THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 404/2021

In the matter between:

MARSHALL ALBERTS	**FIRST APPELLANT**
JEROME ARNOLDS	**SECOND APPELLANT**
ROBERT ATTIES	**THIRD APPELLANT**
THANDUXOLO BAATJIES	**FOURTH APPELLANT**
SIMPHIWE BEFILE	**FIFTH APPELLANT**
THOMBELANI BISHINI	**SIXTH APPELLANT**
MABUTHI BLAAUW	**SEVENTH APPELLANT**
THEMBINKOSI SIDWELL BLESS	**EIGHTH APPELLANT**
LUCKY BOKWANA	**NINTH APPELLANT**
NDUMISO BONGO	**TENTH APPELLANT**
and 128 OTHERS	

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**RESPONDENT**

Neutral citation: *Alberts and Others v The Minister of Justice and Correctional Services* (Case no 404/2021) [2022] ZASCA 25 (9 March 2022)

Coram: SALDULKER, ZONDI, MAKGOKA, PLASKET and GORVEN JJA

Heard: 18 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 9 March 2022.

Summary: Summons – multiple plaintiffs – special plea of misjoinder – test whether issues of fact and law substantially the same for each plaintiff – issues of fact and law substantially the same – convenience and absence of prejudice – permissible to join in single action – appeal upheld and special plea dismissed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Rawjee AJ, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

‘1 The special plea is dismissed.

2 The defendant is directed to pay the costs arising from the special plea.’

JUDGMENT

Gorven JA (Saldulker, Zondi, Makgoka and Plasket JJA concurring)

[1] This appeal arises from a summons sued out by 138 plaintiffs (the plaintiffs). Each of them has claimed damages from the Minister of Justice and Correctional Services (the Minister). Each claim arises from an alleged assault on the particular plaintiff at St Albans Medium B Correctional Centre on 1 and 2 March 2014. The assaults are alleged to have been perpetrated by Correctional Services officials employed there by the Minister. They are alleged to have used batons, hands and feet to beat, slap and kick the plaintiffs. Different injuries and sequelae are pleaded for each plaintiff and each plaintiff claims R500 000 by way of general damages.

[2] The action was instituted in the Eastern Cape Division of the High Court, Port Elizabeth (the high court). The plaintiffs annexed 138 separate sets of particulars of claim to the summons.

[3] This prompted the Minister to enter a special plea which, in essence, raised two defences. First, that a combined summons is defined in rule 1 of the Uniform Rules of Court (the Uniform Rules) as a summons with a statement of claim annexed thereto. If one has regard to form 10 of the Uniform Rules, a summons must have annexed to it 'a set of Particulars of Claim'. Because 138 sets of particulars of claim were attached to the summons, the summons was irregular as not complying with form 10. Secondly, that the particulars of claim of the respective plaintiffs do not comply with the requirement in rule 10(1) that the claims depend upon the determination of substantially the same question of law or fact.

[4] The special plea was heard separately and initially in the high court. No evidence was led. Rawjee AJ upheld the special plea and dismissed the claims of the plaintiffs. She also dismissed the plaintiffs' application for leave to appeal. The appeal is before us with the leave of this Court.

[5] On appeal, the plaintiffs addressed the same issues for determination. The first issue is whether the annexing of 138 sets of particulars of claim to a summons by the individual plaintiffs, rather than one set referring to all of the plaintiffs, was irregular in failing to comply with rule 17(2)*(a)* read with form 10. This issue depends on whether annexing more than one document rather than a single one is an irregularity and, if so, a fatal one which should result in the dismissal of each plaintiff's claim.

[6] Rule 17(2)*(a)* reads:

'In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of his claim, which statement shall ***inter alia*** comply with rule 18.'

There is no issue that rule 18 was not offended. And form 10 informs the defendant in the part dealing with the combined summons that the plaintiff institutes action against them:

'. . . in which action the plaintiff claims the relief and on the grounds set out in the particulars annexed hereto.'

[7] I see no reason why, when a number of documents containing the particulars in respect of each plaintiff's claim are annexed, this should result in the dismissal of all of the claims. After all, if a single, composite set of particulars had been annexed, the present action would simply include paragraphs describing each plaintiff in turn. The other 13 paragraphs which are, as shown below, virtually identical, could then follow one after the other. It may be that the manner in which the particulars of claim have been annexed is unwieldy but it is not irregular. Of course, this should not be understood as encouraging the practice. It must be said that, in argument before us, the Minister, while not abandoning this point, indicated that it was not being pressed. In my view this was prudent.

[8] In any event, an overly formal approach to pleadings has always been discouraged. It is generally only where there is prejudice to a litigant that a different approach is taken by our courts. As was said in *Trans-African Insurance Co Ltd v Maluleka*:[1]

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[1]*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278E-G.

'If there was any insufficiency in those summonses there seems in all cases to have been ample room for a simple condonation, since no question of prejudice to the defendant seems to have arisen in any of them. No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

No question of prejudice is raised in the present matter. If any irregularity arose, therefore, it is not a fatal one and could be condoned in the discretion of the court. It is certainly no basis for dismissing the claims as was done in the high court.

[9] I now consider the second issue. This is whether the plaintiffs fall foul of a fatal misjoinder. Some texts suggest that at common law the general rule was that a number of plaintiffs with separate causes of action could not jointly sue the same defendant. Many of them rely for this proposition on the matter of *Estate De Beer v Botha*.[2] In that matter, the plaintiffs were joint executors in the estate of one de Beer and his spouse who predeceased him. De Beer was found to have murdered her and had been executed as a result. An exception was taken to the declaration on the basis that the two estates had been wrongly joined as co-plaintiffs or, alternatively, that the estates should have made separate and distinct claims. The exception was upheld. It was held that, when his spouse died, the community of property terminated and, as a result, after the death of de Beer, there were two separate estates to administer. Since the claim of de Beer's estate concerned the setting aside of an agreement struck after the death of his spouse, her estate had no such claim. The joint executors had also sued on two policies belonging to his spouse to which de Beer had no claim. The court held that the respective claims disclosed no cause of action since they lay

[2] *Estate De Beer v Botha* 1927 CPD 140.

at the instance of the separate estates. It held, further, that once the separate claims were brought, '. . . it may be that the Court will consider it desirable that the two actions should be heard together'. This matter does not constitute a total bar to two or more plaintiffs suing the same defendant on different causes of action. It envisages that this will be allowed in certain circumstances. I do not read it as authority for the blanket prohibition of such a joinder.

[10] Some support for the proposition was alluded to in *Sieff v Wilhelmina and Another*.[3] Here, two plaintiffs had sued a defendant for assault alleged to have been committed on the same day. The plaintiffs also sued a second defendant in the same action for a different assault which allegedly took place on a different day and which did not involve the first defendant. Exception was taken on the basis of a misjoinder of the second defendant. In the court of first instance, after argument, the plaintiffs withdrew the claim against the second defendant and proceeded to trial against the first, obtaining judgment. On appeal, it was argued that the entire summons was void as a result of the earlier misjoinder. Having reviewed English, Scottish and Roman Dutch authorities, Ward J held:

'The rule, therefore, in Roman-Dutch law seems to approximate to the Scots' practice, and is founded upon convenience. I take it the Courts here would not allow an exception of misjoinder, when the cases could be easily disposed of together, and this seems to be borne out by what fell from DE VILLIERS, C.J., in *Ettling v Schiff* (5 SC 131). He said: "In cases of this sort (misjoinder) it seems to me that the Court in which the trial takes place is the best judge of what would be convenient in the course of its practice."'

[3] *Sieff v Wilhelmina and Another* 1911 OPD 24 at 26.

He mentioned certain cases involving misjoinder of plaintiffs where the courts had held that the summons was not void or a nullity but had given leave to the plaintiffs to amend the summons so as to allow one of them to withdraw from the action.[4]

[11] It seems, therefore, that at common law, the default position might have been that plaintiffs could not join together to sue a defendant on separate causes of action but that convenience was a factor by which a court could determine whether they should be heard together. This, of course, is a recognition that high courts have inherent jurisdiction to decide matters of procedure.[5] This has now been specifically provided for in the Constitution[6] and is also echoed in the uniform rules which allow a court to condone non-compliance with the rules.[7]

[12] With that in mind, I turn to rule 10(1) which reads:

'Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same

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[4] *Paterson v Pearson and Others* 1875 Buchanan 45. In that matter, the plaintiff had sued on his own behalf and on behalf of his minor children. The court held:
'If the plaintiff, wished to try the objections made on his own behalf, and those on behalf of his minor children, he must bring two actions. The exception of misjoinder of counts must be allowed.'
In *Nigel Gold Mining Co v Croft and The Beatrice Syndicate* 1889-1890 3 SAR TS 87, the summons had referred to the company as the plaintiff along with others. Some of the others were said to have no real interest in the claims. Exception was taken on the basis that they should not have been joined. The exception was upheld and it was ordered that the summons should be amended. The matter thus did not so much deal with multiple plaintiffs but with the fact that certain plaintiffs lacked *locus standi* to sue in the matter.

[5] The common law position was succinctly explained by Corbett JA in *Universal City Studios Inc v Network Video* (*Pty*) *Ltd* 1986 2 All SA 192 (A); 1986 2 SA 734 (A) at 754 as '. . . an inherent reservoir of power to regulate . . . procedures in the interests of the proper administration of justice. . .'.

[6] Section 173 of the Constitution of the Republic of South Africa, 1996, provides:
'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[7] Rule 27(3) provides: 'The court may, on good cause shown, condone any non-compliance with these Rules.'

question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.'

It is clearly the first proviso which comes into focus in this matter. It serves to narrow an otherwise all-encompassing provision allowing multiple plaintiffs. There is no dispute that each plaintiff is entitled to bring an action against the Minister. The only issue is whether the plaintiffs may do so in a single action. The test for compliance with the rule is whether the right to relief of each plaintiff '. . . depends upon the determination of substantially the same question of law or fact which . . . would arise on . . .' the other action or actions if brought separately.

[13] Any action is based on facts and law. The facts are those which, if proved, would sustain in law the cause of action relied upon. Each action is a straightforward delictual claim under the *actio legis aquiliae*. The legal contours of the actions are the same for each one. The question before us thus resolves itself into whether the pleaded facts amount to substantially the same questions of fact which would arise in the notionally separate actions.

[14] Three of the 138 particulars of claim were initially included in the appeal record. These were those of the first, second and third plaintiffs. Subsequently, the others were introduced on appeal. Apart from the identities of the plaintiffs and paragraph 7, each set of particulars of claim is identical. Paragraph 7 sets out the injuries allegedly sustained by the respective plaintiffs. Three of the subparagraphs are identical, alleging that each plaintiff sustained a psychological injury, suffered shock and trauma and suffered pain. Paragraph 8 sets out the sequelae alleged to have resulted from those injuries. These are pleaded in identical terms: that they required medical attention and medication to alleviate the pain, and that they experienced further pain, emotional trauma, discomfort and suffering.

[15] The matter was argued against the likely backdrop that, if the action survived the special plea, there would be a separation of the issues under rule 33(4). The first issue would require proof of the alleged assault on the plaintiffs. The question is whether the different assaults, injuries and damages concerning each of the plaintiffs mean that they should be tried separately. It is so that each plaintiff will need to prove that they were assaulted and that they suffered the pleaded injuries. As such, 138 assaults and the injuries sustained as a result will need to be proved. If the plaintiffs, or any of them, succeeds in this task, an assessment of the damages sustained by each of the successful plaintiffs on the initial issue will be required.

[16] The first thing to note is that the phrase, 'the same question of fact', is qualified by the word 'substantially'. This means, at the very least, that the questions of fact to be determined need not be identical. What, then, is meant by 'substantially'? The dictionary definition is not particularly helpful. In the present context it is said to mean 'in large part' or 'to a large degree'.[8] This begs the question what is meant by 'large'. It seems to allow for a wide range of circumstances without a single determinative test. In the present context, I conceive that it connotes that there should be a significant overlap of the facts to be determined.

[17] The Minister contended that the facts to be determined in respect of each plaintiff were not substantially the same. This because, although all the plaintiffs were detained at St Albans Correctional Facility and the assaults were alleged to have taken place during the same two-day period, they were detained in different cells and sections. In addition, the consequences of the assaults differed as did the treatment each plaintiff required.

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[8] RE Allen (ed) The Concise Oxford Dictionary of Current English 8 ed 1990 p 1216; https://dictionary.cambridge.org/dictionary/english/substantially?q=Substantially, accessed on 25 February 2022.

[18] As against that, however, the causes of action are founded on incidents taking place at the same time and place. The claim is that the assaults took place in the same correctional centre over the same two-day period. It is unlikely that each alleged assault took place in isolation at a time and place unique to each plaintiff. As such, it is overwhelmingly probable that a number of the alleged assaults took place in the presence of a number of persons, whether employees or offenders. Evidence of many of the witnesses is likely to bear on a number of the alleged assaults. Those witnesses would need to be called once only in a joint action. It is only the specific details of each assault, their sequelae and the individual circumstances of the plaintiffs bearing on the quantification of damages that differ. To my mind, there are significantly overlapping facts. As such, substantially the same questions of fact fall to be determined as would be the case in separate actions.

[19] Add to that the question of convenience. If heard separately in 138 actions, it may well be that different judges would arrive at different conclusions on the same or similar factual issues. The time of courts is likely to be taken up in a multiplicity of actions concerning claims arising from the same time and place as the others with a number of common witnesses. Multiple appeals might eventuate over an extended period of time with potentially different outcomes. The same witnesses would be called in multiple actions and face very similar cross-examination in each action. The weight attached to the evidence of different witnesses by different courts might well differ from action to action. It seems to me that both the plaintiffs and the Minister would be advantaged in calling each witness once only on the assault issue. This would probably result in a considerable saving of time and expense both at trial and in preparation for trial. In argument before us, the Minister conceded that the time spent would be no more than if separate actions were heard and the Minister would not be prejudiced in confronting a single action.

[20] I accordingly do not agree that the Minister is correct in contending that there was a fatal misjoinder. On the basis that the facts concerning each plaintiff are substantially similar as also on the basis of convenience, the joinder of the plaintiffs in one action is appropriate and inoffensive. As a result, the special plea should have been dismissed.

[21] The substantial success of the plaintiffs on appeal warrants an order that the Minister should pay their costs of the appeal. This applies equally to the costs arising from the special plea. No argument to the contrary was advanced.

[22] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

‘1 The special plea is dismissed.

2 The defendant is directed to pay the costs arising from the special plea.’

T R GORVEN

JUDGE OF APPEAL

Appearances

For appellants:	A C Moorhouse
Instructed by:	Egon A Oswald Attorneys, Centurion
	Lovius Block Attorneys, Bloemfontein
For respondent:	A Beyleveld SC (with him I Dala)
Instructed by:	State Attorney, Port Elizabeth
	State Attorney, Bloemfontein