

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 2556/2013

Date Heard: 6 December 2017

Date Delivered: 12 December 2017

In the matter between:

BULELANI MPUKANE

Applicant/Plaintiff

and

MINISTER OF CORRECTIONAL SERVICES

Respondent/Defendant

JUDGMENT

EKSTEEN J:

[1] At the commencement of proceedings in this matter the plaintiff sought a separation of issues. After hearing argument I made an order in terms of the provisions of Rule 33(4) of the Uniform Rules of Court (the Rules). I indicated that I would provide the reasons for my ruling together with my judgment on the merits. Notwithstanding the granting of the order counsel disagreed in respect of the liability for the costs of the application for the separation of the issues. I reserved judgment in that regard.

[2] The trial proceeded thereafter solely on the separated issue relating to the liability of the defendant. After the luncheon adjournment on the first day of trial counsel on behalf of the defendant advised that by virtue of instructions received during the luncheon adjournment the defendant was constrained to concede its liability to the plaintiff. This prompted a dispute in respect of the appropriate order for

the costs of the action in respect of the issue of liability. I reserved my judgment in that regard. The present judgment addresses only these three issues.

Background

[3] The plaintiff is employed by Bosasa, a company providing catering services for the St Albans Correctional Centre in Port Elizabeth and he is employed as a chef in the kitchen. Upon the completion of his daily task he is required to pass through portions of the correctional centre in order to leave the premises. On 30 January 2013, after completion of his duties, he proceeded, together with an employee of the Department of Correctional Services, through the area of the Medium B cells in order to leave the premises. Before leaving the Medium B area he was attacked by a prisoner and stabbed with a sharp object.

[4] The plaintiff alleges that the said attack was caused solely by the negligence of the defendant in that the Department of Correctional Services had failed to provide the necessary security to ensure his safe passage through the prison. The defendant denied that it had been negligent in any respect alleged and contended that it had taken all reasonable precautions in this regard.

[5] The pleadings were duly closed and the matter was enrolled for trial on 9 September 2014. On 5 August 2014 the parties held a pre-trial conference in terms of the provisions of Rule 37 of the Rules and the minutes of the pre-trial conference were duly drawn and signed on behalf of the parties. Two paragraphs of the minute are material for purposes of the present debate. Paragraphs 5 and 6 of the minute record:

“5. **Transfer to another Court**

5.1 The Plaintiff contends that the matter should not be transferred to another court and contends that action was properly instituted in the High Court.

5.2 The Defendant disagrees and contends that the matter should have been instituted in the Magistrate’s Court (or at least the Regional Magistrate’s Court) and reserves the right to argue the issue relating to the incorrect forum at the conclusion of the trial in relation to potential costs.

6. **Separation of Issues**

The parties agree that there exists no issue which can conveniently be decided separately as envisaged in terms of Rule 33(4).”

[6] Subsequent to the conclusion of the pre-trial conference and on 9 September 2014 the matter was postponed *sine die*. It was again enrolled for hearing on 17 December 2015, however, by notice dated 25 November 2015 the plaintiff unilaterally removed the matter from the roll. It was enrolled for the third time for 6 December 2017 when the matter was heard.

[7] On 27 November 2017 the plaintiff launched an application seeking an order that the issue of the liability of the defendant be separated from the remaining issues in the trial and be heard prior to any evidence being tendered in respect of the issues relating to the quantum of the plaintiff’s damages. The application was opposed. I shall revert below, to the extent necessary, to the content of this application.

The separation

[8] Rule 33(4) of the Rules provides as follows:

“(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

[9] The application for separation was opposed primarily on two grounds. Firstly, the defendant contends that the plaintiff is bound by the agreement reached and recorded at the pre-trial conference and is not entitled to resile therefrom. Secondly, the defendant argues that the application should be dismissed on the ground that it is brought at the eleventh hour and, so it is argued, is occasioned solely by the plaintiff's failure timeously to prepare for trial.

[10] In respect of the first argument I have been referred to *Erasmus: Superior Court Practice* (2nd ed) vol 2 where the author records:

“To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would, therefore, tend to negate the object of the Rule which is to limit issues and to curtail the scope of litigation.”

[11] For this reason too the author *Harms: Civil Procedure in the Superior Courts* at para B37.3 records that:

“A party is not entitled to resile from an agreement deliberately reached at a pre-trial conference or during the trial unless (perhaps) special circumstances are present”.

[12] I have had regard to these authorities and to the authorities relied upon by these authors for these propositions. The authorities which support these statements are all concerned with agreements reached in respect of the issues in dispute in the trial. They do not relate to the procedure which the court is required to adopt in the resolution of the disputes. On behalf of the defendant it is argued, however, that the principle must necessarily be the same. I have given careful consideration to this submission, however, I consider that it is unsound. Rule 33(4) empowers the court, *mero motu*, to order a separation of issues where the separated issues may be conveniently decided either before any evidence is led or separately from any other question. This it may do irrespective of any agreement which may have been reached by the parties. Where the issues may conveniently be decided before any evidence is led or separately from any other question the court is enjoined to grant such an order on the application of any party to the proceedings. The object of Rule 33(4), in a case such as this, is to enable a factual issue to be determined which can give direction to the remainder of the case or to enable the plaintiff's claim to be determined without the costs and delays of a full trial (see *Erasmus supra* at D1-435).

[13] In the present instance, in the event that the plaintiff were unsuccessful on the merits of his claim a separation of issues would obviate the need for him to incur considerable expenses in obtaining of medical experts to testify in respect of the quantum of damages. If, on the other hand, the plaintiff is successful on the merits, experience has taught that the prospects of settlement of the quantum of damages without the need for further litigation are significantly enhanced. The issue of liability (negligence on the part of the Department of Correctional Services) in this case is totally divorced from any consideration material to the quantum of damages. No duplication of evidence could be foreseen if the merits were decided separately from the quantum. In these circumstances, it seems to me, that the present case is indeed a matter where the issue of liability can conveniently be decided separately from any other issues in dispute and that such a procedure is clearly expedient. That being so the court cannot be precluded from granting a separation of issues simply because the parties agreed in 2014 that there were no issues which could conveniently be separated.

[14] The second argument relating to the lateness of the application and the lack of preparation on the part of the plaintiff was not persisted in in resisting the separation of issues. Counsel on behalf of the respondent argued, however, that it should be considered in determining the liability for costs incurred by the application for a separation at the eleventh hour. For these reasons I granted the separation.

Costs of the application for the separation of issues.

[15] The plaintiff sought an order that the costs occasioned by the application for the separation of issues be costs in the cause. The defendant, in response, reliant

on the same two arguments raised in respect of the merits of the application, contends that it would be appropriate in the circumstances of the present matter to order that the plaintiff pay the costs occasioned by the application for a separation, notwithstanding that the application was granted.

[16] It is necessary to consider briefly the foundation of the plaintiff's claim and the reasons advanced for the application being brought at the last minute.

[17] The plaintiff issued summons in September 2013. In the particulars of his claim it is alleged that as a result of the injuries sustained in the said assault he was referred to a psychologist for traumatic counselling. He claims an amount of R2 450 000 under three heads of damages. The claim was formulated as follows:

“9.1 General Damages: R1 000 000.00;

This head of damages is in respect of shock, pain and suffering, psychological trauma, discomfort and loss of the amenities of life. It is not practical to appropriately separate claims to the individual heading (*sic*) under general damages.

9.2 Estimated future loss of earnings: R1 000 000.00;

This head of damage is an estimate of the anticipated likely future loss of earnings. Plaintiff was and is still employed by Bosasa. Plaintiff is currently suffering from post traumatic stress disorder and is unable to fulfil his duties as he used to. It is anticipated that he will be forced to leave his current job as a result of the psychological trauma he suffers from. Medico legal reports will be obtained to support this claim and shall be furnished to the Defendant upon receipt thereof.

9.3 Estimated future medical expenses: R450 000.00.

This head of damage is an estimate of the anticipated likely future medical hospital treatment as a result of the injuries sustained. Expert medical evidence

will be sought to support this claim, and upon receipt of same it will be furnished to the Defendant.”

[18] As recorded earlier a pre-trial conference was held on 5 August 2014. In his founding affidavit in support of the application for a separation of issues the plaintiff's attorney seeks to explain the reasons for the plaintiff reneging from the agreement concluded at the pre-trial conference. He records that he had consulted with the applicant prior to the conference and that the applicant had instructed his firm that his injuries had healed and that there was no need for further treatment and/or examination and assessment of his person. He states that there was no suspicion at the time of any sequelae as a result of the injuries suffered and that his firm therefore agreed that the merits and quantum should be decided in one hearing. In consultation in preparation for trial during October 2017, however, the plaintiff instructed that “he still experiences nightmares of the incident and always feels not safe when he enters the respondent's premises” in order to go to work. For this reason a suspicion has now arisen that the plaintiff has not fully recovered from his injuries and, accordingly, an appointment has been set up with a clinical psychologist for an evaluation to be carried out in February 2018. It is difficult to reconcile the explanation advanced with the manner in which the plaintiff's case has been conducted.

[19] On 15 October 2014, approximately two months after the pre-trial conference the plaintiff amended the particulars of his claim. Significantly the formulation of the quantum of his claim which I have quoted earlier, remains unamended. The amended Particulars of Claim persist in the claim for future medical expense based on the allegation that the plaintiff “is currently suffering from post-traumatic stress

disorder and is unable to fulfil his duties as he used to". On any reading of the particulars of the plaintiff's claim as amended after the pre-trial conference the thrust of the claim relates to psychological trauma and the persistence of post-traumatic stress disorder. Little can be gleaned from the Particulars of Claim relating to the severity of the physical injuries sustained. A perusal of the file, however, does reveal that no notice has been given in terms of Rule 36(9) of the Rules in respect of any medical as foreshadowed in paragraph 9 of the Particulars of Claim.

[20] On a consideration of these issues I consider that there is merit in the argument on behalf of the defendant that the application for separation and the plaintiff's decision to renege from the agreement concluded at the pre-trial conference is prompted not by any perception that the plaintiff had fully recovered, but by a lack of preparation for trial. The explanation advanced for the change of stance affords no explanation for the formulation of the quantum of damages in the amended Particulars of Claim filed subsequent to the pre-trial conference nor for the plaintiff's stance in the conference that the High Court was the appropriate forum for the trial to be conducted.

[21] In **Rauff v Standard Bank Properties (a division of Standard Bank of SA Ltd) and Another** 2002(6) SA 693(WLD) Flemming DJP was concerned with the obligations of an attorney in litigation and stated at 703H-704A:

"... It is not proper work if the separation of issues is attended to long after the pleadings are closed.

[22.2] The possibility of separation of issues is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs. The attorney must apply himself to an assessment of how the matter can proceed with maximum expedition and without avoidable costs. There is so much that can be done and be gained by so using the attorney's insight that the frequent excuse that discovery must first be obtained is more often than not an exaggeration of the importance of discovery and a lame excuse for inactivity."

[22] These sentiments were endorsed by Leach J in **Mayo v The Minister of Safety & Security** [2007] JOL 20798 (SE). Leach J proceeded to add:

"It therefore makes no sense for the plaintiff to have delayed until the doors of the court to launch this application, particularly as the defendant has presumably incurred its trial costs."

These remarks appear to me to be particularly apposite to the present matter.

[23] On the other hand, however, as set out earlier herein, I do not think, on a reading of Rule 33(4) that there was merit in the opposition to the application for the separation of issues. In the circumstances it would be appropriate for each party to pay its own costs in respect of the application for a separation. I make no order in respect thereof.

Costs of the trial in respect of liability

[24] By virtue of the concession of the merits the plaintiff seeks an order that the defendant pay the costs occasioned by the trial in respect of the separated issue of liability. On behalf of the defendant, however, it is argued that plaintiff sustained only superficial injuries which will justify an award of damages which would fall within the

jurisdiction on the Magistrates' Court and the costs of the trial should therefore be reserved for decision by the court called upon to determine the quantum of the plaintiff's damages.

[25] It has been held that where a plaintiff has been successful in a trial in the High Court which has proceeded on a separated issue the costs occasioned by the trial, irrespective of the ultimate outcome in respect of the remaining issues, are occasioned by the position taken by the defendant and that the defendant should accordingly bear the costs of that trial. (**See Mkhwanazi v Van der Walt** 1995 (4) SA 589 (AD) at 595F.) This is the rule which would generally be followed where a trial court exercises its discretion in respect of the costs occasioned by a trial on a separated issue.

[26] In the present matter, however, the defendant has, at the pre-trial conference, expressly reserved its right to argue at the conclusion of the trial that the summons ought to have been issued in the Magistrates' Court and that costs should be limited to the appropriate Magistrates' Court scale. I cannot at this stage assess the probable quantum of damages which may eventually be awarded. I have recorded earlier that there is little indication in the Particulars of Claim as to the probable severity of the physical injuries sustained by the plaintiff and that no notice has been given in terms of rule 36(9) of the Rules of any medical evidence which will be presented. Before me, however, the plaintiff has testified that he was not hospitalised as a result of his injuries. Although he was never admitted to hospital, he did receive treatment for his injuries on the day of the incident at the St George's Hospital. These averments, coupled with his alleged assertion to his attorney in

August 2014 that he had made a full recovery from all his injuries give rise, in my view, to the real possibility that the quantum of damages which may be awarded may fall within the jurisdiction of the Magistrates' Court.

[27] In these circumstances I consider that there is merit in the submission that the costs occasioned by the trial on the merits should be reserved for adjudication by the court called upon to determine the quantum of the plaintiff's damages.

[28] In the result:

1. It is ordered that the defendant is liable to the plaintiff for such damages as the plaintiff is able to prove arise from the assault upon the him on 30 January 2013 at the St Albans Correctional Centre; and
2. The costs occasioned by the trial in respect of the separated issue of liability are reserved.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant/Plaintiff: Adv Poswa instructed by Mgweshe Ngqeleni Inc
c/o Ketse Nonkwelo Inc, Port Elizabeth

For Respondent/Defendant: Adv Beyleveld SC instructed by State Attorney,
Port Elizabeth