IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO.: 664/2017

In the matter between:

LINDELWA GXIGXI **Plaintiff/Respondent**

and

MEC FOR HEALTH, EASTERN CAPE

PROVINCIAL GOVERNMENT **Defendant/Excipient**

***EX-TEMPORE* JUDGMENT**

MBENENGE JP

[1] This is an exception taken against the plaintiff's particulars of claim on the ground that it is vague and embarrassing. For the sake of convenience I shall

continue using the same appellations by which the parties have been cited in the action which is the subject of the exception.

[2] The action is for recovery of damages. The plaintiff is suing in her personal and representative capacities as natural mother and guardian of her daughter, A[..], who is alleged to have been born with severe and permanent eschemic encepalopathy and suffering from severe and permanent quadriplegic and spastic cerebral palsy. The defendant is sued in its official capacity on the basis that it is statutorily liable for the acts and omissions of employees of the Department of Health in the Eastern Cape Provincial Government.

[3] Seven causes of complaint are raised in support of the contention that the particulars of claim is vague and embarrassing. All the complaints were persisted in when the exception was being heard yesterday.

[4] Before dealing with each of these causes of complaint it becomes necessary for one to remind oneself of the legal principles applicable to exceptions, especially in so far as they are relevant in this matter. Much as a party has to plead with sufficient particularity the material facts upon which she or he relies for the conclusions of law she or he wishes the court to draw from these facts,[1] the plaintiff is required to furnish an outline of its case. The outline does not entitle the defendant to a framework like a cross-word puzzle in which every gap can be filled by logical deduction.[2] In the *Jowell* case the Court went on to say:

> "The outline [of the plaintiff's case] may be asymmetrical and possess rough edges not obvious until actually explained by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."[3]

[5] The principles applicable to an exception founded on the contention that the summons is vague and embarrassing were aptly stated by Van der Linde J in *Mosothokazi Share Trust & Others v Broll Auctions and Sale (Pty) Ltd & Another; In*

[1] *Trope v South African Reserve Bank & Another and Two Other Cases* 1993 (3) SA 264 (A) (*Trope*).
[2] *Jowell v Bramwell-Jones & Others* 1998 (1) SA 836 (WLD) at 913 F (*Jowell*).
[3] Id at 913F-G.

re: v Broll Auctions and Sale (Pty) Ltd & Another v Mosothokazi Share Trust & Others[4] as follows:

> "[4] …. The first principle is that exceptions are there to weed out unmeritorious causes, whether claims or defences. They are not there to exact perfection in pleading.
>
> [5] The second principle is that in considering whether a pleading is excipiable, the pleading must be viewed from the perspective of every reasonable interpretation that it can bear. Unless thus viewed the pleading remains vague and embarrassing, the exception cannot succeed.
>
> [6] The third is that an exception on the basis that the pleading is vague and embarrassing needs to strike at the pleading as a whole, and not only certain paragraphs, before it will succeed.
>
> [7] The fourth principle is that a plaintiff need only set out the framework of its cause of action in its particulars of claim; evidence is not required to be pleaded."[5]

[6] It is also trite law that even if a pleading is vague, in the sense that the pleading is either meaningless or capable of more than one meaning, the court must still undertake a qualitative analysis of such embarrassment as the excipient can show is caused to him or her by the vagueness complained of. In each case an *ad hoc* ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient were she or he to be compelled to plead to the pleading in the form to which she or he objects.[6]

[7] Before turning to consider the defendant's objections more closely, I should place it on record that the particulars of claim is not a model of perfection, both in form and substance. However, as already pointed out that is not the test.

[8] In paragraph 4 of the particulars of claim, the plaintiff alleges that during her pregnancy in 2009 she regularly visited the clinic in East London and all examinations and tests carried out in respect of herself and her unborn foetus indicated that she and her foetus were healthy and that the pregnancy was proceeding normally. This, so the complaint goes, is alleged without the plaintiff clarifying which clinic in East London she visited, the dates on which she visited the

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[4] *Mosothokazi Share Trust & Others v Broll Auctions and Sale (Pty) Ltd & Others; In re: v Broll Auctions and Sale (Pty) Ltd & Another v Mosothokazi Share Trust & Others* (29772/2015) [2016] ZAGPJHC 111 (13 May 2016).
[5] Id at paras 4 to 7.
[6] *Lockhat & Others v Minister of the Interior* 1960 (3) SA 765 D at 777 A-E.

clinic and what examinations and tests were carried out in respect of herself and her unborn foetus.

[9] It is clear from a benevolent reading of the particulars of claim that the failure to exercise a duty of care and the negligent conduct complained of were meted out at the hospital where the plaintiff gave birth, and not elsewhere. The impugned part of the particulars of claim is headed "*THE BACKGROUND*". The introduction of irrelevant matter into a summons may make it vague and embarrassing, but the pleading of irrelevant matter as history does not.[7]

[10] The first ground of the exception is thus unsustainable.

[11] The second complaint is that there is a contradiction between the allegation that the plaintiff and her foetus were healthy and that alleged in paragraph 4.4, where it is stated that the defendant's employees and staff were causally negligent "*in failing to conduct adequate, proper and regular pre-partum monitoring of the foetal wellbeing*."

[12] I have already found that the allegation concerning attendance at a clinic is, upon a benevolent reading of the particulars of claim, background information which constitutes irrelevant history and thus not offensive as to render the particulars of claim excipiable and deserving of being set aside in its entirety. The cause of action relates to the events of 30 November 2009 when the plaintiff is said to have given birth and not to "*her pregnancy in 2009*".

[13] The third complaint concerns the reference, in the particulars of claim, to "*Hospitals*" instead of "*Hospital*". This complaint which is founded on a clear grammatical error need detain us no further. It is plain from a reading of the impugned particulars of claim that the plaintiff gave birth, at one hospital, and not otherwise. That hospital is Frere Hospital, East London. Mr *Pitt*, counsel for the defendant, was hard put to explain how the use of the plural instead of a singular noun in the context of this case embarrasses or prejudices his client in any way.

[14] I now turn to consider the fourth and fifth causes of complaints. As far as I could have ascertained, the plaintiff is also criticised for alleging that the defendant

[7] *Du Plessis v Van Zyl* 1931 CPD 439 at 442.

was causally negligent in the respects alleged without having demonstrated how, for instance, the omissions caused or resulted in A[..]'s condition.

[15] It is indeed trite law that the plaintiff must allege in the pleadings (and prove at trial) a causal connection between the negligent act relied upon and the damages suffered.[8]

[16] Upon a reading of both paragraphs 12 and 13 of the particulars of claim, no allegation is made that the damages suffered resulted from the negligent conduct complained of. Instead, the plaintiff has merely alleged that A[..]'s condition resulted from the defendant's breach of a legal duty.

[17] Ordinarily, this cause of complaint would properly have founded a contention that the summons lacks averments necessary to sustain a cause of action. However, to the extent that there is a defect or incompleteness in the manner in which the cause of action is set out[9] and strikes at the formulation of the cause of action, with resulting embarrassment and prejudice to the defendant, the summons is excipiable. The defendant would clearly be prejudiced if it were to plead to the particulars of claim; absent averments necessary to sustain a cause of action, the issues are not triable and any evidence that were to be led to link the negligence to the damages suffered would be irrelevant.

[18] In the sixth instance the plaintiff is criticized for having referred, in support of the claim for loss of earnings or loss of earning capacity, to A[..]'s parents' level of education and their respective earning capacities, without an allegation having been made of the parents' occupation, level of education and income earning ability. In my view, it is possible for the defendant to plead and deny, if so advised, being liable to the plaintiff's future loss of earnings or loss of earning capacity, for the reasons alleged or at all and thus put the plaintiff to the proof thereof. The information that is said to be lacking could be obtained under rule 21 of the Uniform Rules of Court.

[19] The last cause of complaint is that the plaintiff has made reference to A[…] as having suffered a significant reduction in her life expectancy, without alleging what A[…]'s life expectancy is or by how much it has been reduced or the basis upon

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[8] *Minister of Police v Skosana* 1977 (1) SA 31 (A).
[9] *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Scheepers v Krog* 1925 CPD 9 at 11; *Cilliers v Van Biljon* 1925 OPD 4; *Lockhat* above n 6 at 777E; *Trope* above n 1 at 268F.

which it has been reduced. Here, too, the defendant could, if so advised, deny that there is a reduction in A[…]'s life expectancy, without, in so doing, suffering any prejudice.

[20] The fourth and fifth causes of complaint dealt with above are, in my view, legitimate for the aforementioned reasons. To that extent, the exception must be upheld. There is no reason why costs should not follow the result.

[21] In the result, I make the following order:

(a) *The exception succeeds only in so far as it is contended therein that the plaintiff's particulars of claim does not establish a causal link between the alleged negligence and the damages allegedly suffered.*

(b) *The plaintiff is granted leave to amend the particulars of claim so as to remove the shortcoming referred to in paragraph (a) above, within 15 days from date of service of this order on the plaintiff, failing which the defendant is, on these papers duly amplified as may be necessary, granted leave to apply for the dismissal of the plaintiff's action.*

(c) *The plaintiff shall pay the costs of the exception.*

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S M MBENENGE
JUDGE PRESIDENT OF THE HIGH COURT

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Date heard	:	18 June 2019

Date judgment delivered : 19 June 2019