

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case No: 33982/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
.....
SIGNATURE	DATE

In the matter between:

**TRANSNET SOC LIMITED t/a TRANSNET
FREIGHT RAIL**

Plaintiff/Applicant

and

TANKER SERVICES FUEL AND GAS (PTY) LTD

First Defendant/Respondent

IMPERIAL LOGISTIC

Second Defendant/Respondent

TUMELO WELSH TSOTESI

Third Defendant/Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 6 March 2023

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The Plaintiff instituted action against the First and Second Defendants in the alternative, based upon a collision which occurred between the Plaintiff's train and a truck/trailer combination with registration numbers [...] GP and [...] GP (*'the truck/trailer'*) driven by the Third Defendant.

[2] This is an application in which the Plaintiff seeks to compel the Second Defendant to discover and to obtain better responses from the First and Second Defendants to two separate requests for further particulars. If those particulars are furnished they will assist in ascertaining the identity of the owner of the truck/trailer which in turn will assist the Plaintiff in determining who is to be held liable for the damages suffered by the Plaintiff arising from the actions of the Third Defendant, who is alleged to have been the driver of the truck/trailer at the time of the collision with the train.

[3] Botha's Attorneys filed a notice of intention to oppose on behalf of all 3 Defendants. On 13 November 2019, they withdrew as attorneys of record on behalf of the Third Defendant because they asserted that they had never been instructed by the Third Defendant. On the 15th of November 2022, they withdrew as attorneys of record on behalf of the Second Defendant stating that there is no entity trading as "Imperial Logistics" in existence as described in the summons and it never instructed Botha's Attorneys to defend the action.

[4] The pleadings filed on behalf of the Defendants by Botha's attorneys deny that the Second Defendant is in existence, that it is a legal entity and deny that both the First and Second Defendants are owners of the truck/trailer.

[5] In response to Plaintiff's notice in terms of Rule 14(5), the Second Defendant indicated that it is not a firm, and that "Imperial Logistics" is nothing more than a brand name. Of what I do not know.

[6] Initially (and prior to the withdrawal of Botha's Attorneys) a discovery affidavit was filed by the Defendants jointly. The discovery affidavit was deposed to by the legal adviser of Hollard Specialist Insurance Limited (*'Hollard'*). Hollard indicated that it was obliged to take over any action that might be instituted involving the truck/trailer. That necessarily implies that there is an insured, an insurance policy and an insurable interest in the truck/trailer. Amongst the documents discovered was the salary payment history of the Third Defendant, certificates of registration of the truck/trailer and licences of the truck/trailer. These documents did not, however, cast light on the identity of the owner of the truck/trailer.

[7] After the launching of this application, the First Defendant made discovery in its own name, however, has now failed to make discovery of the documents previously discovered.

[8] No proper discovery affidavit has been filed by the Second Defendant and the discovery affidavit on behalf of Hollard, which is not a party but which is evidently the insurer of some person juristic or otherwise with an insurable interest in the truck/trailer, remains.

[9] In response to a request for further particulars, the Defendants indicated that Hollard gave an instruction to the Defendant's attorneys to act on behalf of the Second Defendant.

[10] Hollard appears to be acting for the owner of the truck/trailer whom it has insured, but it remains coy as to the identity of its client.

Who is the Second Defendant?

[11] Mr Botha of Botha's Attorneys, deposed to the answering affidavit in opposition to this application to compel. In it he said that the Second Defendant does not exist. How an appearance to defend can be entered by a firm of attorneys on behalf of a non-existent entity is difficult to comprehend. He explained that the summons intended for the Second Defendant was served at an address which he defined as '*the premises*'. According to Mr Botha upon receipt of the summons, the unnamed entity, which occupies the premises (which I shall hereafter refer to as '*the Phantom*'), notified Hollard as the Phantom was concerned that if judgment were granted against the non-existent Second Defendant, the Sheriff might attempt to attach the assets at the premises which are the assets of the Phantom.

[12] Mr Botha then repeated what was stated in paragraph 1.4 of the Plea being that:

'Botha's Attorneys entered an appearance to defend on behalf of the Second Defendant on the understanding, and wrongfully so, that there is indeed such an entity as described in paragraph 3 of the Plaintiff's particulars of claim and furthermore to protect the interest of such entity on which the summons was in fact served as far as it may be necessary.'

[13] He does not explain why he wanted to protect an entity that was not his client. Mr Botha also stated in the answering affidavit that the Plaintiff is now in possession of a discovery affidavit deposed to by a representative of the First Defendant and one deposed to by a representative of Hollard acting on instructions of the Phantom

because, he repeated, there was nobody to depose to such affidavit on behalf on the non-existent Second Defendant as no such entity exists but that Hollard sought to protect the interests of the Phantom.

[14] Mr Dobie, representing the Plaintiff, argued that I should grant an order against the non-existent Second Defendant and that rule 14 caters for this very situation. Mr Bothma SC, representing the First Defendant, and conceding that he holds no brief for the non-existent Second Defendant, argued that the application of rule 14 in this manner would be incompetent.

[15] Rule 14 provides:

“14. Proceedings by and against partnerships, firms and associations

(1) In this rule—

“Association” means any unincorporated body of persons, not being a partnership.

“Firm” means a business, including a business carried on by a body corporate, carried on by the sole proprietor thereof under a name other than his own.

“Plaintiff” and “Defendant” include applicant and respondent.

“Relevant date” means the date of accrual of the cause of action.

“Sue” and “sued” are used in relation to actions and applications.

(2) A partnership, a firm or an association may sue or be sued in its name.

(3) A plaintiff suing a partnership need not allege the names of the partners. If he does, any error of omission or inclusion shall not afford a defence to the partnership.

(4) The previous subrule shall apply mutatis mutandis to a plaintiff suing a firm.

(5) (a) A plaintiff suing a firm or a partnership may at any time before or after judgment deliver to the defendant a notice calling for particulars as to the full name and residential address of the proprietor or of each partner, as the case may be, as at the relevant date.

such (b) The defendant shall within 10 days deliver a notice containing information.

(c) Concurrently with the said statement the defendant shall serve upon the persons referred to in paragraph (a) a notice as near as may be *mutatis mutandis*, in accordance with Form 8 of the First Schedule and deliver proof by affidavit of such service.

(d) A plaintiff suing a firm or a partnership and alleging in the summons or notice of motion that any person was at the relevant date the proprietor or a partner, shall notify such person accordingly by delivering a notice as near as may be, *mutatis mutandis*, in accordance with Form 8 of the First Schedule.

(e) Any person served with a notice in terms of paragraph (c) or (d) shall be deemed to be a party to the proceedings, with the rights and duties of a defendant.

(f) Any party to such proceedings may aver in the pleadings or affidavits that such person was at the relevant date the proprietor or a partner, or that he is estopped from denying such status.

(g) If any party to such proceedings disputes such status, the court may at the hearing decide that issue *in limine*.

(h) Execution in respect of a judgment against a partnership shall first be levied against the assets thereof, and, after such excursion, against the private assets of any person held to be, or held to be estopped from denying his status as, a partner, as if judgment had been entered against him.

(6) The preceding subrule shall apply *mutatis mutandis* to a defendant sued by a firm or a partnership.

(7) If a partnership is sued and it appears that since the relevant date it has been dissolved, the proceedings shall nevertheless continue against the persons alleged by the plaintiff or stated by the partnership to be partners, as if sued individually.

(8) The preceding subrule shall apply *mutatis mutandis* where it appears that a firm has been discontinued.

(9) (a) A plaintiff suing an association may at any time before or after judgment deliver a notice to the defendant calling for a true copy of its current constitution and a list of the names and addresses of the office bearers and their respective offices as at the relevant date.

(b) Such notice shall be complied with within 10 days.

(c) Paragraphs (a) and (b) shall apply *mutatis mutandis* to a defendant sued by an association.

(10) Paragraphs (d) to (h) of subrule (5) shall apply mutatis mutandis when—

(a) a plaintiff alleges that any member, servant or agent of the defendant association is liable in law for its alleged debt;

(b) a defendant alleges that any member, servant or agent of the plaintiff association will be responsible in law for the payment of any costs which may be awarded against the association.

(11) Subrule (7) shall apply mutatis mutandis in regard to the continuance of the proceedings against any member, servant or agent referred to in paragraph (a) of subrule (10).

(12) Subrule (4) of rule 21 shall apply mutatis mutandis in the circumstances set out in paragraphs (a) and (b) of subrule (5) and in subrule (9) hereof.

[16] After the conclusion of the argument Mr Dobie and Mr Bothma referred me to the judgment of *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket*,¹ which reference they forwarded to my secretary. In my view, such judgment is dispositive of this point. The court, per Harms JA (with whom Cameron and Nugent JA concurred) held that Rule 54 of the Magistrates' Courts Rules (the Magistrate's Court equivalent of High Court Rule 14) deals with procedure and not with substantive law. It does not turn a firm into a different entity or into a juristic person. Crucially, '*legal proceedings cannot commence against any party unless that party is notified by means of an initiating process; if not, the proceedings are null and void...*'² The initiating process here was not served on the Second Defendant but on the Phantom, i.e. an entity which denies that it has anything to do with the name "Imperial Logistic".

[17] The factual position, as pleaded, is that no entity nor person associated with that name is at the address where the summons was served, that the Plaintiff does not know who its debtor is and that any order I grant against an entity bearing the

¹ 2002 (6) SA 297 (SCA)

² At 301J

name of the Second Defendant, might be a *brutum fulmen* – an ineffectual order. The identity of the owner of the truck/trailer is of course highly relevant in the action as that is the entity the Plaintiff seeks to hold liable, but can a Court grant an order compelling an entity which has not been served to deliver further particulars? Clearly not, I therefore decline to issue an order which the Plaintiff prays for against a mere name, the name 'Imperial Logistic' which has not been shown at this stage of the proceedings to have any person or entity behind it. Courts do not issue orders against mere names.

The First Defendant

[18] The First Defendant has now discovered and says it doesn't know who the owner of the truck/trailer is.

[19] For now, this court must accept the version on the affidavit and is precluded from going behind it unless it can be shown that the deponent was mistaken in their appreciation of what they were deposing to.

Costs

[20] Hollard, who is not a party to these proceedings and for now is not before the court, clearly knows who the owner of the truck/trailer is. It seems to this court that Hollard could be subpoenaed to produce the insurance policy(ies) in respect of the truck/trailer which collided with Plaintiff's train, which policy ought to reveal the identity of the owner of such truck/trailer. The relationship between the occupant of the premises on which service was effected when Imperial Logistic was sought to be served, the Phantom, the name 'Imperial Logistic' and the driver of the truck/ trailer, Third Defendant, might then become more clear. Then the Plaintiff will know what to do and a court hearing the matter in the fulness of time will no doubt express its

dissatisfaction through an adverse costs order against the parties or legal representatives playing games with the Court, if that is what the facts reveal.

[21] It is concerning that Hollard and its legal representatives appear to have taken such a cloak-and-dagger approach, particularly against a state owned entity where public funds are at play. I have not heard them on this issue and there may well be a perfectly innocent explanation for all of this. Because even the most 'open and shut' cases have proven not be so when a full explanation is heard, I intend reserving the costs of this interlocutory application as a Court in the fullness of time will be able to assess who was playing their cards too close to their chest, if at all, and why.

[22] This is of course an interlocutory application so nothing would preclude the Plaintiff from launching another application when it has new or better information to hand but at this stage I do not have enough information to grant the orders prayed for in the light of the authority cited.

Order

[23] I accordingly grant the following order:

The application is dismissed and the costs are reserved for determination in the action.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the Plaintiff : Adv JG Dobie
Instructed by : Lindsay Keller Attorneys
Counsel for the 1st Defendant : Adv C Bothma SC

Instructed by : Bothas Attorneys
No appearances for the 2nd and 3rd Defendants

Date of hearing : 23 February 2023
Date of Judgment : 6 March 2023