

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

CASE NO. 645/2020

Date heard: 13 August 2020
Date delivered: 12 November 2020

In the matter between:

C[...] L[...] S[...]

Applicant
(Plaintiff in the main action)

and

T[...] I[...] S[...]

Respondent
(Defendant in the main action)

JUDGMENT

RUGUNANAN, J

[1] On 19 March 2018 the parties' marriage out of community of property in terms of an antenuptial agreement that excluded the accrual system was dissolved by a decree of divorce granted in the Regional Court, Port Elizabeth. The dissolution incorporated a deed of settlement concluded between them on 1 December 2017. Consequent to representations made by the defendant and /or his agents, which representations allegedly induced the plaintiff to enter into the settlement agreement, the plaintiff obtained an order on 23 August 2019, in the Regional Court, in terms of which several clauses incorporated in the agreement were rescinded. The present action in this court has been instituted by the

plaintiff on 5 March 2020, and is for delictual damages allegedly suffered by her as a result of the aforesaid representations.¹

[2] This historical detail including the nature of the representations and damages allegedly suffered by the plaintiff have been pleaded in her particulars of claim. On 7 May 2020 the defendant delivered a notice of exception objecting to the particulars of claim on various grounds, further to which the plaintiff delivered a notice of intention to amend the particulars of claim on 9 June 2020. The defendant has objected to the notice of intention to amend (hereinafter “the notice”). Interlocutory to the pending action the plaintiff (as applicant) approaches this court for leave to amend the particulars of claim.

THE PRESCRIBED RATE OF INTEREST ACT

[3] There is an initial observation regarding the applicability of the Prescribed Rate of Interest Act² which I think summarily disposes of the defendant’s objections to the interest component in all the heads of damages dealt with hereunder except for the claim relating to the maintenance for the minor child and the claim for the cost of servicing and maintaining a motor vehicle (for which claims a similar objection has not been raised).

[4] The plaintiff contends that the various heads of damages dealt with hereunder constitute unliquidated debts under section 2A of the Act and for which debts interest *a tempore morae* is claimed in the prayers to the particulars of claim from date of demand until date of final payment. Since no demand prior to summons is alleged, the date for the commencement of the calculation of *mora* interest would be effective from date of service of summons (an observation which, quite sensibly, is evident from a reading of the particulars of claim as a whole). The applicable rate of interest in terms of section 1(2) of the Act is the rate determined by the Minister of Justice who may from time to time prescribe a

¹ In heads of argument the plaintiff relies on AB v AB 2016 (5) SA 210 (SCA) as authority for the proposition that negligent misrepresentations giving rise to the conclusion of a settlement agreement in a divorce action may result in a claim for delictual damages suffered.

² Act No. 55 of 1975, as amended

rate by notice in the Gazette. This initial observation, disposes of the defendant's main objection that the proposed amendment neither makes reference to section 2A of the Act nor to any facts which entitle her to invoke the Act and that it is improper for the plaintiff to rely thereon in her heads of argument.

[5] Where, as in the present case, there is no indication in the particulars of claim and in the contemplated amendments that a rate of interest has been agreed on, expressly or impliedly, and the rate is not governed by any other law, then self-evidently the applicable interest rate is that which is prescribed from time to time by notice in the Gazette.³ In these circumstances the formulation⁴ of the pleading is sufficient to convey that the Act applies by operation of the law and there can be no difficulty in the defendant (or those representing him) determining the applicable interest rate by recourse to the relevant Gazette.

INFLATION ADJUSTMENTS

[6] These adjustments affect: the claim in respect of the minor's maintenance (prayer 14 of the plaintiff's notice⁵), the claim in respect of the loan to the defendant (paragraph 5.1 of the plaintiff's notice⁶), and the claim in respect of the sale of the plaintiff's vehicle (paragraph 18 of the plaintiff's notice⁷). In each instance the defendant's objection essentially is that the plaintiff has failed to plead necessary averments to support her contention that the amount for each claim should be subject to the escalation claimed, and that such failure in each instance renders it impossible for the defendant to calculate the *quantum* of damages being claimed.

[7] Rule 18(4) of the Uniform Rules of Court requires of a pleader to set out a clear and concise statement of the material facts upon which reliance is sought.

³ See generally Wille's Principles of South African Law, Juta 9th ed at page 951

⁴ cf. *Yannakou v Apollo Club* 1974 (1) SA 614 (AD) at 623F-G where it is stated: "Hence, if [a party] relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it."

⁵ p 24 of indexed papers

⁶ p 11 of indexed papers

⁷ p 20 of indexed papers

The purpose, after all, is to define the issues so as to enable the other party to know what case it has to meet. Pleadings are required to be lucid, logical and intelligible so that a cause of action or defence appears clearly from the factual allegations made.⁸ What must be pleaded are facts, not evidence, and only the material facts should be pleaded.⁹ In this regard it is of importance to be mindful of the distinction between *facta probanda* or primary factual allegations which a pleader must make and *facta probantia* which are secondary allegations or evidence upon which the pleader will rely to prove the primary allegations.¹⁰ A pleading that propounds a party's own conclusions and opinions instead of the material facts is defective.¹¹

[8] The pleading of damages is regulated by the general provision in rule 18(10) which requires that damages be set out in such manner as will enable the defendant reasonably to assess the quantum thereof. A plaintiff is not required to set its claim out in a manner that will enable the defendant to determine whether or not the plaintiff's assessment of the *quantum* is correct because the defendant has a duty himself to work out what is a reasonable assessment of the damages claimed by the plaintiff.¹²

[9] I am not persuaded that there is merit in the defendant's objections. To uphold them would be tantamount to either obliging the plaintiff to plead *facta probantia* or to speculate in expressing her own conclusions and opinions relevant to her measure of damages. In any event the plaintiff has pleaded nominal figures representing capital amounts; the methodology or formulae for achieving their inflation adjusted threshold are matters, I think, over which evidence can be led and legal argument can be advanced.¹³ The amendments

⁸ Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T) at 210H

⁹ Moaki v Reckitt and Colman (Africa) Ltd and Another 1968 (3) SA 98 (A) at 102A-B

¹⁰ Nasionale Aartappel Korporasie Beperk v Price Waterhouse Coopers ING en andere 2001 (2) SA 790 (T) at 797G-I and 798C-E; Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 903A-B; and Makgae v Sentra-boer (Koöperatief) Bpk 1981 (4) SA 239 (T) at 245D-E

¹¹ Erasmus, Superior Court Practice [Service 8, 2019] at D1-232A

¹² Erasmus, Superior Court Practice [Original Service, 2015] at D1-241

¹³ see ST v CT [2018] 3 All SA 408 (SCA) at paragraphs [116] and [163] regarding the practical use of an actuarial calculation

are sufficiently intelligible to communicate the preliminary quantum of the plaintiff's damages.

THE REMAINING CLAIMS AFFECTED BY THE PROPOSED AMENDMENTS AND THE OBJECTIONS RAISED:

Claim in respect of Plaintiff's maintenance

[10] In prayers 1 and 2 of the particulars of claim, the plaintiff claims payment in the amount of R308 983.41 and interest *a tempore mora* thereon from date of demand until date of final payment. The amendment set out in paragraph 12 the notice quantifies this amount for the period 1 December 2017 to 1 March 2020 by reference to annexure "POC4" to the particulars of claim. The annexure is a schedule that offers a somewhat jagged but ready quantification of the plaintiff's monthly maintenance requirements (and those of the minor child). Relevant to prayer 2, the defendant's main objection is that the proposed amendment neither makes reference to section 2A of the Prescribed Rate of Interest Act nor to any facts which entitle her to invoke the legislation.¹⁴ This issue has already been dealt with elsewhere in this judgment and warrants no further consideration.

Claim in respect of minor's maintenance

[11] In paragraph 13 of the notice the plaintiff claims "*maintenance payable for the minor child in the amount of R4 483.58 per month, calculated from 1 December 2017.*" This amount claimed as a maintenance contribution from the defendant is calculated with reference to annexure "POC4" to the notice. In prayer 14 of the particulars of claim the amount claimed as maintenance for the minor "*is to escalate yearly in accordance with the consumer price index*". The escalation issue begs of no further consideration as it has been dealt with elsewhere under the rubric of inflation adjustments.

¹⁴ cf. *Yannakou v Apollo Club* 1974 (1) SA 614 (AD) at 623F-G where it is stated: "Hence, if [a party] relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it."

[12] The defendant's remaining objection (understood in the baldest of terms) is that the period over which the amount of maintenance should be paid has not been pleaded which renders it impossible for the defendant to calculate the quantum of this claim for want of compliance with rule 18(10). The effect thereof, so the argument goes, is that the particulars of claim are rendered vague and embarrassing; alternatively, lacking sufficient particulars to sustain a cause of action and further alternatively, they are irregular for non-compliance with rule 18(10). Tritely, where it is alleged that a pleading is vague and embarrassing the *onus* is on the party making the allegation to show that it suffers prejudice as a result of the offending allegations.¹⁵ This issue, although mentioned in the defendant's heads of argument by reference to a glancing principle, was not emphatically dealt with in argument.

[13] It was contended by plaintiff's counsel that the use of the word minor implicitly conveys that the duration or period for which maintenance is claimed endures until the minor attains majority at the age of 18. This has not been pertinently pleaded (nor has any other cut-off date). Considering however, that it is nowhere pleaded that the minor will require maintenance beyond that age¹⁶, the logical conclusion seems to favour the plaintiff especially where it has not been pertinently contended that the defendant is prejudiced.

Claim in respect of arrear maintenance for minor

[14] Prayers 3 and 4 of the particulars of claim respectively incorporate claims for the amount of R121 056.66 and interest *a tempore mora* thereon from date of demand until date of final payment. The interest issue has been dealt with elsewhere in this judgment - it requires no further consideration.

[15] Paragraph 15 of the notice proffers detail that the above amount is calculated over the period 1 December 2017 until 1 March 2020 in instalments of

¹⁵ Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed, at 636-637

¹⁶ See however *Burse v Bursey* 1999 (3) SA 33 (SCA) for the proposition that the duty of support owed by a parent to a child does not terminate when the child reaches a particular age but continues until the child becomes self-supporting even if that occurred after attaining majority.

R4 483.58 per month. The defendant's objection is that the intended amendment is vague and embarrassing since no facts have been pleaded to support the allegation that the amount claimed was "*due and payable*" for the minor.

[16] In the plaintiff's heads of argument the submission is made that the claim for arrear and future maintenance for the minor is premised on the defendant's misrepresentations (and those of his agents). The period 1 December 2017 to 1 March 2020 over which the claim is quantified did not extinguish the defendant's reciprocal duty to provide maintenance and support for the minor - a duty which plaintiff's counsel correctly contended exists in law (and which applies to both parents of a minor child). I was not addressed on the facts which the plaintiff ought to have pleaded to support her allegation that the amount was "*due and payable*". Since it was incumbent on the defendant to have demonstrated prejudice, which he has not done, I am not persuaded that the objection has any merit.

Claim in respect of loan

[17] At prayers 10 and 11 of the particulars of claim the plaintiff claims an amount of "*R23 000 adjusted with inflation in accordance with the consumer price index from date of payment until date of divorce*", together with "*interest a tempore mora on the amount of R23 000 adjusted with inflation from date of demand until date of final payment.*" These issues have been dealt with and require no further consideration.

[18] Omitting discursive detail contained in the plaintiff's notice, the claim for R23 000 is set out in paragraph 5.1 and is founded on an inheritance received by the plaintiff and dispensed to the defendant as a non-interest bearing loan during 2003 and payable to the plaintiff on demand *per* summons.

[19] A party who relies on a contract in its pleading shall, in terms of rule 18(6), state whether the contract is written or oral, and when, where and by whom it was

concluded, and if the contract is written a copy thereof or the applicable part relied on in the pleading shall be annexed thereto.

[20] For the defendant, the composition of the amendment is problematic for non-compliance with rule 18(6) hence his objection on the basis that the form and conclusion of the alleged loan have not been sufficiently pleaded in accordance with the prescripts of the relevant sub-rule. The plaintiff's argument that the dispensing of money between parties to a marriage out of community of property amounts to a loan was not supported by any case authority. I make no formal pronouncement on the correctness or otherwise of this argument but will assume in plaintiff's favour purely for the sake of expedience and for reasons that follow.

[21] Although it is apparent that the detail required by the sub-rule is wanting in the proposed amendment, non-compliance with the sub-rule does not mean that the loan agreement ceases or that the plaintiff will be precluded from proving its enforceability.¹⁷ Non-compliance is not fatal and can be condoned in the absence of prejudice to the opposite party¹⁸, an issue not categorically and straightforwardly dealt with in argument. In any event, I do not think that a rule of procedure should serve as a device to deprive the plaintiff of the opportunity to prove her claim. As has often been said, the rules exist for the courts, not the courts for the rules.

Claim in respect of sale of vehicle

[22] What is claimed here is an amount of R15 000 adjusted with inflation in accordance with the consumer price index from date of payment until date of divorce plus interest *a tempore mora* from date of demand until date of final payment (prayers 12 and 13 of the particulars of claim). To repeat the obvious, these issues do not necessitate further elaboration.

¹⁷ compare Absa Bank Limited v Zalvest Twenty (Pty) Ltd 2014 (2) SA 119 (WCC) at 122D-F, 122F-G, 123C-127D and 127H-128A, and for an abridgement see Erasmus, *op cit* [Original Service, 2015] at D1-237

¹⁸ Dass and Others NNO v Lowewest Trading (Pty) Ltd 2011 (1) SA 48 (KZD) at 53B-H

[23] The *causa* for this claim is detailed in paragraph 6.1 of the notice of intention to amend wherein it is pleaded that:

“11.2.4.1 The defendant sold the plaintiff’s vehicle (an asset excluded from the defendant’s estate as a consequence of the parties’ marriage out of community of property) for an amount of R15 000 during the course of the parties’ marriage and he used the amount of R15 000 to buy a new vehicle, which vehicle was registered in the defendant’s name alternatively in the defendant’s business’ name, without paying any amount of the proceeds received from the aforesaid sale, to the plaintiff.”

[24] In argument it was contended for the plaintiff that the amount claimed under this head is analogous to - and for present purposes - ought to be treated as a claim founded on a loan - this on the premise that the dispensing of money between parties to a marriage out of community of property amounts to a loan. Without seeking to make a formal pronouncement on the correctness or otherwise of this argument, I am again prepared to assume in favour of the plaintiff purely for the sake of expedience. As such, the intended amendment is upheld for reasons similar to those evident in the preceding paragraphs.

Claim in respect of replacement vehicle

[25] This claim is implicated by paragraph 8 of the notice as read with prayers 7 and 8 of the particulars of claim. In the latter paragraphs it is pleaded that the plaintiff claims payment of an amount of R300 000 together with interest *a tempora mora* thereon from date of demand to date of final payment. The crux of the defendant’s objection is that the plaintiff has failed to plead averments necessary to determine the rate of interest. Again, to repeat the obvious - the interest issue has already been dealt with.

Claim in respect of the costs for servicing and maintenance of vehicle

[26] Read with prayer 9 of the particulars of claim the proposed amendment introduced at paragraph 21 of the plaintiff's notice is set out as follows:

“17.9 Payment of the costs for services and maintenance of the plaintiff's vehicle calculated from 19 March 2018 (i.e. the date of divorce) until 1 March 2020 (i.e. plaintiff's date of employment) as part of the defendant's maintenance obligation to the plaintiff as at 1 December 2017 (i.e. date of settlement) and as a consequence of the contents of paragraph 11.2.6 supra.”

[27] The composition of the proposed amendment attracted an objection from the defendant for non-compliance with rule 18(10), contending in effect that the pleading is rendered vague and embarrassing or irregular. The amendment clearly conveys that the cost for services and maintenance were incurred as a past expense for a specified period. The plaintiff cannot side-step her obligation to set out and quantify her alleged damages in such a manner as will enable the defendant reasonably to assess the quantum thereof. In formulating the proposed amendment there has been a clear misconception of the sub-rule which has culminated in a prayer for unquantified relief that can only be described as speculative.

COSTS

[28] A court will allow an amendment for the purpose of ensuring a proper ventilation of the dispute between the parties.¹⁹ It may also be considered correct to allow an amendment even if the pleading would appear to be possibly open to exception or even if the court is of the opinion that the question of whether or not the pleading is excipiable is arguable.²⁰ Courts have also increasingly recognised that the rules of court and pleadings do not exist for their own sake but to advance the administration of justice.²¹ This judgment is informed by these precepts particularly as I have observed that the particulars of claim are long

¹⁹ See YB v SB 2016 (1) SA 47 (WCC) at 51D and the cases cited therein

²⁰ YB v SB supra at 51G

²¹ YB v SB supra at 51E

winded and inelegantly formulated and so too the contemplated amendments which renders the exercise of discerning the material integral to the plaintiff's cause of action nebulous. The particulars of claim and indeed the contemplated amendments are deficient in several other respects which I find unnecessary to detail seeing that these were not the issues before this court. This brings me to the question of costs.

[29] For the defendant it was argued that the amendments sought by the plaintiff should be disallowed and the application must be dismissed with costs. Plaintiff's counsel contended that the defendant persisted with his opposition despite having received the plaintiff's heads of argument.

[30] It is considered timely to say something about heads of argument. The plaintiff's heads of argument (including supplementary heads), though industrious and helpful, were not concise and succinct. They included statutory excerpts and lengthy quotations from cases. They were prepared in a manner clearly discordant with the practice directions in this division.²² Both sets of the plaintiff's heads were paginated and secured at the back of the indexed court papers. I was not impressed by this. It is a situation that is, for good reason, not catered for in the practice directions.²³ I accept the explanation that this was done in error by a junior incumbent in the office of the plaintiff's attorneys, but ultimately it calls for caution and scrutiny to be exercised by seniors. My sentiments about this are a matter of record. Heads of argument must be filed separately and should never be attached or secured to the court papers. To say the least, I found the task of navigating through the plaintiff's heads of argument while simultaneously cross-referencing the papers to be cumbersome and time consuming with resultant irritation and frustration.

[31] As for the defendant, much of his heads of argument were a duplication of the content of his notice objecting to the amendments.

²² see rule 8 of the Joint Rules of Practice of the High Courts of the Eastern Cape Province.

²³ Rule 3 of the Joint Rules *supra*

[32] In the exercise of my discretion I have decided to order that each party shall pay their own costs relevant to the opposition to these proceedings. The order below accommodates the amendments conceded by the defendant at the commencement of the proceedings.

[33] In the result the following order issues:

- (i) The plaintiff (as applicant) is given leave to amend her particulars of claim in accordance with her Notice of Intention to Amend dated 09 June 2020, such leave excludes the amendment sought in paragraph 21 of the said Notice;
- (ii) Each party shall pay their own costs relevant to the opposition to the application for leave to amend.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 12 November 2020.