

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/207/2014

In the matter between:

ALICE `MAKABELO CHEFA

APPLICANT

and

STALLION SECURITY (PTY) LTD

1st RESPONDENT

LETS`ENG DIAMOND MINE (PTY) LTD

2nd RESPONDENT

Neutral Citation : Alice `Makabelo Chefa v. Stallion Security (Pty) Ltd & One Another [2022] LSHC 146 Civ (1 July 2022)

CORAM : **F.M. KHABO J.**

HEARD : **14th MARCH, 2022**

JUDGMENT : **01st JULY, 2022**

SUMMARY

Practice and procedure - Request for further and better particulars - 2nd Defendant applying to have Applicant's claim dismissed in terms of Rules 25(6) and 30(5) of the High Court Rules, 1980 for their failure to provide the further and better particulars sought - In reaction, Plaintiff filing an application to have the move by the 2nd Defendant set aside as irregular in terms of Rule 30 (1) - Court finds step irregular but exercises its discretion to condone the irregularity to have matter brought to finality in the interests of justice.

ANNOTATIONS

Statutes and Regulations

High Court Rules, 1980

Cases cited

- **Lesotho**

Mathapelo Hloele v Lesotho National General Insurance Company Ltd
CIV/T/135/2018

John Tsolo Makhele v The Commander LDF CIV/T/210/05

VVM Kotelo t/a VVM Kotelo v Maphaka Fiee and Another CIV/T/303/2005

- **South Africa**

Cete v Standard and General Insurance Co., Ltd 1973 (4) SA 349

Coop and Another v Motor Union Insurance Co., ltd 1959 (4) SA 273 at 276 D - E

Martin Visser N.O and Others v Johan Altus Van Niekerk and Others
(5937/2016) [2021] ZAFSHC 187

Sandprops 1160 CC v Karlshavn Farm Partnership 1996 (3) SA 1026

South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975(3) SA 944

JUDGMENT

Khabo J.,

Background

[1] This is a long dragging matter dating as far back as March, 2014 as a result of a series of procedural issues. It was allocated this court on 29 October, 2021 following the retirement of Peete J., who was otherwise seized with it. The present ruling is limited to preliminary issues argued on 14 March, 2022.

The claim

[2] The Plaintiff is a former employee of 1st Defendant. She instituted action proceedings against Defendants claiming damages in the amount of One Million Maloti (M1 000 000.00) for a medical condition that affected her eyes whilst stationed at 2nd Respondent's. The claim is broken down thus:

- (a) M400 000.00 for loss of vision in respect of each eye;
- (b) M200 000.00 for present and future medical expenses;
- (c) Interest at the rate of 18.5% *a tempore morae*;
- (d) 10% collection commission;
- (e) Costs of suit;
- (f) Further and /or alternative relief.

Liability

[3] In her Declaration, Plaintiff attributes blame and /or liability on 1st Defendant for their negligence in not providing protective gear when, she contends, she used equipment that was potentially dangerous to her health. She pins blame on 2nd Defendant because, according to her, 2nd Defendant's medical practitioners misdiagnosed her eye condition in that when they carried out an exit medical screening when she left 1st Defendant's employ, they failed to see that her vision was impaired. They had carried out a pre-employment medical screening when she assumed duty at 2nd Respondent's, and according to the Plaintiff, her eyes were perfectly healthy. Plaintiff further alleges that she was later certified by a different optometrist to have far sightedness and poor vision.

Request for further particulars

[4] 2nd Defendant raised an exception that Plaintiff's Declaration lacks averments on vicarious liability which are necessary to sustain an action against 2nd Defendant. Peete J., as he then was, dismissed the exception and directed that if they so wished, 2nd Defendant may request further particulars in order to plead properly in terms of **Rule 25 of the High Court Rules**. **Rule 25 (1)** provides for the request for further particulars for pleading as may be "**strictly necessary to plead.**" 2nd Defendant did request the further particulars and Plaintiff furnished same, except that according to 2nd Defendant the further particulars were inadequate. It is 2nd Defendant's submission that Plaintiff's reply ought to be sufficient to enable it to plead issuably. Commenting on a South African Rule similar to **Rule 25 (1)**, the court pointed out that the plaintiff is required to make out a case in his or her founding papers with:

... sufficient particularity to convey to the defendant the ground or where they are more, the grounds upon which the claim is based so that he [or she] may be able to decide whether he [or she] has a good defence to the whole or a portion of the claim, and if not, whether he [or she] ought to make a tender. For the purpose of making a tender he is entitled to know the full nature of the claim against him.¹

This passage was cited with approval by my brother Mokhesi J., in *Mathapelo Hloele v Lesotho National General Insurance Company Ltd.*²

[5] Contending that they were unable to plead, 2nd defendant filed a notice in terms of **Rule 25 (6)** to the effect that Plaintiff has not fully replied to their request for further particulars. **Rule 25 (6)** reads:

If a request for further particulars is not complied with, the party requesting the same may subject to the provisions of sub - paragraph (5) of Rule 30 apply to court for an order ... for the dismissal of the

¹ Coop and Another v Motor Union Insurance Co., Ltd 1959 (4) SA 273 at 276 D - E also Cete v Standard and General Insurance Co., Ltd 1973 (4) SA 349

² CIV/T/135/2018 at p. 34, para. 9

action or the striking out of the defence and on such an application the court may make such order which it deems fit to make.

[6] Rule 30 (5) reads:

where a party fails to comply timeously with a request made or notice given pursuant to these Rules, the party making the request or giving the notice may notify the defaulting party that he intends after the lapse of seven days, to apply for an order that such request or notice be complied with, or that the claim or defence be struck out. Failing compliance within the seven days, application may be made to court and the court may make such order thereon as it deems fit.

[7] In the case of ***VVM Kotelo t/a VVM Kotelo v Maphaka Fiee and Another***³ the court noted that Rules 25(6) and 30(5) had to be read together as they cover two different situations, namely, where there has been total non-compliance and where there has been compliance but out of time. Furthermore, both Rules require that an application be made to court after an allowance of seven days to the other side to comply has been given.

[8] Before the expiration of the seven days, in fact a day following receipt of the notice in terms of ***Rules 25 (6)*** and ***30 (5)***, Plaintiff filed with this court a notice in terms of ***Rule 30 (1)***, for an order setting aside 2nd Defendant's notice to have her claim dismissed as constituting an irregular step. It is Plaintiff's case that an application to compel the filing of further particulars (as was the notice filed by 2nd Defendant) is made where a party fails to comply with a request to furnish further particulars, and not where the other party is of the view that the further particulars furnished are not sufficient. The reading of ***Rule 30 (1)*** is that:

Where a party to any cause takes an irregular or improper proceeding or improper step any other party to such cause may

³ CIV/T/303/2005

within fourteen days of the taking of such step or proceeding apply to court to have it set aside...

Whether the invocation of Rules 25 (6) and 30 (5) by the 2nd Defendant constitutes an irregular step?

[9] The following requirements are notable from **Rule 25 (6)** that:

- (a) the request for further particulars **has not been complied with** (emphasis added)
- (b) Rule 30 (5) has to be invoked; then
- (c) A party may apply for the dismissal of the action or the striking out of a defence.

Applying the law to the case

[10] In *casu*, the request for further particulars was not ignored by the Plaintiff, the 2nd Defendant found them lacking. **Rule 30 (5)** talks of a party failing to comply **“timeously.”** Not only did the Plaintiff furnish the requested further particulars, **albeit**, insufficiently, according to the 2nd Defendant, but she also provided them timely. In the circumstances, I find 2nd Defendant’s **Rules 25 (6)** and **30 (5)** route as irregular. In terms of **Rule 30 (3)** the court has a discretion to set it aside or make any order it deems fit.

[11] On the basis of a trite principle enunciated in ***Sandprops 1160 CC v Karlshavn Farm Partnership***⁴ that **“the Court has a discretion and is entitled in a proper case to overlook an irregularity in procedure that does not cause substantial prejudice to the party complaining of it,”** I find no prejudice to be suffered by Plaintiff in me condoning the irregularity and determining whether or not indeed 2nd Defendant should be furnished with the further and better particulars sought. Here I am also

⁴ 1996 (3) SA 1026 at 1033 A

supported by Rule 59 of this Court's Rules. If anything, determining that issue is bound to bring about progress in the matter.

The rationale behind further particulars

[12] 2nd Defendant followed through with their notice in terms of **Rule 25 (6)** and filed a notice of motion seeking an order for the dismissal of Plaintiff's claim against them and costs of the application. The purpose of further particulars has been ably articulated in such cases as ***John Tsolo Makhele v The Commander LDF***.⁵ In that case Majara J., as she then was, cited with approval the test as laid out in ***South African Railways and Harbours v Deal Enterprises (Pty) Ltd***⁶ that:

a defendant seeking an order for further particulars to be supplied must satisfy the Court that without such particulars he will be embarrassed in pleading; he must show that the plaintiff has failed to deliver particulars sufficiently in terms of what is required; i.e. that the particulars are lacking which are strictly necessary to enable him to plead or to tender....

[13] The court in ***SA Railways (supra)*** further adopted a position that ***“whereas formerly a Plaintiff was obliged to furnish such particulars as were “reasonably necessary” to enable the defendant to plead or tender, the position is now that such particulars are only required to be furnished as are “strictly necessary” for either of the said purposes...”*** This principle was reiterated in ***Martin Visser N.O and Others v Johan Altus Van Niekerk and Others***.⁷

Are the particulars requested strictly necessary for the Defendant to plead?

[14] In their notice to compel in terms of 30 (5), 2nd Defendant requests Plaintiff to reply fully to paragraphs 1, 2, 3.2, 5.1, 5.2, 5.3, 6 and 7. Without copying and pasting the request for further particulars as well as the reply

⁵ CIV/T/210/05

⁶1975(3) SA 944 at 947 F

⁷ (5937/2016) [2021] ZAFSHC 187

thereto, I have perused them. In my view and bearing in mind that 2nd Defendant's qualm is on vicarious liability, Plaintiff replied to the particulars as requested. True, in some respects Plaintiff's reply was that certain matters were for evidence and not necessary for 2nd Defendant to plead. However, I cannot overlook the fact that she provided the contract of employment between herself and 1st Defendant as well as the short-term security services agreement between 1st and 2nd Defendants.

[15] As far as I am concerned, the further particulars provided by Plaintiff are sufficient for 2nd Defendant to plead and the "further and better particulars" are not strictly necessary for purposes of their pleading. We are yet to get to trial and, in the process, there is still room for discovery and pre - trial conferencing. For present purposes, 2nd Defendant is in a position to plead and I do not want to see their conduct as dilatory. It is imperative that 2nd Defendant file their plea so that the matter may be disposed of.

Order

[16] In the circumstances, the court makes the following order:

- (a) Plaintiff's Rule 30 (1) procedure is upheld;
- (b) 2nd Defendant's application to dismiss Plaintiff's claim is dismissed;
- (c) 2nd Defendant is directed to file their plea within 14 days from the date of this judgment; and
- (d) Plaintiff is awarded costs of this application.

F. M. KHABO
JUDGE

For the Plaintiff : Adv. L. Molati

For Respondents : Adv. M. Moerane