

SOUTH AFRICA / JUDGMENT

Nomhle Percy Notshele obo Samkelo v Transnet Freight Rail Limited and Another (2561/2016) [2018] ZAGPPHC 819 (29 September 2018) [2018] ZAGPPHC 819

COURT

North Gauteng High Court, Pretoria

BEFORE

Mdalana-Mayisela

CASE / FILE NUMBER

2561/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 2561/2016

In

the matter between:

NOMHLE

PERCY NOTSHELE obo SAMKELO

Plaintiff

and

TRANSNET

FREIGHT RAIL LIMITED

Defendant

CITY

OF TSHWANE METROPOLITAN MUNICIPALITY

Third Party

JUDGMENT

Mdalana-Mayisela AJ

1. The plaintiff, Nomhle Percy Notshele, born on 10 August 1987 has issued combined summons out of this Court in her representative capacity as the biological and legal guardian of Samkelo Chris Notshele (a minor child born on 20 August 2006). against the defendant, Transnet SOC Limited, trading as Transnet Freight Rail ("Transnet"). The defendant is a State Owned Enterprise (SOE) and an organ of State as contemplated in section 239 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). The defendant was incorporated as a public company in terms of the Legal Succession to the South African Transport Service Act 9 of 1989 ("the Legal Succession Act").
2. The defendant owns freight assets as it is permitted to do so by the Legal Succession Act. The defendant is the operator and owner of Freight Rail Trains in the Republic. The plaintiff avers in the particulars of claim that on 18 April 2009 the minor child who was accompanied by his cousin was hit by a freight rail train which collided with both the minor child and his cousin when they were trying to cross the railway line. According to the particulars of claim the defendant as the owner and operator of the freight rail train aforesaid on the said date owed a legal duty alternatively duty of care to the minor child and his cousin and to ensure the safety of the public including the minor child. On the date in question the defendant and through the conduct of its employees provided freight rail services between Greenview Station and Pienaar Station in phase 5, extension 8, Mamelodi East, Pretoria.
3. The plaintiff avers further that the defendant breached its obligations which are set out in paragraph 4 of the particulars of claim which constituted negligent conduct of its insured driver who inter alia failed to keep a proper lookout; failed to avoid the collision when by the exercise of reasonable care could and should have done so; failed to give any or adequate warning of his approach at a time when he could have done so; failed to apply the brakes of his train timeously or at all and drove at an excessive speed in the circumstances. The collision which occurred as aforesaid resulted in personal injuries on the minor child such as severe head injury with depressed skull injuries; injury to right ankle and suffered paralysis on his left side of the body. The minor child is said to be experiencing pain-and-suffering, suffered loss of amenities of life, hospital and medical expenses which were incurred, emotional stress and shock and will suffer diminishing of loss of income and earning capacity. Resulting from the aforesaid collision the plaintiff claims from the defendant an amount in damages in the sum of R9 100 000.00.

4. The particulars of claim were subsequently amended a matter which is not relevant for purposes of this judgment. On or about 20 July 2018 the defendant delivered a plea accompanied by a third party notice filed on 21 July
2016. In the third party notice the defendant seeks to join City of Tshwane Metropolitan Municipality ("the City") as a third party on grounds that in the event the Court holds that the defendant was liable to pay to the plaintiff the sum claimed or any portion thereof, then on that occasion, the defendant alleges that it is entitled to an indemnification alternatively a

contribution from the third party on the grounds that the third party had a constitutional and/or public duty to ensure the safety of the residents of the informal settlement located in the vicinity on the railway line by providing adequate fencing and/or maintenance ; take reasonable steps in order to prevent pedestrians including the minor or any other resident from rooming near or crossing the railway line; and take reasonable steps to prevent such accidents from occurring. It is alleged in the third party notice that the City of Tshwane Metropolitan Municipality had failed to do so and as such wrongfully and negligently breached its constitutional and/or public duty owed by the City of Tshwane to the plaintiff. According to the defendant, it was foreseeable to the City of Tshwane alternatively it ought to have been foreseen by the City of Tshwane that the failure to perform the alleged constitutional obligations would result in the plaintiff suffering the damage. The third party notice was subsequently amended with the last amendment effected on 26 September 2017 but the substance of the issues raised are substantially the same which is that if the defendant is found to be liable, it should be indemnified by the third party or a portion of contribution should be made by the third party because of the third party's breach of its constitutional obligations.

5. Whilst the defendant amended its third party notice several times, the City of Tshwane excepted three times with the last amendment

which was introduced by a notice of intention to amend on 14 September 2017. The City of Tshwane has excepted to the latest amendment as well. The exception is raised on two grounds which are, first, that the third party notice and its annexure lacked averments

which are necessary to sustain an action, alternatively, that it is vague and embarrassing. It is not necessary to repeat the grounds as set out in the exception in this judgment.

6. Essentiality, the City of Tshwane raises three grounds of the exception. Firstly, it is contended that the municipality's statutory duties do not envisage liability for damages and are unrelated to the provision of safety for unlawful occupiers living in close proximity to the railway line; secondly that no case has been made out for joint wrong doing of the City of Tshwane under the apportionment of Damages Act and thirdly that the defendant and the City of Tshwane are organs of State upon which intergovernmental relations framework ought to have been applied.

7. Exceptions are governed by Rule 23 of the Uniform Rules of Court. In terms of Rule 23(1) exception may be raised if one or both of the following legal requirements are present. Either a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence as the case may be. An exception is directed at attacking the formulation of a pleading rather than its contents. This is so because at exception stage, averments in a pleading are accepted as correct. An exception cannot raise matters that fall outside the averments in a pleading nor raise defences which are best suited to be raised in a plea or at the trial. A pleading that is vague and embarrassing is attacked on the basis that a party required

to plead is prejudiced because it does not know what case is called upon to meet. In that case, if it is established that a pleading is indeed vague and embarrassing a Court in upholding the exception simply directs the party excepted to simply amend the pleading. If a pleading is attacked on the basis that it does not disclose a cause of action that exception strikes at the heart of the pleading

concerned. When the matter is heard at exception level, the excipient is confined to the grounds of the exception and not permitted to go outside those grounds.

8. I first dispose of the intergovernmental relations dispute ground of exception. This ground of exception completely misses the point because there is no dispute between the defendant and the City of Tshwane Metropolitan Municipality. All what the defendant says is that it has been sued by the plaintiff in delict, and should the Court find in favour of the plaintiff, then the liability must be incurred by the City of Tshwane for its failure to safeguard the railway line which passes along the informal settlement. This contention is raised on the basis that the City of Tshwane has a constitutional obligation to ensure safety or owes duty of care to persons living in and around the informal settlement where the railway passes. Whether or not the defendant is correct is not a matter for the exception but the trial Court. As such, there is no intergovernmental dispute which require to be first resolved by employing the provisions of section 41 of the Constitution.
9. The other ground is that the municipality's statutory duties do not envisage liability for damages. This again is not a matter for exception but for the trial Court. At the exception stage, the averments in a pleading are accepted as correct and cannot be contested. The contestation of the averments in the pleading must be done by way of filing a pleading which disputes the averments. In this case, a third party would be required to file a plea to the third party notice or annexure to the third party notice disputing its statutory obligation that has been pleaded. Similarly, this ground of exception is misplaced. The last ground relates to a contention that no case has been made out for joint wrong doing of the municipality. This again is a matter for determination by the trial Court after considering the evidence. It is not a matter for the exception for the reasons I have already alluded to above.

10. Rule 13 of the Uniform Rules of Court permits a party in the position of the defendant in this matter to issue a third party notice which it has issued. Rule 13(4) states that if the third party intends to contest the claim set out in the third party notice it shall deliver notice of intention to defend, as if to a summons.

Immediately upon receipt of such notice, the party who issued the third party notice shall inform all other parties accordingly. In terms of Rule 13(5) upon service of the third party notice on the third party the third party becomes a party to the action and once he or she delivers notice of intention to defend, he or she shall be entitled to all documents filed in the matter. In terms of Rule 13(6), the third party may plead or accept to the third party notice as if he were a defendant to the action. He or she may also file a plea or other proper pleading to contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party provided however that the third party shall not be entitled to claim in reconvention against any person other than the party issuing the notice save to the extent that he would be entitled to do so in terms of Rule 24.

11. Having regard to Rule 13 and the grounds upon which the exception is based, I find that there is no legal basis for the exception and it should accordingly be dismissed.

12. Accordingly I make the following order:

12.1 the exception is dismissed with costs which should include the costs of the employment of two counsel, where employed.

M M P Mdalana-Mayisela

Acting Judge of the High Court Gauteng Division

Date of judgment:

20 September 2018

On behalf of the Plaintiff:

No Appearance

On behalf of the Defendant:

G I Hulley SC

Instructed by:

Hogan Lovells (SA) Inc

On behalf of the Third Party:

A Redding SC

Instructed by:

Norton Rose Fulbright (SA) Inc

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