



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO.: EL2440/2023

Reportable: Yes/No

In the matter between:

**A[...] D[...] obo OM [.....],
LD [[.....] and CD [.....]**

Plaintiff/Applicant

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

Defendant/Respondent

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] This matter concerns an application for amendment in terms of Rule 28 of the Uniform Rules of Court. Despite the plea not having been filed and the pleadings not having been closed, there is a further application for separation of merits and quantum pursuant to Rule 33(4) of the Uniform Rules of Court. For consistency, the

parties will be referred to as they were in the main action. The defendant objects to the applications.

[2] The plaintiff, in her personal capacity and a representative of her minor children, instituted action against the defendant, seeking damages for breach of duty of care. The claim arises from a tragic incident in which her husband, while walking on a footpath, accidentally encountered a live electric cable carrying electric power, resulting in severe electrical burns and other fatal bodily injuries. The plaintiff's husband ultimately succumbed to his injuries.

[3] Following the service of summons and particulars of claim, on 26 January 2024, the defendant's attorneys served a combined notice in terms of Rule 23(1) and 30(2)(b) of the Uniform Rules of Court. This notice calls upon the plaintiff to remedy the specified defects and complaints therein within a period of 15 days. The notice stipulates that the plaintiff's particulars of claim are vague and embarrassing, or in the alternative, lack the averment necessary to sustain a valid cause of action.

[4] In support of this contention, the defendant alleges an inconsistency in the applicant's identification. Specifically, the summons and particulars of claim cite the plaintiff as "A[...] D[...] " acting on behalf of several parties, whereas, in paragraph 1 of the particulars of claim, the plaintiff is referred to by a different name, thereby creating confusion regarding the plaintiff's identity. Further to the notice, the defendant asserts that although the unidentified plaintiff has in the particulars alleged that she is suing in her personal capacity and representative capacity as the biological mother and guardian of the minor children, the personal aspect of her claim has not been pleaded. The third ground upon which the defendant relied in its notice is that although the plaintiff has alleged in paragraph 15 of the particulars of claim that the defendant's employees breached their duty of care.... "*and/or to ensure the safety of members of the public, including the plaintiff's daughter*", it is not clear which daughter she is referring to.

[5] In its notice, the defendant also contests that the plaintiff's proposed amendment, if granted, would constitute an irregular step due to non-compliance with Uniform Rule 18 (4) and 18(10) specifically on the ground that the specificities

regarding the amount that each minors are claiming, the nature of the medical treatment which each one of the minors received in the past; the nature of hospital and medical expenses which each one of the minors incurred in the past; the nature of the medical treatment which each of the minors will receive in the future; the nature of the medical treatment which each of the minors will receive in the future and how the amount claimed is computed are not stated. On 29 January 2024, the plaintiff notified the defendant of her intention to apply for the amendment of the particulars of claim. The notice of the amendment is outlined as follows:

‘1. By deleting the contents of paragraph 1 thereof and by replacing same with the following contents:

“The Plaintiff is A[...] D[...], an adult female person currently unemployed, who resides at No, C[...] Kwa Nobhetele Squatter Camp, Scenery Park, Phase 3, East London, Eastern Cape, who was born on 17 June 1982 with identity number: [.....].

2. By deleting the words “personal and” appearing in paragraph 2 of the particulars of claim herein

3. By deleting the contents of paragraph 14.8 and by replacing same with the following contents:

“14.8 they failed to prevent injury to the Plaintiff’s husband and failed to ensure that existing precautions, if any, are adhered to while in the circumstances they could and should have done so.”

4. By deleting the existing contents of paragraph 15 and replacing same with the following contents:

“In the circumstances, the Defendant’s employees wrongfully and unlawfully breached their duty of care and/or to ensure the safety of the members of the public, particularly the Plaintiff’s husband.”

5. By addition of the following sub paragraph 22.2.3:

“22.3.2 In terms of R8 (10) of the Rules of Court, the Plaintiff hereby provides the following additional particularity to enable the Defendant to assess the quantum of the Plaintiff’s claim despite the absence of the reports by experts:

22.2.3.1 With regard to the estimated future medical expenses, it is anticipated that, as a result of the electrocution and the resultant death of her husband, the Plaintiff’s minor children will require ongoing treatment and therapy from all experts in the field to assist with difficulties experienced by them pursuant to the aforesaid incident, including an occupational therapist and a clinical psychologist, etc. The opinions of the aforementioned experts will be obtained in due course and same will be made available to the Defendant.”

6. By addition of the following sub paragraph 22.3.4:

“22.3.4 In terms of R18 (10) of the Rules of Court, the Plaintiff hereby provides the following additional particularity to enable the Defendant to assess the quantum of the Plaintiff’s claim despite the absence of the reports by the experts:

22.3.4.1 with regards to estimated future loss of support, loss of earnings alternatively earning capacity, it is anticipated that, as a result of the electrocution and the resultant death of her husband, who was the breadwinner in their family, the career path and earning capacities of her minor children may be adversely affected and they would likely to have a significant loss of support and future loss of earnings because of their loss of a father who was their bread winner and their psychological condition.

22.3.4.2 It is unlikely that, due to their psychological condition, they may be able to fairly compete in the open labour market and maintain a fair remunerative work in the open labour market and economic conditions, as such may be precluded from fair earnings until normal retirement age.

22.3.4.3 *However, an opinion of an industrial psychologist, clinical psychologist and educational psychologist will be obtained in due course and same will be made available to the Defendant.”*

7. By addition of the following sub paragraph 22.3.5:

“At this stage, the Plaintiff does not have sufficient funds to engage experts in order to deal with the quantification of claim at this stage. It is for this reason that Plaintiff is costs conscientious and as a result does not currently possess reports expanding on areas requiring expert opinion, once to hand, Plaintiff will serve them.”

8. By addition of the following sub paragraph 22.3.6:

“At the commencement of trial Plaintiff will apply that this Court first decides the question of liability in isolation of quantum. For the above reason Defendant need not prepare its defence or case on aspects relating to quantum.”

9. By deleting the existing amount of R 15 000 000.00 (Fifteen Million Rand) appearing in paragraphs 19, 24 and wherever it appears in the relevant document and by replacing same with the sum of R 18 000 000.00 (Eighteen Million Rand).’

[6] The grounds for the applications, as well as the objection thereto, are fully set out in the affidavits filed by the parties’ attorneys and are further elaborated upon in the respective heads of argument.

[7] As previously stated in its notice dated 26 January 2024, the defendant maintains its opposition to the proposed amendment contending that its allowance would contravene the provisions of Rule 18(4) read in conjunction with Rule 18(10) of the Uniform Rules of Court. The defendant submits that the plaintiff should provide a breakdown of how the claimed amounts were calculated including the constituent

components comprising the total amounts claimed. Moreover, the defendant asserts that permitting the proposed amendments would hinder its ability to reasonably assess the quantum of the substantial claim against it.

[8] In his address, Mr *Kotze*, counsel for the defendant referred to specific paragraphs of the proposed amendments and presented the following argument: Regarding paragraph 6, he contended that the plaintiff seeks to amend the claim for future loss of support and earning capacity by purporting to plead further particulars yet fails to provide such particulars. He further argued that the paragraph attempts to introduce new factual allegations while simultaneously qualifying those facts with the word '*maybe*'. He asserted that this approach does not constitute the pleading factual particularity, but rather amounts to conjecture, speculation or impermissible opinion.

[9] Referring to paragraph 7, Mr *Kotze* argued that the plaintiff failed to plead specific particularity and instead claimed a lack of means to appoint an expert to provide evidence on this issue. Mr *Kotze* countered that this information does not need to require an expert at this point, as it pertains to the plaintiff's personal knowledge.

[10] A further objection relates to the plaintiff's failure to plead specific symptoms or conditions affecting the minor children that would support her claims for future hospital and medical expenses, as well as future loss of support and loss of earning capacity. Notably, she has not alleged even a single symptom, such as depression, anxiety or learning difficulties to substantiate these claims.

[11] Referring to paragraph 8, Mr *Kotze* submitted that it would be illogical and impractical for a party to prepare two separate pleas, one addressing the merits of the claim and another dealing with the quantum of damages. In his view, separating these issues at this stage would be unreasonable and unwarranted.

[12] Mr *Madokwe*'s argument focussed on addressing the alleged technicalities raised by Mr *Kotze* referring to the case *Trans-Africa Insurance v Maluleka* (Tran-

Africa Insurance).¹ He submitted that according to *Trans-Africa Insurance's* case the parties and their legal advisers must adhere strictly to the rules, which are essential for the administration of justice. However, he emphasized, technical objections to minor procedural flaws should not be allowed to hinder the swift and cost-effective resolution of cases unless such objections can demonstrate prejudice.

[13] Mr *Madokwe* contended that the plaintiff has pleaded a clear and valid cause of action, articulating the nature of the harm suffered by the minor children and providing estimated figures in respect of the claim for damages. He argued that the future medical expenses and loss of earnings cannot be determined with certainty without the assistance of the expert witnesses. Furthermore, Mr *Madokwe* submitted that the defendant's objection lacked merit, as he failed to demonstrate any prejudice that would result from the proposed amendment. Additionally, the defendant did not allege that the amendment was motivated by malice or bad faith on the part of the plaintiff. In essence, Mr *Madokwe* argued that the defendant's objection is ill-founded and should be dismissed.

[14] He further submitted that separating the merits from quantum would facilitate a more expeditious and cost-effective resolution of the matter. Elaborating on this point, he noted that at this stage, it would be unnecessary to incur the substantial costs associated with engaging various experts. According to Mr *Madokwe*, briefing expert witnesses would be a futile exercise if the plaintiff were to fall on the merits of the claim. By separating the issues, he argued, the parties can avoid incurring unnecessary expenses and focus on resolving the fundamental question of liability before proceeding to quantify damages.

[15] Even when a cost order is granted, so he submitted, there are inevitably additional attorney and client costs incurred in pursuing experts and quantifying damages. These costs would be entirely unnecessary for both parties if the plaintiff fails to succeed on the merits of the matter.

[16] The approach to the application for amendment of pleadings has been well established through various court decisions. As reiterated in *Moolman v Estate*

¹ 1956 (2) SA 273 (A); see also *Life Health Group (Pty) Ltd v Mdladla & Another* (42156/2013 [2014] ZAGPJHC 20 (10 February 2024).

*Moolman*², the general principle is that the amendments will be permitted unless that application is made in bad faith (*malafide*), would unjustly prejudice the opposing party and such prejudice cannot be adequately compensated through costs, or in other words the amendment would render it impossible to restore the parties to their original positions, as they existed when the pleading to be amended was first filed.

[17] The basic principle is that the court's discretion to permit material amendments is largely unfettered with the sole caveat being the potential for prejudice or injustice to the opposing party. Where the true issue in a case is obscured or ambiguously stated in the pleadings, the court will permit the amendment aimed at clarifying and recording a genuine dispute, thereby ensuring that the real controversy between the parties is properly ventilated.

[18] Our courts have concluded that generally an amendment of a prayer may be permitted provided that the fundamental issue in dispute between the parties remains unchanged. However, the court will be more circumspect in allowing such an amendment if it involves the introduction of a new cause of action, as this may substantially alter the nature of the claim.

[19] I agree with Mr Kotze that generally, pleadings should comply with Uniform Rule 18(4), which requires that every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for their claim, with sufficient particularity to enable the opposing party to respond.

[20] A perusal of the defendant's response to the proposed amendments reveals that no objections are raised regarding paragraphs 1 to 4. The crux of the dispute lies in paragraphs 5 to 9 of the proposed amended particulars of claim, which are the focal point of contention requiring determination.

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

‘A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: Provided

² 1927 CPD 27 at 29, the quotation appears in the work by Erasmus, Superior Court Practice 2nd edition vol 2, Service 1, 2016 D1-332.

that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, the nature and extent, effects and duration of the disability alleged to 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 work the plaintiff will in future be able to do.
 - (ii) The enjoyment of amenities of life (give particulars); and stating whether the disability concerned is temporary or permanent; and
- (d) disfigurement, with full description thereof and stating whether it is temporary or permanent.’

[22] In the matter under consideration, Mr *Madokwe*’s proposal that damages can only be quantified after an expert appointment lacks legal merit. The rule entitles the defendant to sufficient information to make a realistic assessment of the claim, facilitating a timely and informed response.³ This requirement aims to expedite dispute resolution, enabling the parties to engage constructively and explore potential settlement opportunities.

[23] A defendant faced with such an action has an affirmative obligation to take an active role in ascertaining the particulars of claim and evaluating a reasonable

³ SA Mutual Fire and General Insurance Co Ltd v Alberts 1976 (3) SA 612 (SE) at 613h-614A

quantum of damages allegedly sustained by the plaintiff. By so doing, the defendant can respond meaningfully to the claim facilitating a more efficient and effective litigation process.

[24] In paragraph 22.3.3 of the particulars of claim, it is averred that it is not practicable for the minor children to provide greater particularity regarding their claims at this stage. However, the proposed amendment to the particulars of claim fails to provide sufficient detail on the computation of the damages.

[25] Although no malice or bad faith has been demonstrated in the defendant's objection to the application for amendment of the particulars of claim, it is evident that there is a failure to comply with Uniform Rules 18(4) and 18(10). The objections raised by the defendant are well-founded, as they have successfully established a legitimate concern regarding prejudice. This prejudice arises from the inadequate particulars provided, which hinders the defendant's ability to respond effectively and prepare a robust defence. Considering the previously mentioned analysis, the objections to the amended particulars of claim are well founded and the amended particulars of claim cannot be allowed in the current form. This notwithstanding, I do not agree with Mr *Kotze's* submissions that the prejudice calls for the setting aside of the pleadings. Rule 30(3) which also forms the basis of the defendant's objection to the application for leave to amend, allows the court to exercise its discretion.

[26] I now turn to consider the application for separation of merits and quantum in terms of Uniform Rule 33(4). Invoking Uniform Rule 33(4) at the pleading stage would be inadequate and ultimately self-defeating, as it would undermine the purpose for which this rule was established. Given the nature of the cause of action, the merits and quantum in this matter are inextricably linked. Preparing separate pleadings for merits and quantum would only serve to delay the proceedings. This would not be in the best interests of the three minor children involved, who deserve a timely and efficient resolution of this matter. Furthermore, the proposed amendment creates a confusion. At paragraph 8, the plaintiff appears to suggest that the application for separation of merits and quantum will be made at the commencement of the trial, not during pleading stage. It is therefore unclear why the plaintiff has

opted to apply for separation of merits and quantum prematurely before the close of the pleadings. Consequently, this application lacks merit and must fail.

Costs

[27] The general rule is that costs follow the result. Mr *Madokwe* argued that this matter attracts the *Biowatch*⁴ principle citing the plaintiff's intention to assert constitutional rights involving her minor children and the inability of the plaintiff to pay costs. He submitted therefore, that court should deviate from the general rule. Mr *Kotze* countered this argument by indicating that the *Biowatch* principle is inapplicable in interlocutory proceedings. Our courts⁵ have repeatedly warned that the ability to finance the litigation is not a relevant consideration in making a costs order. A party should not get a privileged status because it is indigent particularly if it has a legal representation.⁶ It is crucial to note that the objections raised by the defendant were timely brought to the attention of the plaintiffs' counsel who missed the opportunity to apply his mind and act upon the issues raised. Furthermore, the application for separation of issues which was unjustified failed. In the exercise of my discretion, I am of the view that the granting of the application for the amendment of the pleadings should be compensated by a cost order. Consequently, the *Biowatch* principle cannot apply in the circumstances of this case.

Order

[28] In the result, the following order is issued:

1. The objection is upheld.

⁴ *Biowatch Trust v Registrar Genetics Resources and Others* (CC 80/08)[2009] ZACC 14;2009(6) SA 232 (CC);2009(10) BCLR 1014 (CC) (3 JUNE 2009) para 21. This principle entails that generally in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. At para 43....."the general rule for an award of costs in constitutional litigation between a private party and the state is that if a private party is successful, it should have its costs paid by the state and if unsuccessful, each party should pay its own costs." This principle does not apply to a matter that is of not a constitutional nature.

⁵ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3;2005 (6) BCLR 529 CC;2006(3)SA 247 (CC) at para 139, see also *Biowatch* at para18.

⁶ *Biowatch* footnote 4 supra at paragraph 18.

2. The plaintiff is granted leave to amend the particulars of claim in compliance with Rule 18 (4) and Rule 18(10) of the Uniform Rules of Court.
3. The application for separation of merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court is dismissed.
4. The plaintiff is ordered to pay costs on scale “A” as contemplated under Uniform Rule 67A read with Uniform Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

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