

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 1509/2010

In the matter between:-

**THE SOUTH AFRICAN NATIONAL
ROADS AGENCY LIMITED**

Applicant

versus

VEKNESHAN MOODLEY

1st Respondent

THE XHARIEP DISTRICT MUNICIPALITY

2nd Respondent

THE MANGAUNG MUNICIPALITY

3rd Respondent

THE MEC: POLICE ROADS AND TRANSPORT

4th Respondent

DELIVERED ON:

16 SEPTEMBER 2010

JUDGMENT

MOCUMIE, J

[1] This case is about the setting aside of particulars of claim of three related matters in terms of Rule 30 of the Rules of Practice of the Superior Court Practice under case no's 1509, 1510 and 1511/2010 on the basis that they do not comply with Rule 18(10). Since the facts of the three cases are very similar in that the plaintiffs in the respective claims were travelling together in the same vehicle when the accident occurred and the first defendant is the same institution in all three matters, the matters have been set down for adjudication on a consolidated basis before me. The parties will be referred to as in the

main application.

[2] The plaintiffs issued summons against the defendant in respect of a collision that occurred on 1 April 2007 when a vehicle they were travelling in hit a pothole in the road and capsized. The plaintiffs claim damages for the injuries sustained by all the passengers during the collision in the globular amount of R900 000,00 under the headings "Past Hospital and Medical Expenses"; "Future Medical Expenses"; "Past loss of income"; "Future loss of income" and "General damages". The nature of the plaintiffs' claims, which they allegedly sustained as a result of the accident, is set out in paragraphs 18.1 to 18.3 of the particulars of claim as follows:

<i>"18.1 Past Hospital and Medical Expenses.....R</i>	<i>50 000</i>
<i>As appears from annexure A' hereto</i>	
<i>18.2. Estimated future medical expenses.....R</i>	<i>100 000</i>
<i>18.3. Estimated Past loss of income.....R</i>	<i>50 000</i>

[3] Annexed to the particulars of claim, are faint copies of hospital records in which the alleged injuries of the plaintiffs appear. The nature of the cause of action is delictual and based on the *actio legis aquilia* as applied in the Roman Dutch law and the South African law as expanded and applied. See **Minister van Wet en Orde v Jacobs** 1999 (1) SA 944 (OPA) at 948B.

[4] On 1 April 2010 the first defendant gave notice to the plaintiffs in terms of Rule 30(2)(b). The first defendant's complaint reads as follows:

"1.1 The claim in respect of future medical expenses as per paragraph 18.2 of the Particulars of Claim has not been properly pleaded as required.

1.2. The past loss of income as per paragraph 18.3 of the Particulars of Claim has not been properly pleaded as contemplated in terms of Rule 18(10)(c) as it has not been stated how the amount is made up.

1.3. The amount claimed in respect of future loss of income as per paragraph 18.4 of the Particulars of Claim has not been properly pleaded as it does not comply with the provisions of Rule 18(10)(c)(i) since it is not stated how the estimated future loss is made up and the nature of the work the Plaintiff will in future be able to do."

[5] In the notice the defendants invited the plaintiffs to remove the cause of their complaint within ten days after service of the notice. The plaintiffs did not react to this invitation at all and on 12 May 2010 the defendants filed an application in terms of Rule 30. In the application they rely on the grounds set out in the application as follows:

"1.1 The claim in respect of future medical expenses as per paragraph 18.2 of the Particulars of Claim has not been properly pleaded as required in terms of Rule 18(10) (a) as it has not been stated how these costs and expenses are made up.

1.2. The past loss of income as per paragraph 18.3 of the Particulars of Claim has not been properly pleaded as contemplated in terms of

Rule 18(10)(c) as it has not been stated how the amount is made up.

1.3. The amount claimed in respect of future loss of income as per paragraph 18.4 of the Particulars of Claim has not been properly pleaded as it does not comply with the provisions of Rule 18(10)(c)(i) since it is not stated how the estimated future loss is made up and the nature of the work the Plaintiff will in future be able to do."

[6] In his Heads of Argument Mr. Khan, on behalf of the plaintiffs, raised the point that the application in terms of Rule 30 was filed out of time after more than ten days had expired. Both Mr. Khan and Mr. Cilliers, on behalf of the defendants, however came to an agreement that this issue should not be pursued any further.

[7] The relief sought by the defendants in the Rule 30 application reads as follows:

"1. That the plaintiffs summons and particulars of claim in case number 1509/2010 [1510/2010 and 1511/2010] is set aside as a whole, alternatively that paragraphs 16.2, [18.2; 181.2 and 18.3 of the particulars of claim are set aside.

2. That the plaintiff is ordered to pay the costs of this application."

[8] In their answer to the defendants' complaint, the plaintiffs answer that:

"9.4 If one has regards to the particulars of claim, the amounts set out are in respect of **estimated** future loss of expenses. The claim at this stage is simply an estimate and will need to be properly and fully quantified in due course by the provision of medico-legal reports in this matter.

9.5. It would be improper and negligent of the Plaintiff's attorneys to expend vast amounts of monies on medicolegal reports at this stage when the question of liability..

9.6. As this is a delictual claim and no interest runs against the Applicant, Applicant simply cannot claim prejudice in this respect.

9.7. Once the Plaintiff has undergone medico-legal examinations, notices in terms of the relevant Uniform Rules of Court will be served on the Defendants and full details and particularity provided in respect of the estimated costs

9.8. The Applicant further complains in respect of the Plaintiff's claim for past loss of income as set out in paragraph 18.3 of the summons.

9.9. I again point out that this is an **"estimated"** claim as the amount is subject to quantification by the relevant experts being an industrial psychologist and actuary. Similarly, there can be no prejudice to the Applicant at this stage as there is no interest running in this matter and the full particularity of this claim will be provided once the medico-legal reports are to hand.

9.10. The Applicant further complains in respect of future loss of income. Similarly, this is an **"estimate"** and the full particularity will be provided once the various medicolegal reports are to hand.

9.11. I respectfully submit that the Applicant can have no cause of complaint or prejudice at this stage as the claim in respect of liability

has not been disposed of and it is unclear whether the Applicant is in fact liable to the Plaintiff or not.

9.12. The full information required by the Applicant will be provided in due course once the Plaintiff has undergone medico-legal examinations in terms of the Rules of Court."

[9] Mr Khan submitted, on behalf of the plaintiffs, that in matters of this nature the court will ordinarily determine the issue of liability first and the plaintiffs do not want to incur any costs in respect of the determination of quantum by obtaining expert reports that substantiate their claims at this stage. He submitted further that the current action is delictual in nature and no interest is claimed against the defendants as a result the defendants will not be prejudiced. He also submitted, when such reports are available the defendants will be provided with same.

[10] Mr. Khan argued that the plaintiffs have more to lose than the defendants in that:

10.1 The claims would have lapsed if the plaintiffs did not institute their claims in the unsubstantiated form that they were as the claims would have prescribed by the time such reports were made available;

10.2. The defendants were well aware of the plaintiffs' predicament and potential prejudice and deliberately instituted these applications;

10.3. The defendants can merely plead over once more

particulars become available; and

10.4. The plaintiffs had a right to access to courts enshrined in terms of section 34 of the Constitution of the Republic of South Africa Act 108 of 1996. If this Court upheld the defendants' applications this would virtually shut the plaintiffs' door and they will be without any recourse.

[11] Rule 18(10) reads as follows:

"(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of-

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);" (Underlining for emphasis)

[Erasmus *et al* **Superior Court Rules of Practice**, B1-129 -130 and cases cited.]

[12] It is a basic requirement in civil cases that the defendant must have a clear enough exposition of the plaintiff's case to enable it to take instructions from the client and file an adequate response to the claim in the form of a plea. The plea may consist of a denial ^{seriatim} of all the averments in the particulars of claim (a bare denial), as long as there is no ambiguity in such denial. See Venter and Others NNO v Barrstt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644 G.

[13] Rule 18(4) provides that every pleading must be in a clear and concise statement. The object of the pleadings being to define the issues so as to enable the other party to know what cases he has to meet. See Beira v Beira 1990 (3) SA 802 (W) at 809 B.

[14] The defendant is however not entitled to insist on specific particulars and information which would enable it to make precise, measured and accurate calculations of the plaintiffs damages nor can it insist on an abridged exposition of the plaintiff's proposed evidence in support of the various claims.

See Minister van Wet en Orde v Jacobs, ^{supra} at 952 i -953 c.

[15] For the defendants to succeed in their application in terms of Rule

30 they must show prejudice on their part. Mr. Khan has submitted that the defendants have failed to show prejudice at all.

[16] In **Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen** 1992 (4) SA 466 (W) at 471 H - J; 472 A - B the court stated the following where estimates were claimed:

"I do not think that it is possible to generalise about the particulars that should be furnished of the cost of restoration in a case like the present. It is obviously desirable that the defendant should be informed of the cost, estimated or actual, of the several items of restorative work in order that he may be in a position to tender or plead in excuse where this is possible. On the other hand, in some cases it may be unreasonable to require a separate allocation of different items of work because in the ordinary course they would be done together as a single job. If that is the position it is open to the plaintiff to say so. In the present case the plaintiff has stated that the £450 is an estimate but it is not reasonable to suppose that an estimate of the cost of the several different kinds of repair or replacement work to be done was arrived at without itemisation. The £450 must be a lump sum, a total made up of a number of items which the plaintiff will seek to establish at the trial. The plaintiff does not set up the case that he is not in a position to analyse the sum of £450. His

statement that it is an estimate does not excuse him from giving further particulars; unless it is a pure guess it must be an estimate based on a collection of detailed estimates.

I find it unnecessary to decide whether the damages claimed are "general" or "special"; the substance of the matter is that the details of how the £450 is made up ought, if possible, to be in the defendant's hands at the pleading stage, and there is no reason to doubt that the plaintiff is in a position to supply them." (*Underlining for emphasis*)

I agree with these remarks.

[17] There is no exhaustive test to determine whether a pleading contains sufficient particularity for the purposes of the sub-rule but it is essentially an issue of fact. In Nasionaie Aartappel Kooperasie Bpk v Price Waterhouse Coopers Inq en Andere 2001 (2) SA 790 (T) at 798 F - 799 J the court held that a pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are. What sufficient particularity means in each case will be determined by its own particular circumstances.

[18] In these three matters can it be said that the particulars of claim are of sufficient particularity and in compliance with the prerequisites set out in Rule 18(10)? In my view they are not. The requirements of sub-rule 18(10) and the purpose they serve are different from those of sub-rule (4). In Grindrod (Pty) Ltd v Delport and Others 1997 (1) SA 342 (W) at 346 F - G the court held that:

"However, inasmuch as the learned Judge appears to have coupled the provisions of Rule 18(4) with those of Rule 18(10), I must respectfully disagree with him. It seems to me that these two subrules have entirely different functions and are not in any way related.

Rule 18(4) relates to the pleading of facts which make up either a claim, defence or answer. Here the requirement is that such facts be pleaded with 'sufficient particularity to enable the opposite party to reply thereto '"

[19] Sub-rule 18(10) makes it clear that greater particularity is required in claims for damages for personal injuries. It demands additional requirements in respect of personal injuries as compared to other damages. This provision has done away with the uncertainty which prevailed prior to the substitution of the sub-rule in 1987. See Du Plessis Diamante v De Bruyn Broers 1967 (3) SA 255 (GW); Rondalia Versekeringsskorporasie van Suid Afrika Bpk v Die Ongevallekommissaris 1968 (4) SA 755 (N) at 758 H -759 A; Rondalia Versekeringsskorporasie van Suid Afrika Beperk v Mavundla 1969 (2) SA 23 (N) at 27 G,

[20] It is now accepted that if the pleading does not comply with the provisions of Rule 18(10) requiring specific particulars to be set out therein, the prejudice required for the setting aside of the pleading in

terms of Rule 30 has ^{prima facie} been established. See Sasol Industries (Pty) Ltd, ^{supra} at 470 H - I. This is entrenched in Rule 18(12) which provides that:

" (12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30."

[21] In my view the particulars of claim in all three matters fall short of the prerequisites laid down in sub-rule 10 in that the defendants cannot reasonably estimate the damages in the way in which they are coached. In terms of Rule 18(10)(c), the plaintiffs must show

"the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff[s] will in future be able to do);"

[22] I can find no reason why it is not **"reasonably practicable"** for the plaintiffs to state the work the plaintiffs did previously or are doing currently; how much they earned and what will the position be likely in the future. This could never be a problem because it is information only the plaintiffs are privy to without the assistance of or inputs from the experts. Rule 35(12) and (14) do not solve and address the complaint of the defendants at all as I indicated the subrule demands more particularity in its form now. Mr Khan's submission, on behalf of the plaintiffs, that the

court will be confined to the determination of liability only at this stage and determine quantum at a later stage is not correct because the action is undivided. The fact that the plaintiff can apply for separation of issues in terms of Rule 33(4) is a totally different issue that can have no bearing on the question whether the plaintiffs have complied with Rule 18(10) or not.

[23] The argument Mr. Khan raised, the results of this application, that if the application is upheld the plaintiffs will be denied their right to access to courts provided for in section 34 of the Constitution is a noble idea but one not justified in the circumstances of this case. Rules of Practice are made not only for compliance, but for consistency and for all parties to know precisely what is expected of them so as to promote speedy finalisation of the matters before the courts and importantly to enable the other party to prepare itself adequately and timeously without anticipating any surprises along the way. In my view the failure to provide clear and sufficient particularity of the particulars of claim on its own is prejudicial to the defendants for numerous reasons including the investigation and presentation of their case.

[24] Taking in to account what I have set out above I find that the plaintiffs have not complied with the prescriptive provisions of Rule 18 (10) and that their combined summons in which their particulars of claim are incorporated are deemed to be an irregular step as contemplated in Rule 30 (1).

[25] In the circumstances I make the following order.

ORDER:

1. Paragraphs 18.2, 18.3 and 18.4 of the particulars of claim in case number 1509/2010, 1510/2010 and 1511/2010 are set aside.
2. The plaintiffs are granted leave to amend the particulars of claim, in the matters referred to in para 1 above, within 30 days of this order.
3. The plaintiffs are ordered to pay the costs of this application.

B. C. MOCUMIE, J

On behalf of the applicant: Adv. H.J. Cilliers

Instructed by: Honey Attorneys

BLOEMFONTEIN

On behalf of the defendant/ respondents Adv. Z. Khan Instructed by:

D A Honiball Attorneys

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