
SOUTH AFRICA / JUDGMENT

Sunday Sun Newspaper and Others v Mokondelela (2018/46689) [2020] ZAGPJHC 104 (15 April 2020)

[2020] ZAGPJHC 104

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Southwood

CASE / FILE NUMBER

2018/46689

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2018/46689

In

the matter between:

THE
SUNDAY SUN NEWSPAPER First
Applicant/First Defendant
THE
EDITOR OF THE SUNDAY SUN
NEWSPAPER Second
Applicant/
(PRINCE
CHAUKE) Second
Defendant
REPORTER
OF THE SUNDAY SUN NEWSPAPER Third
Applicant/
(SNAZO
NOTHO) Third
Defendant
and
DONALD
MOKONDELELA
Respondent/Plaintiff

JUDGMENT

SOUTHWOOD, AJ:

A.

INTRODUCTION

1. This is an application in terms of Rule 30(1)[1] read with Rules 18(4)[2] and 18(12)[3] of the Uniform Rules of Court ('the Rules') to set aside the respondent's particulars of claim.
2. In the action, the respondent seeks damages in an amount of R20 million for defamation.

B. PARTIES

3. I refer to the parties as cited in the action.
4. The particulars of claim allege that:
 - 4.1 the plaintiff, the respondent to this application, is an adult male professional soccer player who resides in Polokwane;
 - 4.2 the first defendant, the first applicant in this application, is The Sunday Sun Newspaper, a print media company established in terms of South African law, operating at 69 Kingsway, Auckland Park, Johannesburg;

4.3 the second defendant, the second applicant in this application, is the editor of The Sunday Sun Newspaper (Prince Chauke), responsible for approval of newspaper articles and the printing of the newspaper articles and currently employed by the first defendant at 69 Kingsway, Auckland Park, Johannesburg;

4.4 the third defendant, the third applicant in this application, is a reporter (Snazo Notho), employed by the first defendant, under the supervision of the second defendant, at 69 Kingsway, Auckland Park, Johannesburg.

C. SERVICE OF NOTICE OF SET DOWN

5. At the hearing held on 28 January 2020, the defendants were represented by Mr Stevens. There was no appearance for the plaintiff. Accordingly, the first question to be determined is whether the plaintiff had notice of the hearing.
6. No notice of set down was delivered before the hearing. Two notices of set down were uploaded onto caselines on 21 January 2020. The notices indicate that service would be effected by way of sheriff and by way of email. No proof of service was uploaded with these notices.
7. On 18 November 2019, in a notice dated 14 November 2019, the plaintiff's attorneys, HLM Mamabolo Attorneys, served a notice of withdrawal as attorneys of record on behalf of the plaintiff. The notice indicated that the last known address of the plaintiff is number [...], Polokwane, the address indicated in the particulars of claim, and that his cellphone number is [...]. This notice did not comply with Rule 16(4)(a) which provides that the attorney must serve notice of withdrawal on his own client.
8. Accordingly, it comes as no surprise that the plaintiff did not notify the parties or the registrar of this court of a new address for service in terms of Rule 16(4)(b).
9. At the hearing, the defendants handed up a service affidavit, deposed to, on 27 January 2020, by one Colin Hindle Isherwood, a candidate attorney in the employ of the defendants' attorneys. The affidavit describes the steps taken by the defendants' attorneys to draw the date of the hearing of this matter to the attention of the plaintiff. Initially, the sheriff was instructed to serve the notice of set down at [...] Polokwane, the address indicated in the notice of withdrawal as well as in the particulars of claim. The sheriff's return indicates that no such address could be found, and he was unable to serve the notice of set down. The defendants' attorneys indicated that they then contacted the plaintiff telephonically as well as by email and text to advise him as to the hearing date. Unfortunately, the telephone number used is not identified making it impossible to assess whether the plaintiff's cellphone number was used. In addition, there is nothing to indicate that the email address used is the plaintiff's email address.
10. I was not satisfied, on the basis of this affidavit, that defendants had established that they had brought the set down of this matter to the plaintiff's attention.

11. In response, Mr Stevens indicated that he had been present at the previous hearing of this matter on 24 October 2019 where both parties had appeared, represented by their respective attorneys and counsel. He informed me that the matter had been postponed by the court to 27 January 2020. Since I was in possession of a duplicate court file, the history of this matter was not apparent from the file cover.
12. I requested the defendants to furnish me with a copy of the court order or a transcript or a recording thereof and reserved my determination in this regard. I then invited Mr Stevens to address me on the merits of the application and reserved judgment.
13. After the hearing, both the defendants' attorney and counsel addressed emails to my Registrar indicating that what had been disclosed to me in court in relation to the previous hearing of the matter was not correct. I therefore summoned the defendants' representatives to appear in court on 30 January 2020 so as to be informed as to what the correct position was and to obtain an explanation for the error.
14. I was informed that at the hearing on 24 October 2019, the court postponed the matter to 25 November 2019 and not to 27 January 2020, as indicated by counsel during the hearing on 28 January. However, the matter had not been heard on 25 November 2019. Prior to the previous hearing, the defendants' legal representatives were informed that the registrar had refused to enrol the matter. The defendants' legal representatives had then re-enrolled the matter for hearing on 27 January 2020.

Thereafter, it was discovered that the matter had, in fact, been enrolled for the week of 25 November 2019. The defendants'

legal representatives were informed by the judge to whom the matter had been allocated in the week of 25 November 2019 that the matter would be heard on 27 November 2019. On that date, because of the plaintiff's absence, the matter was removed from the roll.

15. Mr Stevens indicated that he had forgotten about the hearing of 27 November 2019 because nothing had happened on that day.
16. I accept Mr Stevens' explanation for the incorrect submission.
17. Given my queries in relation to the service affidavit handed up at the hearing on 28 January 2020, on 30 January 2020, two further affidavits dealing with service of the notice of set down, entitled, respectively, Supplementary Affidavit and Second Supplementary Affidavit, were tendered. Both affidavits were deposed to on 30 January 2020 by, respectively, Andrew Chris Eric Boerner, the defendants' attorney, and Mr Isherwood. I have accepted both affidavits.
18. In the Supplementary Affidavit, Mr Boerner alleges that the plaintiff's erstwhile attorneys of record, advised the defendants' attorneys that the plaintiff's email address is [...].

19. The service affidavit indicated that, on 14 January 2020, the defendants' attorneys had sent an email to [...] informing the plaintiff of the hearing date of 27 January
2020. Proof of delivery of the email was attached to the affidavit.
20. In addition, on 16 January 2020, the defendants' attorneys sent a further email to [...] to inform the plaintiff that the matter would be heard before me on 28 January 2020 at 14h00. Proof of delivery of the email was attached to the affidavit.
21. In the Second Supplementary Affidavit, a link is drawn between the cell phone number in the notice of withdrawal, [...], and the number used for a variety of WhatsApp messages sent by the defendants' attorneys to inform the plaintiff of the hearing date. These messages were sent on 24 January 2020, informing the plaintiff that the matter would be heard before me on 28 January 2020 at 14h00.
22. Proof that at least one of these messages had been delivered on 14 January 2020 at 16h01 and read at 16h02 were furnished.
23. Accordingly, I am satisfied that the plaintiff was aware of the date for the hearing of this application.

D. OBJECTIONS IN LIMINE

24. The plaintiff contends that there has been non-compliance with:
 - 24.1 Rule 30(2)(b)[4]; and
 - 24.2 Rule 30(2)(c)[5]
25. The plaintiff contends that the defendants would have become aware of the irregularity on the date of service of the combined summons. The plaintiff contends, further, that the Rule 30(2)(b) notice was not filed timeously as the notice was served more than ten days after service of the combined summons. There is no return of service in the court file indicating when the combined summons was served.
26. The defendants, in the founding affidavit, do not indicate when the combined summons was served. Presumably, this is the result of their view, recorded in the replying affidavit, that they only became aware of the irregularity on or about 24 January 2019. This is the date when the plaintiff served the alleged defamatory newspaper article on the defendants in response to their notice in terms of Rules 35(12) and (14). The newspaper article had not been attached to the particulars of claim.
27. Given that the particulars of claim were incomplete in the absence of the alleged defamatory article, I agree that the defendants only became aware of the alleged irregularity on receipt of this newspaper article.
28. As a result, the Rule 30(2)(b) notice had to be given by 7 February 2019. The notice was served on 1 February 2019.

29. Accordingly, the objection that Rule 30(2)(b) was not complied with must fail.
30. Insofar as the objection relating to compliance with Rule 30(2)(c) is concerned, and regardless of the fact that the plaintiff was given fifteen days in which to respond instead of the ten days contemplated by Rule 30(2)(b), the deadline for delivering the application in terms of Rule 30(2)(c) was 8 March
2019. The application was delivered on 1 March 2019.
31. Accordingly, the objection that Rule 30(2)(c) was not complied with must fail.

E. GROUNDS OF IRREGULARITY

32. In its Rule 30(2)(b) notice, the defendants raise eight complaints. The application raises only seven complaints.
33. Each complaint alleges that the particulars of claim do not disclose a cause of action alternatively are vague and embarrassing alternatively do not contain sufficient facts in breach of sub-rule 18(4) of the Rules.
34. The defendants argued the matter on the basis that the particulars of claim do not comply with sub-rule 18(4) because they do not disclose a cause of action or are vague and embarrassing.
35. Rule 30 does not apply to matters of substance but to non-compliance with the Rules.[6] The question as to whether the particulars of claim disclose a cause of action is a matter of substance and cannot be dealt with in terms of Rule 30.
- [7] In any event, the defendants were required to show that on every construction of the particulars of claim, the claim is excipiable. [8] In my view, the particulars of claim disclose a cause of action based on defamation.
36. Whilst a pleading may give rise to both an exception that a pleading is vague and embarrassing in terms of Rule 23 and that it is lacking in particularity, these two rules provide for different situations and have different tests.[9]
37. Rule 18(4) requires that a plaintiff shall furnish only those particulars which are strictly necessary to enable the defendants to plead.[10] Accordingly, an application brought in terms of Rule 30 read with Rule 18(4) requires a determination as to whether the particulars of claim contain sufficient particulars to enable the defendants to plead. Such inability would be inherently prejudicial.
38. Rule 23, on the other hand, contemplates vagueness and embarrassment which strikes at the whole cause of action pleaded, and not merely to paragraphs in the pleading.[11]
39. In order to determine whether particulars of claim are vague and embarrassing, a two-fold consideration must be undertaken, namely:

39.1 whether the pleading lacks particularity to the extent that it is vague (in the sense of rendering it meaningless or capable of more than one meaning); and

39.2 whether the vagueness causes embarrassment of such a nature that the complainant is prejudiced. [12]

40 Prejudice is established if the complainant cannot plead to it.[13]

41 Save that the exception must go to the root of the cause of action, there is an overlap in the tests to be applied in determining whether the particulars of claim are vague and embarrassing and whether the particulars of claim do not contain sufficient particularity to plead thereto.

42 The defendants' heads of argument only refer to the first three complaints. However, Mr Stevens indicated that all the complaints in the application should be considered.

43 Mr Stevens submitted that the first two complaints have the same basis, namely that the particulars of claim do not contain sufficient facts to substantiate the innuendo relied upon and referred to in paragraph 12 of the particulars of claim.

44 This complaint would support a contention that the particulars of claim do not disclose a cause of action based on defamation by innuendo (a determination which is inappropriate in Rule 30 proceedings). It does not support the contention that the particulars of claim are vague and embarrassing.

45 In the premises, the first two complaints must fail.

46 The third complaint is directed at paragraph 7 of the particulars of claim, which refers to a '... required publishing standard' without describing the content of the standard.

47 Whilst this allegation is undoubtedly vague, no content being given to this publishing standard, it does not follow that the defendants cannot plead to this paragraph.

48 The allegation is not required for a defamation claim and no other cause of action appears to arise in relation to this allegation, damages being alleged to have arisen as a result of the alleged defamation. In my view, the defendants are able to plead.

49 Accordingly, the third complaint must fail.

50 In relation to the fourth complaint, the defendants refer to paragraph 10 of the particulars of claim which alleges that, '...the conduct of the First, Second and Third defendant by writing, approving, and authorising printing and publishing (sic) the defamatory newspaper article clearly shows that, all the defendants had an intention to defame the plaintiff' and paragraph 4 of the particulars of claim which provides that, '[o]n or about 26 February 2018 at Johannesburg, the First Defendant printed and published a newspaper article throughout South Africa about the Plaintiff, the

said article had full names, a photo and full description of the plaintiff on it and the said article defamed the plaintiff.'

51 It appears (since the substance of the complaint is not expressly stated) that the defendants interpret paragraph 10 to mean that all the defendants inter alia printed the article whilst paragraph 4 only refers to the first defendant as printing the article

52 Although reading paragraph 10 out of context may give rise to the interpretation alleged by the defendants, it is trite that documents must be interpreted in context.[14]

53 In paragraph 2.2 of the particulars of claim, it is alleged that the second defendant is responsible for the approval of newspaper articles.

54 In paragraph 2.3 of the particulars of claim, it is alleged that the third defendant is a reporter for the Sunday Sun newspaper.

55 In paragraph 6 of the particulars of claim, the allegation is made that the second and third defendants were acting within the scope of their employment with the first defendant, presumably, in the case of the second defendant, as the person responsible for approving the alleged defamatory newspaper article, and, in the case of the third defendant, as the person who wrote the defamatory newspaper article.

56 In the latter instance, this is apparent from the newspaper article itself.

57 In this context, paragraph 10 means that the defendants, respectively, wrote, approved and authorised the printing and publishing of the newspaper article.

58 On this interpretation of the paragraph, the particulars of claim are not vague and the defendants may plead thereto.

59 Even if paragraph 10 is interpreted to mean that all the defendants conducted themselves in the manners alleged, the defendants would be able to plead thereto. They are able to admit or deny whether they, jointly or severally, conducted themselves in the manner alleged.

60 In any event, the import of paragraph 10 of the particulars of claim is not the conduct of the defendants but that the defendants intentionally defamed the plaintiff. The defendants are able to plead to this allegation as well.

61 On this basis, the fourth complaint must fail.

62 In relation to the fifth complaint, the defendants complain that the allegation in paragraph 12 of the particulars of claim that '[t]he conduct of the defendant by publishing defamatory article (sic), intentionally to defame the plaintiff was understood by the plaintiff to mean ...' does not indicate which defendant's conduct is being referred to.

63 However, the import of this paragraph is to indicate what the article meant. The defendants' conduct is not, therefore, relevant to the meaning of this paragraph.

64 Accordingly, although it is not a model of clarity and might be considered vague, the defendants can plead to paragraph 12.

65 In the premises, the fifth complaint must fail.

66 The sixth complaint is that the plaintiff has failed to establish a cause of action against the first defendant as it does not exist as a separate entity.

67 Since it is inappropriate to determine whether the particulars of claim disclose a cause of action in a Rule 30 application, this complaint must fail.

68 The seventh complaint in the papers is entitled, Eighth Complaint.

69 The complaint is that the allegation in paragraph 4 relating to the publication day of the article has the result that the plaintiff will not be able to establish a claim against any of the defendants.

70 This is so, contend the defendants, because the particulars of claim allege that on Monday 26 February 2018, the first defendant printed and published a newspaper article of and concerning the plaintiff.

71 However, the first defendant does not publish a newspaper on a Monday but is a weekly Sunday publication. Daily Sun publishes a newspaper on a Monday.

72 Since this complaint constitutes a matter of substance and not an irregularity, it cannot be dealt with in terms of Rule 30.

73 In any event, the premise of the complaint is incorrect. The allegation in the particulars of claim is that the article was printed on or about 26 February 2018. A copy of the relevant article indicates that it was published in the Sunday Sun on 25 February.

ORDER

Accordingly, I make the following order:

- a. The application is dismissed with costs.

F SOUTHWOOD

ACTING JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Appearances:

Date of Hearing: 28 January 2020, 30 January 2020

Date of Judgment: 15 April 2020

For the Applicants: BD Stevens

Instructed by: Jurgens Bekker Attorneys

For the Respondent: No appearance

1 A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside

2 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.

[3] If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with Rule 30

[4] An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety

alleged, and may be made only if the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days

[5] An application in term of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety

alleged, and may be made only if the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of sub-rule (2)

[6] De Polo v Dreyer 1989 (4) SA 1059 (W)

[7] Cochrane v City of Johannesburg 2011

(1) SA 553 (GSJ) at [20]-[22]

[8] Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters

[2013] 2 All SA 692 (SCA) at [7]

[9] Jowell v Bramwell-Jones and others 1998

(1) SA 836 (W) at 902D-G

[10] Jowell v Bramwell-Jones and others 1998

(1) SA 836 (W) at 901F

[11] Jowell v Bramwell-Jones and others 1998

(1) SA 836 (W) at 899F/G, 902E

[12] Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B-E

[13] Jowell v Bramwell-Jones and others 1998

(1) SA 836 (W) at 913F-G

[14] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

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