



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case No: 2084/2014

In the matter between:

**SABATA DOMINIC LISELE**

Plaintiff

and

**MINISTER OF POLICE**

Defendant

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**HEARD ON:** 09 FEBRUARY 2018

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**DELIVERED ON:** 22 FEBRUARY 2018

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**JUDGMENT BY:** P J LOUBSER

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[I] **INTRODUCTION:**

[1] This matter came before me for the determination of an exception filed by the Defendant against the Plaintiff's Particulars of Claim

on the basis that it does not disclose a cause of action against him. The exception is opposed by the Plaintiff.

- [2] The exception became complicated by a number of procedural issues which may have a bearing on the outcome thereof. These issues pertain to the question whether the Particulars of Claim have been amended after the filing of the Notice of Exception or not. The relevant facts are mostly common cause between the parties.

[II] **THE FACTS:**

- [3] The Plaintiff issued summons for damages against the Defendant on 23<sup>rd</sup> June 2014, alleging in his Particulars of Claim that he was kidnapped at gunpoint, assaulted with a fire-arm belonging to the Department of the Defendant, and then driven over repeatedly using his own vehicle. It is alleged that the Defendant was liable because his Department failed to retrieve the fire-arm from one of its members on the termination of his service as a policeman, which failure caused the said fire-arm to end up in the illegal possession of the perpetrator.

[4] The Defendant noted the present exception to the Particulars of Claim on 15<sup>th</sup> October 2014 on the basis that it does not disclose a cause of action against the Defendant in that the claim for damages, as a result of the negligent driving or other wrongful act of the perpetrator, falls within the ambit of Section 17(1)(a) of the Road Accident Fund Act no. 56 of 1996. Only the Road Accident Fund is therefore obliged to compensate the Plaintiff, and not the Defendant.

[5] The exception was never set down for hearing by either the Defendant or the Plaintiff. Instead, on 12<sup>th</sup> December 2014, the Plaintiff filed a Notice of Intention to Amend his Particulars of Claim. The amendment sought to introduce allegations to the effect that the Plaintiff had indeed issued Summons against the RAF on 18<sup>th</sup> October 2013 to mitigate his damages, and that the RAF was ordered by the Court on 3<sup>rd</sup> December 2014 to pay to the Plaintiff an amount of R3 664 066.12, together with an undertaking in terms of Section 17(4)(a) of the RAF Act.

[6] The Defendant formally objected to this proposed amendment on 5<sup>th</sup> January 2015 on the basis that, *inter alia*, the Defendant and the RAF should have been sued as joint wrongdoers, that the

Plaintiff has failed to obtain leave of the Court to sue the Defendant, and that the Defendant was not given a Notice in terms of Section 2(2)(a) of the Apportionment of Damages Act no. 34 of 1956.

[7] The Plaintiff then failed to proceed with an application to amend accordingly after the filing of the Objection and the whole matter then became literally dormant for a period of more than two (2) years, apparently because of issues between the Plaintiff's attorneys and the Law Society, not related to the present case.

[8] On 1<sup>st</sup> August 2017, the Plaintiff took the next step by filing a second Notice of Intention to Amend his Particulars of Claim. Broadly speaking, the second amendment sought does not differ much from the first one, although now the Plaintiff sought to reduce the amount claimed, *inter alia*. No objection was filed by the Defendant to this second proposed amendment.

[9] As a result the Plaintiff filed his amended pages on 18<sup>th</sup> August 2017, thereby effecting the amendment in terms of Court Rule 28(7). When this came to the knowledge of the Defendant, he filed two notices on 29<sup>th</sup> August 2017, namely a Notice of

Objection to the proposed amendment, and a Notice of Non-compliance with the Rules in terms of Rule 30A. In both the notices it is stated that the Plaintiff should not be permitted to amend his Particulars of Claim until such time as the Court has pronounced whether he is entitled to amend in accordance with either the first or second notices to amend. It is further stated that it constitutes an irregular step not to have proceeded with the first notice to amend, and then to serve a further notice to amend for substantially the same relief.

[10] A mere three (3) days before the filing of the two notices by the Defendant, the Defendant filed an application for condonation for the failure to object to the second Notice of Intention to Amend, and to be granted leave to object to the Respondent's second Notice of Intention to Amend.

[11] The application was heard on 21<sup>st</sup> September 2017 by Reinders J, and she made the following order on the same day:

1. The Court condones the Applicant's failure to have objected to the Respondent's notice of intention to amend dated 31

July 2017 and served on the Applicant's attorneys on 1 August 2017 ("*the second Notice of Intention to Amend*");

2. The Applicant is granted leave to object to the Respondent's second notice of intention to amend;
3. The Court condones the serving and filing of Applicant's Rule 30A dated 28 August 2017, insofar as this may be necessary.

[12] After this order was made, nothing further happened until 13<sup>th</sup> December 2017, when the Defendant filed a Notice of Set Down for the hearing of the Exception on 9<sup>th</sup> February 2018.

[III] **SUBMISSIONS ADVANCED BY COUNSEL:**

[13] Mrs Williams, appearing for the Excipient/Defendant, took the point of view that the original Particulars of Claim have not been amended finally or at all, and that the Notice of Exception dated 15<sup>th</sup> October 2015 is therefore still valid and of full force and effect. She argued that the Plaintiff never made any attempt to apply to Court for the second amendment to be allowed after the

objection of 29<sup>th</sup> August 2017 and the Court order of 21<sup>st</sup> September 2017. The second amendment therefore never came to fruition with the result that the original Particulars of Claim still stood and has to be adjudicated now in terms of the Exception filed.

- [14] Mr Van Rhyn SC, on behalf of the Plaintiff, submitted that the second amendment was indeed effected on 18<sup>th</sup> August 2017, and that the Defendant never objected thereto after he was granted leave to do so in the Court Order of 21<sup>st</sup> September 2017. According to his submissions, the exception has therefore lapsed, since the Defendant failed to apply for a date of hearing within five (5) days of the filing of the first notice to amend in terms of Rule 23(2), read with Rule 6(5)(f), and since it does not deal with the amendments already effected on 18<sup>th</sup> August 2017.

[IV] **DETERMINATION:**

- [15] It is clear from the submissions advanced by counsel that the Court Order of 21<sup>st</sup> September 2017 was understood differently by the parties. The Plaintiff understood the order to mean that the Defendant was granted leave to file an objection to the second

amendment in the days to come, regardless of the fact that such objection was already filed on 29<sup>th</sup> August 2017. The Defendant understood the order to mean that leave was granted to object to the amendment, and that the order have referred to the objection already filed. These conflicting interpretations caused the Plaintiff to believe that the second intended amendment was never objected to, and that the already effected amendment therefore became final, while the Defendant believed that the objection was already in place, but that the Plaintiff had failed to take the proposed amendment any further, as contemplated by Rule 28(4). No amendment therefore came into effect, and the Particulars of Claim remained in its original form, rendering the exception still relevant, the argument went.

- [16] It is the view of the Court that it is not necessary to decide the correct interpretation of the Court Order. This is so because there can be little doubt that the Plaintiff had wanted to amend his Particulars of Claim in response to the Defendant's exception on more than one occasion. The Defendant had failed to proceed with his exception in terms of the Rules in 2014, and before long, the Defendant's focus had shifted to the proposed first amendment and later the proposed second amendment, while on

a balance of probabilities, the exception had then faded into the background in the mind of the Defendant. It was only when the opportunity presented itself to the Defendant to take advantage of the confusion following the Court Order of 21<sup>st</sup> September 2017, that the Defendant saw fit to revive the exception and to set it down for hearing.

[17] While the Court Order of 21<sup>st</sup> September 2017 clearly had in mind regularising the process of the proposed amendment, unfortunately it failed to do so. I say unfortunately, because the present exception is clearly dependent on the question whether the Particulars of Claim will indeed be amended or not. In any event, should the proposed amendment simply be ignored and the exception be held to succeed, the Plaintiff will be afforded the opportunity of amending his pleading, with the result that the proposed amendment would again come under scrutiny in what would appear to be a never-ending circle of wasting time and costs.

[18] As regards the failure of the Defendant to apply for a date of hearing for the exception within five (5) days way back in 2014, I cannot agree with the submission that there is nothing preventing

an Excipient to take the necessary steps to have the exception set down for hearing at any point in time. The provisions of Rule 23(1) are clear to the effect that the principal use of an exception is to raise and obtain an expeditious and economical decision on questions of law which are apparent on the face of the pleadings

**(See: Harms, Civil Procedure in the Superior Courts B23.3 and Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, 5<sup>th</sup> Edition, Vol. 1 page 630).**

[19] I therefore regard the sudden setting down of the exception for hearing more than three (3) years after the filing thereof as an opportunistic step by the Defendant in the circumstances outlined above, which step justifies an order of this Court aimed at finally regularising the proceedings now and achieving a speedy resolution to the question of the proposed amendment to the Plaintiff's Particulars of Claim. Should the proposed amendment be allowed, then the present exception will become irrelevant. In my view, the allegation made by Mrs Williams that the parties had agreed by way of correspondence to have the exception heard on the day of hearing, can have no influence on the decision of the Court.

[V] **THE FOLLOWING ORDER IS THEREFORE MADE:**

1. The exception is struck from the roll with costs.
2. The Plaintiff is ordered to lodge an application for leave to amend his Particulars of Claim in accordance with his second Notice of Intention to Amend and in response to the Objection filed by the Defendant on 19<sup>th</sup> August 2017, which application must be filed within ten (10) days of date of this order.
3. After the filing of the application referred to above, the further proceedings in the application are to be conducted in terms of the provisions of Rule 28.
4. The Defendant's Rule 30(A) notice dated 28<sup>th</sup> August 2017 may be determined together with the application to amend, insofar as this may be necessary.



**P J LOUBSER, J**