

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: **YES/NO**
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

.....
DATE
SIGNATURE

CASE NO. 4215/2020

In the matter between:

MEDIA 24 HOLDINGS (PTY) LTD

APPLICANT/ PLAINTIFF

and

ABM COLLEGE SA (PTY) LTD

1ST RESPONDENT/ DEFENDANT

COLLEGE ON HILLS (PTY) LTD

2ND RESPONDENT/ DEFENDANT

Coram: Salmon AJ

Heard on: 17 October 2023, (MS Teams)

Delivered on: 06 December 2023

JUDGMENT

SALMON AJ:

- [1] This application comes towards the end of a series of procedural convolutions. The Applicant, the Defendant in an action in which the Plaintiffs sue for damages arising out of the publication of an allegedly defamatory article, seeks an order dismissing the Plaintiffs' claim for failure to comply with an order of court that they amend their Particulars of Claim. This is the third time such an application has been made.
- [2] Independently of each other, though with a director common to both, the Plaintiffs operate educational institutions. The article in question was published in the Daily Sun newspaper, and on the Daily Sun website, both of which are published, controlled, owned, and operated, respectively, by the Defendant. The article bore the title "Stay away from bogus colleges".
- [3] The following allegations appear in the Particulars of Claim (as of when the action was launched):

"8

- 8.1. The first plaintiff was shut down by the Department of Higher Education;
- 8.2. The first plaintiff was shut down by the Department of Higher Education for operating without accreditation;
- 8.3. The first plaintiff operated without accreditation;
- 8.4. The first plaintiff advertised non-accredited courses;

8.5. Students should not enrol at the institution of the first plaintiff;

8.6. The first plaintiff is operating illegally.

9.

Apart from the defamatory meaning of the article as set out above, the article carries the additional sting that the first plaintiff is:-

9.1 not provisionally or at all registered with the Department of Higher Education and Training as a Private College in terms of Section 31(3) of the Continuing Education & Training Act 2006 (Act No. 16 of 2006); and/or

9.2. not provisionally or all registered to provide continuing education and training in respect of any of the advertised courses or at all; and/or

9.3. operating illegally.

10.

The said words, in the context of the article, are wrongful and defamatory of the first plaintiff in that they were intended and were understood by readers of the newspaper and its website to mean that the first plaintiff is:-

10.1. A bogus college; and/or

10.2. Not provisionally or at all registered with the Department of Higher Education and Training as a Private College in terms of Section 31(3) of the Continuing Education & Training Act 2006 (Act No. 16 of 2006); and/or

- 10.3. Not provisionally or at all registered to provide continuing education and training in respect of any of their advertised courses or at all; and/or
- 10.4. Operating illegally;
- 10.5. Students are advised to not enrol at the first plaintiff at all.”

[4] The allegations in respect of the second plaintiff proceed on a similar footing:

“13.

The said article stated of and concerned the second plaintiff (who traded under the name and style of Shepperd Academy) that:

- 13.1. The second plaintiff was shut down by the Department of Higher Education;
- 13.2. The second plaintiff was shut down by the Department of Higher Education for operating without accreditation;
- 13.3. The second plaintiff operated without accreditation;
- 13.4. The second plaintiff advertised non-accredited courses;
- 13.5. The second plaintiff is investigated by the Department of Higher Education and Training.

15.

Apart from the defamatory meaning of the article as set out above the article carries the additional sting that the second plaintiff is:-

- 15.1. not provisionally or at all registered with the Department of Higher Education and Training as a private college in terms of Section 31(3) of the Continuing Education & Training Act 2006 (Act No. 16 of 2006); and/or

- 15.2. not provisionally or at all registered to provide continuing education and training in respect of any of the advertised courses or at all; and/or
- 15.3. Students should not enrol at the institution of the second plaintiff;
- 15.4 The second plaintiff is operating illegally.

16.

The said words, in the context of the article, are wrongful and defamatory of second plaintiff in that they were intended and were understood by readers of the newspaper and its website to mean that the second plaintiff is:-

- 16.1. A bogus college; and/or
- 16.2. Not provisionally or at all registered with the Department of Higher Education and Training as a Private College in terms of Section 31(3) of the Continuing Education & Training Act 2006 (Act No. 16 of 2006); and/or
- 16.3. Not provisionally or at all registered to provide continuing education and training in respect of any of their advertised courses or at all; and/or
- 16.4. Operating illegally; and/or
- 16.5. were closed down by the Department of Higher Education and Training;
- 16.6. Students should not enrol at the second plaintiff at all;
- 16.7. A fraudulent college.”

[5] Each Plaintiff claims an amount of R700 000,00 comprised by damages to their reputation in the sum of R200 000,00 and loss of income in the sum of R500 000,00

[6] The Particulars of Claim are dated 21 January 2020. The Defendant took objection on the basis that the pleading failed to comply with Rules 18(4) and 18(12) of the Uniform Rules of Court, and are therefore an irregular step as contemplated by Rule 30. This led to an opposed application which came before Acting Justice JF Pretorius who, in a judgment dated 26 August 2021, upheld the Defendants' objections and granted the following order:-

1. Paragraphs 10.2, 10.3,10.4, 12, 16.2, 16.3, 16.4, 16.6 and 18 of the Plaintiffs' Particulars of Claim are struck out.
2. The Plaintiffs are ordered to amend their Particulars of Claim within 10 days of the date of this order.
3. Leave is granted to the Defendant to approach this court on the same papers, duly supplemented, for an order to dismiss the Plaintiffs' claims in the action should the Plaintiffs fail to amend their Particulars of Claim within 10 days from date of this order.

[7] The following is a summary of what happened next, leading up to the application before me:-

- On 10 September 2021, the Plaintiffs served a Notice of Intention to Amend their Particulars of Claim. On 27 September 2021, the Defendant served a comprehensive Notice of Objection to the intended amendment, recording what in its view were several objectionable allegations. The Plaintiffs did not apply to have the amendment granted, and thus did not amend. Put differently, the Plaintiffs did not comply with the order of Acting Justice JF Pretorius.

- As a result, on 6 October 2021, the Defendants delivered an affidavit supplementing their Rule 30 Application, and sought the dismissal of the Plaintiffs' claim, as per Order No. 3 granted by Acting Justice JF Pretorius. The application was set down for hearing on 17 March 2022.
- The Plaintiffs did not file any answering papers, but on that day their then newly appointed attorney of record (Letshabo Attorneys) sought a postponement. Justice Ally granted the postponement, ordering the Plaintiffs to pay the costs on the scale of attorney and client.
- On 24 March 2022, the Plaintiffs appointed yet further new attorneys of record (Du Toit's Attorneys). On 29 April 2022, the Defendant served the order of Justice Vally on Du Toit's Attorneys.
- By 18 May 2022, there had been no movement from the Plaintiffs, and the Defendant delivered a further affidavit supplementing those before, again seeking the implementation of Order No. 3 by Acting Justice JF Pretorius. Notice of the set down of the application, for 3 October 2022, was served on 19 July 2022. On 10 August 2022, Du Toit's Attorneys withdrew as the Plaintiffs' Attorneys of Record due to a termination of mandate. On 30 September 2022, the Plaintiffs appointed Letshabo Attorneys, again, as their Attorney of Record.
- Also on 30 September 2022, the Plaintiffs delivered an application for condonation for the "*late filing of the amendment as per the Court order of 26 August 2021*" It will be remembered that this is the order of Acting Justice JF Pretorius.
- As against that state of affairs, the Defendant's application to dismiss the Plaintiffs' claim came before Justice Adams who, on 4 October 2022, granted the following order:
 1. The Plaintiffs are directed to deliver a draft notice of intention to amend the particulars of claim within 5 days from the date of granting this Order.

2. The Defendant is authorised to deliver an answering affidavit opposing the condonation application within 5 days of receipt of the draft notice of intention to amend.
 3. The Plaintiffs are authorised to deliver a replying affidavit to the Defendant's answering affidavit within 5 days from receipt thereof.
 4. The Application¹ is removed from the roll.
 5. The First and Second Plaintiffs are ordered to pay the Defendant's wasted costs occasioned by the removal of the application on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved.
- On 11 October 2022, the Plaintiffs delivered a notice of intention to amend their Particulars of Claim, as well as the Particulars of Claim as if amended. As he had to, it was accepted by Mr BD Stevens, who appeared for the Defendant in the hearing before me, that this is within the five day framework envisaged in the Order of Justice Adams.
 - No further steps consequent upon this step were taken by either party. The Plaintiffs did not further serve amended pages, and the Defendant did not object to any irregular step.
 - Moreover, it appears from the record on Caselines that the Defendant did not take up the option afforded by the order of Justice Adams to deliver affidavits in opposition to the condonation sought by the Plaintiffs for the late filing (late, according to the Order of JF Pretorius AJ) of their intended amendment.

¹ In other words, the Defendant's Application to Strike Out the Plaintiffs' claims for want of compliance with the order of JF Pretorius AJ.

- [8] However, on 8 June 2023, the Defendant delivered a third supplemental affidavit by way of which it again sought the dismissal of the Plaintiffs' claims according to the initial order of JF Pretorius AJ. It set the application down for hearing on 16 October 2023, by way of a Notice delivered on 28 July 2023. (This is the application before me.) On 10 October 2023, Mr Letshabo, the Plaintiffs' Attorney of Record who appeared for them in the hearing before me, deposed to an affidavit in opposition to the grant of the relief.
- [9] According to Mr Stevens, the crisp issue is that, having served a Notice of Intention to Amend on 11 October 2022, the Plaintiffs failed to effect the amendment by serving the amended pages in terms of Rule 28(5) - that is to say, after a period of ten days there being no objection to the amendment. Therefore, the intended amendment fell away, the consequence being that there is no amendment. Therefore, the Order of JF Pretorius AJ for the dismissal of the Plaintiffs' claims can be activated - which is what the Defendant now does.
- [10] I am not convinced that the issue is so crisp. It is so that the Plaintiffs did not wait out the regulated period in terms of Rule 28(5) and consequent thereupon serve amended pages. But, if the position adopted by the Defendant is correct, it means the Defendant could ignore the step taken by the Plaintiffs in serving the amended pages (simultaneously with the Notice of Intention to Amend) - put differently, procedurally, it is to be considered *pro non scripto*. In this event, as there was no objection to the intended amendment, the Plaintiffs were left anyway then to serve the amended pages. Conversely, if the Defendant was not entitled to consider the amended pages as a non-event, then it was for it to raise an irregular step complaint under Rule 30. This it also did not do.
- [11] There is some significance, in the fact that the condonation application is not yet determined - whether as an opposed or unopposed application. Adams J did not engage with the application - indeed, the learned Judge set time periods for the filing of affidavits to enable the matter to become

ripe for hearing. However, Justice Adams seems to have anticipated the condonation application by directing the Plaintiffs to deliver a draft Notice of Intention to Amend within five days (and which is what the Plaintiffs did).

[12] Leaving aside the qualification of a 'draft' Notice of Intention to Amend, to which I advert next, the best I can make of this is that the question of condonation may be redundant – unless one is to read into the order of Justice Adams that his direction to the Plaintiffs to “*deliver a draft notice of intention to amend*” is subject to the Plaintiffs (in due course) securing condonation for the past delay. If so, it is difficult to ascertain then the intention of the directive to deliver a notice to amend. Even then, why the direction to deliver a *draft* Notice of Intention to Amend? One might deduce that the Notice is only to be a 'draft' so that the Defendant can get an advance peek at what the Plaintiffs will do when once they secure condonation, but either way, it makes for a lack of clarity. At least, it seems that the Defendant has accepted that the Notice delivered by the Plaintiffs on 11 October 2022 was not a “draft”; it accepted it as invoking Rule 28, because the complaint is that there was no further step as contemplated by Rule 28(5).

[13] The fact remains, however, that the question of condonation for the Plaintiffs' failure to meet the order of JF Pretorius AJ is still open. As is recorded in the parties' Joint Practice Note (paragraph 8.10) “*the Applicants can only assume that the Respondents' notice to amend is subject to the condonation filed in September 2022.*” In effect, it seems to me, enforceability of the Order by JF Pretorius AJ is still hanging.

[14] This being so, the relief sought by the Defendant cannot be granted. Nearly four years have elapsed since the launch of proceedings and *litis contestatio* seems still a long way off. Tempting though doing so may be, it would go beyond that with which I am seized to make directions for the further disposal of this matter. The application must be put on ice until the

Plaintiffs' application for condonation is determined, to be prosecuted accordingly thereafter.

[15] In my view, this is a matter in which the parties should bear their own costs.

[16] The order I make is as follows:

1. The application for dismissal of the Plaintiffs' claims is postponed *sine die*.

SALMON AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 17 October 2023

Date Delivered: 06 December 2023

For the Plaintiff/ Applicant: Adv B.D Stevens

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