

SOUTH AFRICA / JUDGMENT

**Nyamela v King Sabata Dalindyebo
Local Municipality (1824/12, 234/2014)
[2014] ZAECMHC 42 (27 November 2014)
[2014] ZAECMHC 42**

COURT

Eastern Cape High Court, Mthatha

BEFORE

Griffiths, Majiki

CASE / FILE NUMBER

1824/12, 234/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION : MTHATHA

CASE NO. 1824/12

DATE:

27TH

NOVEMBER 2014

In the matter

between:

NOMBULELO DORIS

NYAMELA.....Plaintiff

and

KING SABATA

DALINDYEBO

LOCAL

MUNICIPALITY.....Defe

ndant

JUDGMENT

GRIFFITHS, J.:

- [1] This is an action for damages arising from an incident which occurred during the course of the evening of 14 September 2011 when the plaintiff fell into a hole and suffered severe injuries.
- [2] At the outset of the trial I was informed by Mr. Qitsi, who appeared on behalf of the plaintiff, that it had been agreed that the issues of liability and quantum would be separated and that only liability would be dealt with at this stage. I accordingly made a ruling to this effect in terms of Rule 33(4). I was next informed that the issues to be tried were the following:
1. Whether the person or persons who created the hole into which the plaintiff fell at Mandela Park (next to the National Road (R61)), Mthatha, were workers of the defendant and/or were working for the benefit of the defendant.
 2. Should it be so established, whether the defendant's employees or persons who performed the work for the benefit of the defendant were negligent in leaving the hole uncovered.
- [3] The plaintiff pleaded the following at paragraph 3 of her particulars of claim:
- "At all times material hereto:-
- 3.1 The defendant had a legal obligation to provide water drainages (sic) along the national Road (R61) within its jurisdiction.
- 3.2 The defendant had a legal duty to protect people from being injured by the holes which provides drainages (sic) which drains (sic) water along the roads within its jurisdiction.
- 3.3 The defendant had a legal duty to protect people from injured (sic) by those holes by fencing around the holes or provides (sic) drainage caps (sic) in order to close the holes."
- [4] All these allegations were denied by the defendant, as were the grounds of negligence pleaded by the plaintiff. To an allegation that the defendant's employees acted wrongfully as they had breached a legal duty to ensure the safety of the people in the area, the defendant specifically pleaded that no employees of the defendant had in fact executed the duties alleged, i.e., it was made quite clear that the defendant denied having excavated the hole or having had anything whatsoever to do with it.
- [5] As against this background, Mr. Qitsi led the evidence of one witness in support of the plaintiff's case. That was the plaintiff herself who testified that on the day in question she had alighted from a taxi and had walked a distance of approximately 2 m. It was dark at the time and she had not noticed the hole into which she had fallen, as a result of which she was injured. The hole was not covered and was quite large as her entire body fell into it. She stated that there were stones in the hole and that it was completely dark inside.

- [6] She had never been back to the hole and could not thus describe it any further. However, five photographs were admitted in evidence as being a true reflection of the condition of this hole as at the time when she fell into it. These photographs indicate a reasonably deep hole which was lined with stones of some sort, the base consisting of wet sand or mud. There appears to be a drainage pipe entering the hole and the hole itself is clearly situated within one or two meters of the side of the aforementioned road.
- [7] The plaintiff also testified that the area, for various reasons, fell within the area of jurisdiction of the defendant but conceded during the course of evidence that no drainage system had been installed by the defendant in Mandela Park where this hole was to be found.
- [8] Upon the plaintiff closing her case Mr. Kunju, who appeared on behalf of the defendant, immediately applied for absolution from the instance. This was opposed by Mr. Qitsi. The test for absolution was crispy set out by Harms JA in *Gordon Lloyd Page and Associates v Riviera*¹ as follows:

"The test for absolution to be applied by a trial court at the end of a plaintiffs case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

. . (W)hen absolution from the instance is sought at the close of plaintiffs case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court,

applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)'

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim -to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; *Schmidt Bewysreg* 4th ed at 91

- 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff (*Gascoyne* (loc cit)) - a test which had its origin injury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court.

Having said this, absolution at the end of a plaintiffs case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.”

[9] Mr. Qitsi has submitted that a prima face a case has been made out. He has submitted that, despite one of the issues clearly being the question as to whether or not the defendant's employees, or others acting for the defendant's benefit, excavated the hole and failed to protect the public from the dangers presented by it: “...it is not the issue that the Plaintiff should know who actually dug and built that water drainage. The Court cannot allow Defendant to make an excuse by the fact that the Plaintiff does not know who dug the hole. It is enough to find that the water drainage is within the jurisdictional area of the defendant

"In elaborating on this submission, he submitted further:

"I am making this submission looking at the number of decided cases involving negligence of the municipalities because municipalities are liable even for the dangerous pavements which are just damaged by nature which are left unattended by the municipality.”

[10] For this proposition he has relied in two cases, *Rose Lillian Judd v Nelson Mandela Bay Municipality*² and *Adam Richard James v City of Cape Town*³.

[11] The plaintiff sues in delict. She was accordingly required to prove the following:

"(a) the commission or omission of an act {actus reus), (b) which is unlawful or wrongful (wrongfulness), (c) committed negligently or with a particular intent (culpa or fault) (d) which results in or causes the harm (causation) and (e) the suffering of injury, loss or damage (harm). These are separate and distinct components of the same delict, each having its own requirements and test.”⁴

[12] It seems clear to me from the aforementioned denials by the defendant in its plea as read with the agreed issues, that the defendant denied the actus reus which, in this case, is in the form of an omission to protect the plaintiff from the dangers presented by the hole. It was therefore incumbent upon the plaintiff to prove that it was indeed the defendant who either constructed the hole through its employees or that it was in some other manner responsible for the dangers presented by the hole. In my view, no evidence whatsoever has been tendered by the plaintiff to establish this. The mere fact that the hole may be within the area of jurisdiction of the defendant cannot imbue it with liability by any stretch of the imagination. It may well be, for all I know, that this particular hole was excavated by whoever constructed the road, referred to by plaintiffs representative as the "National Road", and not the municipality. Even if, as I have said, the road and the hole fall within the area of jurisdiction of the defendant but had been dug by another entity altogether such as the National Government or SANRAL, or even the O R Tambo Municipality in whose jurisdiction

this hole also falls, the defendant cannot be held responsible simply for that reason.

[13] The aforementioned cases to which Mr. Qitsi has referred are clearly distinguishable. In both of them the defendants, being the municipalities concerned, accepted responsibility for the maintenance of, in one instance, the pavement concerned and, in the other, the storm water drain. In the present matter the defendant has not so accepted responsibility and has pertinently denied this in its plea. It thus remained incumbent upon the plaintiff to prove this issue which she clearly has not.

[14] In my view, even making allowances for as many inferences as one might from the evidence presented by the plaintiff, there is simply no evidence upon which a court could or might find for the plaintiff and I therefore conclude that the plaintiff has not made out a prima facie case. This is an unfortunate result as it does appear that the plaintiff has a reasonable case as against whoever is indeed responsible for this hole. However, the order which I am about to grant this does not necessarily close the door on the plaintiffs right of action, depending on questions of prescription.

[15] In the result;

I grant absolution from the instance in favour of the defendant, with costs,

JUDGE OF THE HIGH COURT

HEARD ON: 05 NOVEMBER 2014

DELIVERED ON : 27 NOVEMBER 2014

COUNSEL FOR PLAINTIFF: Mr Qitsi

INSTRUCTED BY : Ntsiki Mthambeka & Associates

COUNSEL FOR DEFENDANT : Mr Kunju

INSTRUCTED BY: S. Booi & Sons Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION - MTHATHA)

CASE NO.: 234/2014

Heard on: 16 September 2014

Date delivered: 04 December 2014

CHARGE- IN

MABASO.....Applicant

KING SABATA DALINDYEBE MUNICIPALITY.....1st Respondent

THE MUNICIPAL MANAGER -

MR ZIZAMELE MNQANQENI.....2nd
Respondent

MR ZOZO, THE SPEAKER - KING SABATA

DALINDYEBO LOCAL MUNICIPALITY.....3rd
Respondent

BANTUBOXOLO GWADISO.....4th
Respondent

MAJIKI J:

[1] This is an application for an interlocutory relief wherein the applicant seeks a declaratory order relating to the amendment of his notice of motion in the main application against the respondents. He also seeks an order of costs against the first and second respondents.

In the alternative, he seeks an order granting him leave to amend his notice of motion in the main application.

[2] Originally the main application was against the first, second and third respondents. The applicant sought the following order:-

2.1 The respondents' failure to include the applicant to an interview for the post of General Manager : Electrical Engineering be declared unlawful.

2.2 The respondents' failure to advise the applicant that despite the interviews held in Durban the applicant will still be afforded a hearing in future through an interview, is hereby declared unlawful.

2.3 The respondents' decision to exclude the applicant to an interview for a post of General Manager: Electrical Engineering is hereby reviewed and set aside.

2.4 Any steps and decisions taken with an intention of filling the vacant post of a General Manager: Electrical Engineering pursuant to the exclusion of the applicant in an interview held in Durban is hereby reviewed and set aside.

2.5 The respondents are directed to afford the applicant an interview in respect of a General Manager: Electrical Engineering.

2.6 The respondents are interdicted and restrained in any manner whatsoever from appointing, pronouncing and conveying the name of a person who has been successful for a post of a General Manager: Electrical Engineering.

2.7 The respondents are hereby interdicted from considering the names of the incumbent for a post of a General Manager: Electrical Engineering in exclusion of the applicant's application without considering the applicant's application for the said post.

[3] The notice of intention to amend the initial notice of motion was filed on 11 April

2014. The applicant also filed the amended notice of motion together with the notice of intention to amend. The applicant's notice of intention to amend was framed as follows:

"BE PLEASED TO TAKE NOTICE THAT the applicant intends to amend his notice of motion herein to be amended as per annexure "A"

annexed hereto.

TAKE NOTICE THAT if no objection is received within ten days on receipt hereof, annexure "B" annexed hereto shall constitute an amended notice of motion."

[4] The applicant sought the following additional relief in terms of the amendment:

4.1 The appointment of the fourth respondent to a post of General Manager: Electrical Engineering is hereby declared unlawful and set aside.

4.2 The appointment of the fourth respondent to a post of a General Manager: Electrical Engineering by the first respondent is hereby rescinded and set aside.

4.3 The applicant is hereby declared to be entitled to participated (sic) in to an interview for a post of a General Manager: Electrical Engineering

4.4 That the respondents are directed to pay costs of the application in an attorney and own client scale.

[5] The applicant has raised an issue as a preliminary question relating to the authority or lack thereof by the respondents' attorneys of record to act on behalf of the third respondent. I agree with the respondents that issue does not stand to be determined in the present application.

[6] On 28 April 2014, (on the tenth day of filing of notice to amend) the first and second respondent filed notice to object to the notice of intention to amend and did not state the reasons for such objection. On 14 May 2014 the applicant filed a notice that the notice to object does not comply with the rules and that after lapse of 10 days without compliance with Rule 28(3) the applicant shall apply for an order that the said notice be struck out. The respondents replied to the said notice stating that it does not comply with the rules. In the alternative, they indicated that they seek to amplify their notice of objection to the amendment of 28 April 2014. Despite the fact that the said reply and amplification was served upon the applicant, there is no indication that it was filed.

[7] On 5 June the parties sought an order by consent that the first and second respondents' notice of objection to the applicant's

Intention to amend be set aside as an irregular step and that the said respondents pay the costs of the application.

- [8] The Issue to be decided is whether the applicant did effect an amendment in his notice of motion in the main application, in terms of the Rule 28(5) of the Uniform Rules of court. Alternatively, whether the applicant ought to be permitted to amend his notice of motion. Furthermore, whether the amplification to the notice of objection to the amendment is of any force and effect.
- [9] According to the applicant the amplification of the notice of objection took place outside of the time limits provided for in the rules. It was delivered after the matter was already set down for hearing. Furthermore, the notice to object was set aside as an irregular step. It then followed that any attempt to amplify it could not be sustainable, what it sought to amplify having been set aside.
- [10] It is common cause that the amendment was filed after the answering affidavit was filed and that the applicant's replying affidavit addressed issues raised in the amendment.
- [11] According to the applicant if the respondents were of the view that their case was affected on the amendment, they could utilise Rule 28(8) and seek to file further affidavits.
- [12] On the other hand it is argued on behalf of the respondents that the court in exercising its discretion it needs to consider all the facts and circumstances presenting in the matter. The amendment is of material nature, it seeks an order against the fourth respondent.
- [13] An amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order of costs and, where appropriate a postponement.
- [14] I agree with the respondents that the amendment sought is of a material nature. Furthermore the fourth respondent who was ordered by the court to be joined was not served and notified of the intention of the applicant to amend its notice of motion.
- [15] Firstly, with regard to the respondents' amplification of the notice of objection, I do not see how it would stand if the original notice it seeks to amplify was set aside. In my view, there is no notice of objection and therefore there cannot be any substantiation of a nonexistent pleading.
- [16] Secondly, with regard to the main relief sought by the applicant, Rule 28(5) of the Uniform Rules provides that "if no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice to the proposed amendment may, within 10 days of the expiry of the period mentioned in sub rule (2), effect the amendment in terms of subrule (7)" Subrule
- (7) provides that "unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form. "

- [17] In this application all parties sought to complain that either party did not comply with the rules of court in some way. It therefore becomes imperative to state that any party who complains about his opponent's failure to comply with the rules of the court should himself approach court with clean hands with regard to any issue relating to their own compliance with the rules.
- [18] In my view, there has not been compliance with Rule 28(5). Firstly, not all parties received the notice, secondly the applicant did not deliver each relevant page in its amended form after the expiry of 10 day of the notice of intention to amend.
- [19] With regard to an application to grant the applicant leave to amend the original notice of motion, the granting of an application to amend is a matter within the discretion of the court, after considering all the facts and circumstances surrounding the matter at hand-
- [20] The effect of the amendment on the fourth respondent is to seek that his appointment be declared unlawful, reviewed and set aside.
- [21] The fourth respondent was served with application papers on 16 May 2014. As I have already stated above, the action of the applicant did not constitute an amendment. This however does not imply that the court cannot at this stage consider an application seeking leave to amend the notice of motion.
- [22] In my view, any prejudice that may have been caused to the respondents, can be remedied. The amendment sought addresses a material issue about the dispute between parties. If the position that is the subject of the dispute has already been filled it becomes central to the applicant's intended relief that all steps undertaken up to the filling of the position require to be interrogated fully. An attempt seeking review of the entire process in my view is linked to the original relief and cannot be said to be introducing a new cause of action. I therefore find no basis why the applicant should not be granted leave to amend the notice of motion.
- [21] Consequent to the amendment the respondents are hereby granted leave to file a further set of affidavits dealing with the issues raised in the amendment.

In the result;

1. The applicant is hereby granted leave to amend the notice of motion in the main application and the respondents are hereby granted leave to file a further set of affidavits.
2. Each party is ordered to pay its own costs in relation to the costs occasioned by this application.

B MAJIKI

Counsel for the applicant: MR KUNJU

instructed by : GUBEVU HLALUKANA INC.

NO. 18 OWEN STREET MTHATHA

Counsel for the respondents: MR ZILWA SC and

MR BOLINGFIELD

Instructed by : R.M. MAYEKISO ATTORNEYS

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1 2001

(1) SA 88 (SCA) at 92-93

2Unreported case No. CA 149/2010 (ECD - Full Bench)

3Unreported case No. 11785/2009 (WC)

4See Judd's case supra at paragraph 8

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