

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO. 1409/2008

Date Heard : 7th September 2010

Date Delivered : 23rd November 2010

In the matter between:

HOWARD COLLEN

APPLICANT/DEFENDANT

and

MOOSA TIRY

RESPONDENT/ PLAINTIFF

JUDGMENT

DUKADA , AJ

[1] This is an application by the Defendant seeking to compel Plaintiff to deliver his reply to Defendant's Request for particulars for trial, and in the event of Plaintiff failing to deliver the said reply, Defendant to be granted

leave to supplement the papers to the extent necessary, seeking a dismissal of the Plaintiff's action plus costs of suit, The application was set down for Friday the 10th day of September 2010.

[2] A Counter- application was launched by Plaintiff and was also set down for hearing for Tuesday the 7th day of September 2010. In the counter-application Plaintiff seeks an order granting leave to withdraw the main action against the Defendant plus costs of the Counter-application only in the event of Defendant opposing same.

[3] Both applications came before me on Tuesday the 7th September 2010.

[4] Mr GAJAR, Counsel for Applicant/ Defendant, indicated that the Defendant no longer pursues his application to compel delivery of reply to request for particulars for trial. He further stated that Defendant is not opposing the application by Plaintiff to withdraw the main action. That being the case the only live issue remaining for consideration is the question of costs. Both Mr GAJAR and Mr SCOTT, Counsel for Respondent/ Plaintiff requested me to decide the question of costs in respect of the main action, the application for leave to withdraw the main action and the application to compel delivery of reply to request for particulars for trial.

[5] It is necessary to sketch out briefly the background of these applications.

[6] **FACTUAL BACKGROUND**

The Claim arises from a Notice of Sale in Execution of Plaintiff's

immovable property alleged to have been published in a local newspaper in pursuance of a judgment which Defendant says it was never granted or existed.

[7] Plaintiff instituted summons proceedings against the Defendant on the 9th July 2008 claiming payment of R400 000-00 being damages suffered by him as a result of extreme embarrassment, injury to his dignity as well as defamation of character.

[8] Defendant entered an appearance to defend and delivered his plea. In his plea Defendant denied publication of a Notice of Sale in Execution of Plaintiff's immovable property as alleged by Plaintiff. He also denied to have defamed Plaintiff as alleged or at all.

[9] After delivery of discovery papers a Rule 37 conference was held and a minute thereof was compiled and signed by the legal representatives of the parties on the 2nd August 2010.

Under the heading :- "OTHER MATTERS REGARDING PREPARATION FOR TRIAL RAISED BY EITHER PARTY FOR DISCUSSION", paragraph 13.3 reads as follows:-

"Defendant denies there was a notice of the sale in the newspaper.

Counsel for the Plaintiff inquired what if there is such a notice. The Defendant attorney responded that then the situation changes."

[10] A request for further particulars for trial by Defendant was served on Plaintiff's Attorneys and also filed in Court on the 11th August 2010.

[11] Notice of the Application to compel plaintiff to deliver reply to Defendant's request for particulars for trial, with a supporting affidavit, was served on Plaintiff and also filed in Court on 2nd September 2010, setting down the application for hearing in this Court on Tuesday the 7th September 2010.

[12] The Counter- application together with a supporting affidavit, seeking leave to withdraw the main action was delivered on the 3rd September 2010, setting it down for hearing in this Court on Tuesday the 7th September 2010.

[13] **COSTS IN RESPECT OF APPLICATION TO COMPEL DELIVERY OF REPLY TO DEFENDANT'S REQUEST FOR PARTICULARS FOR TRIAL**

Rule 21 of the Rules of this Court provides that after the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting necessary further particulars to prepare for trial.

Defendant delivered such request on the 11th August 2010. That was within twenty days before the trial date, viz, 10th September 2010.

[14] Rule 21 also provides that such request shall be complied with within ten days after receipt thereof.

Plaintiff failed to furnish such particulars within the afore-said ten days.

[15] On the 30th August 2010 Defendant's Attorneys wrote and faxed letter to Plaintiff's attorneys, the contents of which read as follows:-

"We acknowledge receipt of your fax dated 27th of August 2010, the contents of which are noted.

In previous correspondence exchanged between us we have declined your request that the above matter set down for hearing on the 10th of September 2010 be postponed as a result of your client's difficulties in establishing the date on which the alleged advertisement in issue was published.

For good order we reiterate that in our view, with respect, if your client has to date not yet managed to establish the date on which the aforesaid advertisement was published it is highly unlikely that affording your client more time is going to resolve his difficulties. This matter has been ongoing since 2008 and our client is anxious to finalize matters."

This letter is annexed to Defendant's application papers as Annexure "C2"

[16] On the 1st September 2010 Plaintiff's Attorneys wrote and faxed a letter to Defendant's Attorneys, the relevant portions of which read as follows:-

"Our client's claim for defamation is premised on the publication of the notice of sale in execution. The publication of such notice was common cause. Refer to Case No. 34/08 PARAGRAPH 17 of our client's founding affidavit and your client's opposing affidavit AD PARAGRAPH 17 wherein your client admitted to the publication of the advertisement.

The reason our client does not have a copy of the advertisement is due to a fire that occurred at his premises a while ago which resulted in all his documentation being destroyed.....

Due to time constraints we have had difficulty in finding the publication as we do not know the exact date that the advertisement was published.

We have advised our client to withdraw the proceedings, each party to pay their own costs. Should your client fail to agree, we shall seek the courts leave to withdraw."

This letter was annexed to Plaintiff's Counter-application as Annexure "A".

[17] On the following day the 2nd September 2010 Defendant's Attorneys served the papers for the application to compel on Plaintiff's Attorneys and filed same in Court the same day.

[18] It is clear from the letter from the Defendant's Attorneys, quoted in paragraph 13 supra, that there has been communication by correspondence between Defendant's Attorneys and Plaintiff's Attorneys about the non-availability of the Notice of Sale in Execution in question.

[19] In their letter dated 1st September 2010 addressed to Defendant's Attorneys, quoted in paragraph 16 above, Plaintiff's attorneys stated that they have advised their client to withdraw the main action.

[20] Instead of responding positively by agreeing to withdrawal of the main action and insist on Plaintiff paying costs, Defendant's Attorneys on the following day delivered the papers for the application to compel delivery of reply to Defendant's request for particulars for trial.

I do not understand the reason behind that.

[21] It is my respectful view that the launching of the application to compel delivery of reply to Defendant's request for particulars for trial on the 2nd September 2010, despite a clear position shown by the Plaintiff's Attorneys to withdraw main action, was not justified at all and Plaintiff cannot be saddled with the costs thereof.

[22] In the circumstances, I am of the view that each party should bear its own costs in respect of the application to compel Plaintiff to furnish reply to Defendant's request for particulars for trial.

[23] **COSTS IN RESPECT OF PLAINTIFF'S COUNTER APPLICATION AND WITHDRAWAL OF MAIN ACTION**

In paragraph 14 and 15 of his affidavit in support of the counter application, Plaintiff says:-

"14. I have not made any tender of costs to the Applicant as I believe that I was justified in bringing the action on the strength of the Applicant's admission that he had published the relevant notice in a local newspaper, had that been the case, and had the Applicant not denied same, I would have persisted in the action and I believe that I would have been successful therein.

15. in view of the change in stance by the Applicant in this regard, I believe that I was justified in bringing the action, as stated above, and that there should be no order as to costs in this matter."

[24] Plaintiff's Attorneys, in their letter to Defendant's Attorneys dated 1st September 2010 quoted in paragraph 16 above, say :-

"Our client's claim is premised on the publication of the notice of sale in execution."

I fully agree with this statement. Publication is one of the essential elements to be proved in a claim for defamation. In this regard, WESSELS, JA in **SA ASSOCIATED NEWSPAPERS AND ANOTHER v ESTATE PELSER** 1975 (4) SA 797 (A) at 810 C – D remarked as follows:-

" In every defamation action the Plaintiff must allege, and prove, that the defamatory words were published and concerning him."

This has now become trite law.

[25] That being the position in our law, I am of the opinion that for a litigant who intends to institute a defamation action, it is of paramount importance to secure evidence to prove publication of a defamatory statement as early as at the time of finally deciding to institute a defamation action.

With due respect, I cannot understand how Plaintiff could progress with the action so far without securing the availability of the proof of the publication.

[26] Plaintiff states that he relied on an admission made by the Defendant in an affidavit in another case. Being also mindful of the **HALLINGTON V HAWTHORN& CO Ltd** rule, I am of the opinion that Plaintiff took a high

risk in relying on such admission.

In paragraph 10 of his affidavit, Plaintiff says:-

" In view of this, I deemed it imprudent to persist in my claim against the Applicant as I have been advised that I may have difficulty in proving publication, more especially if the Applicant were to persist in his denial of same, which appears to be the case, and tender an explanation for his admission in the affidavit, as aforesaid."

In my view such advice was a prudent one though one would have expected it to have come up at an earlier stage.

[27] In **GEMISHIUS v DOUGLAS BESPROEIJINGSRAAD 1 1973 (3) SA 299 (NC) VAN RHYN**, J remarked as follows:-

"where a litigant withdraws an action or in effect withdraws it, very sound reasons must exist why a defendant should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because after all his claim or application is futile and the defendant or respondent after all, is entitled to all costs associated with:

See **KOOPERATIEF BPK v MPHAKA 1981 (2) SA 814 (0)** and **WASTE PRODUCTS UTILIZATION v WILKES (BICCARI INTERESTED PARTY) 2003 (2) SA 590 (WLD)** at 597 A- B.

I fully agree with this exposition as outlined above. I am not convinced with the reasons advanced by Plaintiff to institute and pursue this action up to this

stage without having secured the availability of an essential piece of evidence mentioned afore.

[28] In the circumstances, I am of the view that Defendant is entitled to costs both for the application for leave to withdraw the main action and also for the main action.

[29] In the result, the following order shall issue:-

- (i) In respect of the application to comply Plaintiff to deliver a reply to Defendant's request for particulars for trial, each party shall pay its own costs;
- (ii) In respect of the application for leave to withdraw the main action, Plaintiff shall pay costs occasioned thereby;
- (iii) Plaintiff pay costs of the main action.

D.Z. DUKADA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant / Defendant : Adv Gajar instructed by Messrs BOQWANA
LOON & CONNELLAN

For Respondent / Plaintiff : Adv P.W.A. Scott instructed by ZTA
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