



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 73418/16

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHERS JUDGES: YES
(3)	REVISED: YES
18/02/21	
DATE	SIGNATURE

In the matter between:

PETER THEMBEKILE MALGAS
ALFRED DISCO BIYELA
BOSWELL JOHN MHLONGO

First Plaintiff
Second Plaintiff
Third Plaintiff

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Defendant

SPECIAL PLEA JUDGMENT

BAQWA J:**INTRODUCTION**

1. The plaintiffs have claimed damages by way of action and the background thereto is briefly as follows: -
2. In June 2004, the North West High Court found the plaintiffs guilty of a number of serious crimes and sentenced them to life imprisonment and other lesser periods of imprisonment after which the plaintiffs were incarcerated.
3. The defendant is the Minister of Justice and Correctional Services who has been cited in terms of the *State Liability Act*, Act 20 of 1957 in his capacity as the Minister responsible for the administration of justice.
4. After their conviction, plaintiffs approached the Mahikeng Justice Centre ("the Centre") for assistance with their intended appeal. The Centre required a transcript of the record of proceedings of the trial in order to assess the merits of an appeal and the plaintiffs were informed that it did not possess the resources to acquire a transcript.
5. The plaintiffs did not possess the financial resources to acquire a transcript but after a period of about two years, family and friends of the plaintiffs raised the necessary funds to obtain a transcript and payment was made during August 2006.
6. However, a materially complete and judicially approved transcript could only be provided to the plaintiffs during October 2012. This was despite repeated and

ongoing efforts by the plaintiffs to obtain the transcript.

7. After obtaining the transcript, the plaintiffs proceeded with their appeals first to the full bench of the North West High Court, then petitioning the Supreme Court of Appeal and finally to the Constitutional Court.
8. On appeal, the plaintiffs' convictions and sentences were set aside on the merits by the Constitutional Court during 2015 and the plaintiffs were released during that year.
9. This action seeks an order declaring that the detention of the plaintiffs was wrongful and that the defendant is liable in delict for the said wrongful detention and deprivation of liberty. The plaintiffs also seek an order postponing the issue of quantum *sine die* with costs.
10. The matter has been set down for trial from 15 to 26 February 2021 and on the first day of trial the defendant sought to pursue the special plea which formed part of its plea as follows:

"DEFENDANT'S SPECIAL PLEA OF NON – JOINDER

1.1 *In paragraph 13.1 of their particulars of claim, the plaintiffs aver that:*

"During the period between the year 2004 to the year 2006 the plaintiffs could not obtain a copy of the record of proceedings during their trial before the Honourable Justice Leeuw, due to the failure, refusal and/or neglect of the Mahikeng Justice Centre to arrest the plaintiffs to obtain a copy of the said record of the proceedings."

1.2 *In paragraph 13.2 of their plea the plaintiffs aver that:*

“During the period between 2006 and 2012 the plaintiffs could not obtain a materially complete copy of the record of the proceedings during their trial before the Honourable Justice Leeuw, due to the failure refusal, and/or neglect by various functionaries of the state to provide, within a reasonable time, a complete and judicially revised and approved copy of the proceedings to the plaintiffs; those functionaries of the State include the Honourable Justice Leeuw, the Registrar of the North West Division of the High Court of South Africa, Mahikeng Justice Centre and the transcription service provides.”

1.3 The plaintiffs have failed to join the Mahikeng Justice Centre as a party to the proceedings and in circumstances where it has a direct and substantial interest in the subject matter of the plaintiffs’ claim.

1.4 The plaintiffs have also failed to join the transcription service providers as a party to the proceedings. WHEREFORE the defendant prays that the plaintiffs’ claim be dismissed with costs on this ground alone.”

11. The defendant submits that the plaintiffs have failed to allege any specific grounds on which the Minister could be said to be vicariously liable for the conduct or actions of the other parties referred to in paragraph 6, 13.1 and 13.2 of the particulars of claim. They further argue for the citation the Mahikeng Justice Centre, transcription service providers, namely, Sneller Verbatim (Pty) Ltd who were later replaced by Rencey Smit T/A L & C Typing Services, and the Registrar of the North West Division of the High Court.

THE EXCEPTION ARGUMENT

12. Counsel for the plaintiff submit that the argument presented by the defendant’s Counsel is a mere rehash of the submissions before Justice Tuchten who adjudicated upon an exception raised by the defendant in which it was alleged

that the particulars of claim are vague and embarrassing. Defendant's riposte to plaintiff is that the Tuchten decision on that matter did not involve the hearing and adjudication on the issues of misjoinder and non-joinder as a special plea.

13. Rule 10 (3) of the *Uniform Rules of Court* provides as follows:

"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."

14. A reading of the grounds of the exception and the contents of Rule 10 (3) demonstrates that we are dealing with different legal considerations in each case and that Justice Tuchten's decision in which he found that the exception as framed on behalf of the defendant had no merit and dismissed it with costs cannot assist in the determination of the present matter.
15. The plaintiffs have sought to rely on the decision **Alves v LOM Business Solutions (Pty) Ltd and Another (GSJ) [2011] ZAGPJHC 108; 2012 (1) SA 399 (GSJ); [2011] 4 All SA 490**, at p407, par [20] which according to the defendant is misplaced in that, that decision is distinguishable from the present case. I do not agree.
16. A brief examination of the facts of the Alves decision shows that the case is relevant in the determination of issues in the present matter.
17. In that case the plaintiff claimed damages on the basis that the defendants were

negligent in preparing the transcript for his appeal hearing resulting in his having to spend a further unnecessary period of about fifteen (15) months in incarceration. The first defendant was the company which was contracted to transcribe court records and the second defendant was the Minister of Justice and Constitutional Development who was nominally cited as the member of the National Executive with the overall responsibility for the administration of justice.

18. Similar to the present case the plaintiff had been indicted of murder and was convicted in the South Gauteng High Court of attempted murder on 13 December 2005. He had appealed his conviction and sentence. The appeal was heard on 29 February 2008 and it was successful with both conviction and sentence being set aside.
19. The plaintiff claimed in that case that the long interval of time between the granting of the leave to appeal and the hearing thereof could be attributed to the negligence of the defendants in that they failed to ensure that an appeal record was prepared within a reasonable time.
20. A direct parallel to be drawn from the Alves decision is that the first defendant was the contracted transcriber which was not only cited as first defendant but which had to defend itself credibly and extricate itself from liability.
21. Section 316 (7) (b) of the *Criminal Procedure Act* 51 of 1977 as amended (the Criminal Procedure Act), provides:

“(b) If an application under subsection (1) for leave to appeal is granted and the appeal is under section 315(3) to be heard by the full court of the High

Court from which the appeal is made, the registrar shall without delay prepare a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be prepared of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the full court of the High Court concerned may nevertheless call for the production of the whole record."

22. In my view, Section 316 of the *Criminal Procedure Act* disposes of any submissions or assumptions about the official responsible for the preparation of the record. That the registrar is a functionary in the department of the defendant goes without saying.

23. In paragraph 23 of *Alves* the following was said:

*"[23] The purpose of the statutory obligation imposed on the registrar to prepare a record of appeal in criminal matters is, in my respectful view, expressed with admirably succinct accuracy and clarity by Erasmus J in **S v Manyonyo [1997 (1) SACR 298 (E) (1996 (11) BCLR 1463)]** where the learned judge said:*

'The reason for the statutory insistence on the expeditious despatch of records on review is generally to promote the speedy and efficient administration of justice, but in particular to insure that an accused is not detained unnecessarily in cases where the court of review sets aside the conviction or reduces the sentence.'"

24. No case has been made out for the joinder of the Chief Justice, the Secretary General of the OCJ, the Mahikeng Justice Centre and Justice Leeuw. Section 316 (*supra*) is quite explicit regarding the officer responsible for the preparation and production of a case record.

THE TRANSCRIBERS NON-JOINDER

25. Bearing in mind what I have already said about the citation of the first defendant in the Alves matter, I now proceed to consider the position of the transcribers in the present matter.
26. Defendant's Counsel submits that the plaintiffs' allegations of 'failure, refusal, and/or neglect' to provide them timeously with a complete record of the proceedings is also attributable to two other separate entities which are private companies, namely, Sneller Verbatim (Pty) Ltd and/or Ms Rencey Smit t/a L & C Typing Services.
27. It is further submitted that on plaintiffs' own version as contained in paragraph 13.2 these two entities are private companies who were operating as independent contractors and whose relationship with the defendant was founded on the basis of a contract. Consequently, their liability or otherwise for the alleged omission or negligence cannot be assumed to lie with the defendant but stand to be assessed and determined based on the relevant facts and the relevant terms and conditions of the contracts entered into with the defendant. It is presumed that Sneller Verbatim and L & C Typing Services are possessed with a legal persona having the right to sue and be sued in their own right.
28. The basis on which the transcribers can be said to fall within the ambit of Rule 10 (3) (*supra*) appears from a document filed by the plaintiffs titled "Plaintiffs' List of Admissions Sought for Trial":

"The plaintiffs received the purported record during or about May 2010 and the record was materially incomplete in that the testimony of accused 1,3,7 and 8 in the trial – within – a – trial was missing. Also missing was the cross – examination of accused 1 during his testimony in the main trial and the [entire/part of the] testimony by accused 1 [first/second testimony] and accused 3,7 and 8 in the trial."

29. It goes without saying that it is only the transcribers who would be the persons/companies to provide explanations with regard to the above material omissions. The issues arising between the plaintiffs and the defendant would be the same as those between the plaintiffs and the transcribing companies.
30. In the circumstances I find that defendant has made out a case of non-joinder in regard to the transcribing companies.

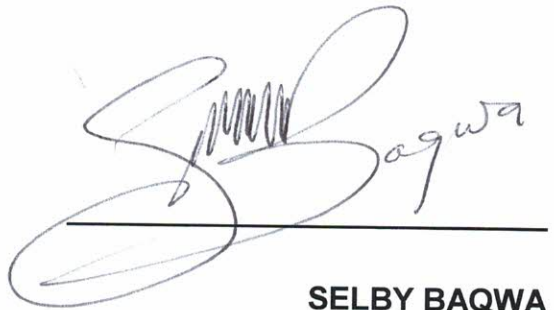
MISJOINDER

31. Defendant's Counsel submits that the current defendant has been wrongly cited in the proceedings. There is no merit in this submission. The defendant is cited in his capacity as a member of the Executive responsible for the administration of justice in the Republic of South Africa. The Registrar of the High Court falls under his authority and there is therefore no misjoinder. The position of the defendant is put beyond any doubt when the findings of the Court in Alves matter are considered. In that case it was held:

"That the Minister owed a duty to appellants in the position of the plaintiff to ensure that records were prepared for the hearing of an appeal within a reasonable time. The constitutional rights of the plaintiff could not be rendered nugatory by unreasonable delays in the offices for which the Minister was responsible (Paragraph [22] – [21] at 407 B – D)."

ORDER

32. In light of the above, I make the following order:
33. The special plea of non-joinder is upheld in regard to the transcribers, namely Sneller Verbatim (Pty) Ltd and/or Ms Rencey Smit t/a L&C Typing Services.
34. Plaintiffs are granted leave to amend their summons within 20 days of this order.
35. The special plea of misjoinder is dismissed.
36. Costs will be costs in cause.



A handwritten signature in blue ink, appearing to read 'Selby Baqwa', is written over a horizontal line.

SELBY BAQWA**JUDGE OF THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA**

Matter Heard On	:	15 February 2021
Judgment Reserved On	:	15 February 2021
Judgment Delivered On	:	18 February 2021

APPEARANCES:

Counsel for the Plaintiffs	:	Adv. L.S de Klerk [SC]
	:	Adv D Thaldar
Attorneys for the Plaintiffs	:	Gildenhuys Malatji Inc.
 Counsel for the Defendant	:	 Adv Shakoane [SC]
	:	Adv. D Mosoma
Attorneys for the Defendant	:	The State Attorney