs, in response, amended the particulars of claim. The particulars of claim, as amended, again resulted in the delivery of a notice in terms of rule 23(1) by the defendant, raising a number of similar causes of complaint pointing to the particulars remaining excipiable as suggested in the first notice.
- [4] The second notice did not prompt the plaintiffs to address the causes of complaint, resulting in the defendant delivering an exception to the particulars of claim in terms of which it was contended, again, that the particulars were vague and embarrassing, alternatively did not contain the requisite averments to sustain a cause of action, namely a claim for damages arising from defamation. During argument counsel for the defendant abandoned the latter contention and relied only on the ground of exception in terms of which it was argued that the particulars of claim were vague and embarrassing to the extent that the defendant was unable to plead thereto.

The grounds of exception

The first exceotion

- [5] In paragraph 9 of the particulars of claim the plaintiff avers that, during March-May 2021, the defendant authored and broadcast several WhatsApp (a social media messaging platform) messages (“the messages”) concerning the plaintiffs to various other persons in a WhatsApp messaging group. The messages, so it is contended, were widely distributed not only to members of the messaging group but also to third parties who would receive the messages from members of the messaging group and the defendant would have known, or ought reasonably to have known, that this would occur.
- [6] Paragraph 10 of the particulars claim contains the allegation that the recipients of the messages would know that they referred to the plaintiffs.
- [7] The plaintiffs go on to contend in paragraph 12 of the particulars of claim that the messages were defamatory and were calculated to cause the esteem in which the plaintiffs were held by progressive-thinking persons in the global society, and more especially in the Muslim community, to be diminished.

[8] The defendant's complaint is then formulated to the effect that the abovementioned paragraphs of the particulars of claim are vague and embarrassing as they do not identify:

8.1. who the wider audience to whom the messages were disseminated is;

8.2. who read the messages;

8.3. who the "right-thinking" persons are;

8.4. who is intended to fall within the wider Muslim community in South Africa and beyond.

[9] In summary, the defendant's complaint is that the abovementioned paragraphs in the particulars of claim are vague and embarrassing as they suffer from a lack of particularity, which it is stated renders the particulars excipiable.

The second exception

[10] Paragraph 15 of the particulars of claim is to the effect that the defendant, having broadcast the messages to several recipients in a WhatsApp group, which is social media platform which allows a the dissemination of information such as the messages to other persons, the defendant intended, alternatively, should reasonably have foreseen that the messages would be widely published, thus enhancing the damage to the plaintiffs' reputation.

[11] This paragraph, according to the defendant, is vague and embarrassing as it contains insufficient factual averments to support the conclusions it seeks to make.

The third exception

[12] This complaint is addressed at paragraph 16 of the particulars of claim in terms of which the plaintiffs allege that persons outside the social media group to whom the messages were published indeed picked up on the messages and that these persons, in turn would continue the dissemination of the messages to the detriment of the plaintiffs.

[13] Again the complaint is that the paragraph is vague and embarrassing because of its lack of particularity as to the identity of the persons who allegedly repeated the messages, the failure to identify more precisely the social media platform from which the messages were disseminated or the other social media platforms which received the messages and further disseminated them.

The fourth exception

[14] This complaint states that the plaintiffs, in paragraph 18.2 of the particulars of claim, aver that the second plaintiff had a "prominent" standing the Muslim community. The word "prominent" is, however, not used in the paragraph.

[15] Here too it is the argument of the defendant that the paragraph is vague and embarrassing as insufficient particularity had been furnished to establish the alleged prominence of the plaintiffs.

The fifth exception

- [16] In respect of this complaint the defendant says that paragraph 19 of the particulars of claim is vague and embarrassing as the plaintiffs had failed to identify the persons who had read the messages and understood the messages to refer to the plaintiffs and that these persons, in turn, had had the opportunity to further disseminated the messages. Again the vague and embarrassing epithet is attributed to the paragraph because of an alleged lack of particularity.

The sixth exception

- [17] The six complaint, insequentially, refers to paragraph 18.5 of the particulars of claim. In this paragraph the plaintiffs allege that the words attributed to the defendant and referred to in the paragraph 16 were intended to draw false conclusions regarding the conduct of the plaintiffs referred to in the words.
- [18] The defendant says that in the paragraph concerned the plaintiffs have not stated what was false about the conclusions drawn by the defendant. This complaint is therefore also addressed to an alleged lack of particularity.

The seventh exception

- [19] In paragraph 21 of the particulars of claim the plaintiffs aver that the defendant published the messages to further his own agenda. The defendant's complaint is that the plaintiffs, in the paragraph, have not particularised what the defendant's agenda is.

Legal principles

- [20] In *Trope v South African Reserve Bank* 1992 (3) SA 208 (D) at 210-211 it was held that an exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration, namely whether:

20.1. the pleading lacks particularity to the extent that it is vague;

20.2. the vagueness causes embarrassment of such a nature that the excipient is prejudiced.

- [21] An exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception must go to the whole cause of action, which must be demonstrated to be vague and embarrassing. *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (WLD) at 899 G.

- [22] In *Jowell* it was stated that where a lack of particularity in a pleading relates to mere detail, the remedy of the defendant is to plead to the averments made and to obtain the particulars he requires:

22.1. either by means of the discovery/inspection of documents in terms of the Uniform Rules; or

22.2. by means of a request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial.

[23] The Uniform Rules provide different remedies in rules 18 (read with rule 30) and 23. The presumption is that they are not co-extensive, but designed to deal with different situations. Rule 18(4) is restrictive and sets out the bare minimum required of a factual averment. Rule 23, however, goes to a vagueness and embarrassment which strikes at the whole of the cause of action pleaded. Jowell at 902 D-E.

[24] Jowell at 902 F-G summarises the crucial distinction between rules 23 and 30 (the rule used to enforce compliance with rule 18), as follows:

24.1. an exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas

24.2. rule 30 may be invoked to strike out the claim pleaded when individual paragraphs do not contain sufficient particularity - it is not necessary that the failure to plead material facts goes to the root of the cause of action.

[25] An attack on a pleading that it is vague and embarrassing cannot be based on the mere averment that it is lacking in particularity. Jowell at 902 H.

[26] Again with reference to Jowell at 902 I-903 B, exceptions that pleadings are vague and embarrassing must be approached, bearing in mind the following general principles:

26.1. minor blemishes are irrelevant;

26.2. pleadings must be read as a whole; no paragraph can be read in isolation;

26.3. a distinction must be drawn between the primary factual allegations which every plaintiff must make (the *facta probanda*) and the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations (the *facta probantia*);

26.4. only facts are required to be pleaded. It is unnecessary to plead conclusions of law.

Application of principles

[27] In general, applying the abovementioned principles, it is clear that the exception was poorly formulated and is ill-founded, as:

27.1. it is directed at individual paragraphs in the particulars of claim and does not address the whole of the cause of action, namely a claim for damages arising from defamation;

27.2. it is founded solely on the averment that the impugned paragraphs lack particularity;

27.3. the complaints relate to a lack of particularity, which lack of particularity if, indeed, it exists does not render the particulars of claim vague to the extent that the defendant will not be able to plead thereto;

27.4. the defendant's remedy, if any, thus lies rather in rule 18, read with rule 30.

[28] In the paragraphs in the particulars of claim underlying the exceptions:

28.1. the elements of a claim for defamation are clearly pleaded;

28.2. the extent of the publication of the alleged statements (the messages) are pleaded with sufficient particularity. The lack of particularity complained of by the defendant does not in any way render the particulars of claim vague and the defendant is in a position to plead to the averments concerned;

28.3. the further dissemination of the alleged defamatory material is clearly pleaded.

[29] The facts as pleaded in the impugned paragraphs do not establish a vagueness and embarrassment which strikes at the whole cause of action pleaded.

Order

[30] Thus, I make the following order:

The exception is dismissed with costs.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

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I Lambrechts

Instructed by: Herold

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c/o Pagdens

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L Ntsepe

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