

IN THE EASTERN CAPE HIGH COURT

BHISHO

CASE NO. 11/2011

DATE HEARD: 24 APRIL 2012

DATE DELIVERED: 26 APRIL 2012

NOT REPORTABLE

In the matter between:

KERR HOHO

PLAINTIFF / APPLICANT

and

SPEAKER OF THE EASTERN CAPE

LEGISLATURE

1ST DEFENDANT / 1ST RESPONDENT

SECRETARY TO THE

EASTERN CAPE LEGISLATURE

2ND DEFENDANT / 2ND RESPONDENT

JUDGMENT ON PLAINTIFF'S / APPLICANT'S APPLICATION FOR

LEAVE TO APPEAL

VAN ZYL J:

- [1] The defendants (respondents in the application for leave to appeal) raised an exception to the plaintiff's (applicant in the application for leave to appeal)

particulars of claim that was upheld by this Court with costs. It was as a result ordered that paragraphs [6.5] and [13] of the particulars of claim and paragraph (a) of the relief claimed therein be set aside. The plaintiff was however given leave to amend and to cure the deficiencies therein complained of. The plaintiff decided not to avail himself of that opportunity, choosing instead to apply for leave to appeal against the order of this Court. There may be merit in the defendants' argument that the order is not final in its effect. I will however in favour of the plaintiff and for purposes of this application alone accept that the order upholding the exception is a final order and that it is appealable.

- [2] The plaintiff's first complaint in his notice of appeal is that this Court displayed bias in the manner in which it dealt with the defendants' exception. At the heart of this complaint is the assertion that the Court advised the defendants' legal representative to "make changes" to the exception raised and ignored the plaintiff's "expressed desire to be equally rescued," presumably from the defects in his particulars of claim and in respect whereof the exception was raised. This ground of appeal is without merit. As stated in the judgment on the exception, the defendants effectively raised three objections with regard to the plaintiff's particulars of claim. At the commencement of argument, the Court debated with Counsel for the defendants whether there was any merit in the third objection, namely that the plaintiff's particulars of claim were vague and embarrassing. The issue raised by the Court with Counsel for the defendants was purely on a matter of law and is dealt with in paragraph [6] of the judgment on the exception. Counsel for the defendants

decided to abandon any reliance on that ground and the matter was as a result confined to the first and second objections referred to in paragraph [5] of the said judgment. How this can on any reasonable basis be interpreted as having allowed the defendants' to correct their pleadings, or unduly giving assistance to the defendants, is not clear. If anything, it assisted the plaintiff in that he was then only faced with two objections to his particulars of claim, instead of three. This ground of appeal displays a lack of appreciation of the fact that the defendants, being *dominus litis* in the exception, is entitled to raise any such objection to the plaintiff's particulars of claim as the law may allow them to, and equally to abandon any such objection raised at any time. It is not for the Court to "allow" them to abandon any of the objections raised, and the assertion that the Court, by raising the issue referred to, assisted defendants' Counsel to argue his case is without merit, in law and in fact.

- [3] The plaintiff's second ground of appeal relates to his claim in his particulars of claim that an instruction issued by the second defendant to a member of the South African Police Services constitutes administrative action which is unconstitutional, in that it is unjust, unreasonable and therefore unlawful. The plaintiff's argument is that this Court, having accepted for purposes of the judgment that the instruction concerned constitutes administrative action, erred in finding that any determination of the unlawfulness thereof must be dealt with in terms of the provisions of the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*. The argument is that the Court thereby ignored the provisions of *section 33 of the Constitution* "and places it at the mercy of ordinary legislation." There is equally no merit in this argument. Firstly, it is

trite that PAJA gives effect to *section 33* as provided for in that section. Secondly, and leaving aside the status of *section 33* of the Constitution, the real issue is whether the plaintiff has shown in his particulars of claim to have an interest in any right to which the administrative action concerned relates. The *locus standi* of the plaintiff remains an issue, whether or not the unlawfulness of the administrative action concerned is to be determined in terms of PAJA, or in terms of the Constitution.

- [4] The appellant's third ground of appeal relates to the "other findings" of the Court. On a reading of the appellant's complaint in this regard it is evident that he is referring to what the Court dealt with in paragraphs [4] and [5] of its judgment. In those paragraphs reference is made to a number of other defects in the plaintiff summons and particulars of claim which the defendants should have, but chose not to raise by way of Rule 30 proceedings. As it was not raised it could not, and was not dealt with. The result is that the Court made no findings in relation thereto. That much is clear from the judgment and the order made. Instead, the Court dealt only with the objections which were properly raised by the defendants on the papers. With regard to the plaintiff's claim for defamation, the Court simply commented on the fact that he failed to expressly allege the existence of *animus injuriandi*, that there was publication of the defamatory words and that it was spoken of and concerning the plaintiff. However, as this was not raised by the defendants in their exception, no finding was made with regard thereto. The purpose was rather to assist the plaintiff by directing him to these other defects so as to take the necessary steps to have it corrected, rather than be faced therewith at a later stage in the

proceedings.

[5] Lastly with regard to the costs order made, as the defendants were successful on two of the grounds of objection raised in the exception, the order was justified. The fact that the defendants may have abandoned their objection relating to their complaint of vagueness at the hearing of the matter does not alter the fact that the defendants were substantially successful.

[6] Accordingly, and for these reasons, the application for leave to appeal is dismissed with costs.

D VAN ZYL

JUDGE OF THE HIGH COURT

Counsel for the Appellant : In Person

Counsel for the Respondent : Mr Kunju

Attorneys for the Appellant : In person

Attorneys for Respondent : The State Attorney

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