



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 155 /2020

In the matter between:

DR KATRINA DU TOIT

PLAINTIFF

and

MANGAUNG METRO MUNICIPALITY

DEFENDANT

HEARD ON: 14 AUGUST 2020

JUDGMENT BY: MAJOSI, AJ

DELIVERED ON: 10 SEPTEMBER 2020

- [1] The plaintiff instituted action proceedings against the defendant for damages arising from bodily injuries allegedly sustained from a fall when a main water cover under the control of the defendant collapsed under her feet. This opposed interlocutory application concerns an exception filed by the defendant in terms of Rule 23(1)

of the Uniform Rules of Court on the basis that the plaintiff's particulars of claim is vague and embarrassing to such an extent that they cannot plead thereto.

[3] I find it convenient to briefly deal with the allegations contained in the plaintiff's particulars of claim to provide context to the exception. The plaintiff, a medical practitioner, alleges that whilst she was walking on a sidewalk, a manhole cover collapsed beneath her feet and caused her to trip and fall and sustain serious injuries. The injuries sustained are described as a soft tissue injury to her foot and inclusive of a transverse comminute fracture which required her to be admitted to hospital and to undergo orthopaedic surgery where an open reduction and internal fixation was performed on her right foot and a back slab applied thereto.¹

[4] She further alleges that the defendant is classified as a local authority as described in section 2 of the Municipal Systems Act 32 of 2000 and had a legal duty to inspect, maintain, repair its infrastructure and ensure it does not present a hazard to members of the public and more specifically, the plaintiff. In its failure to execute this legal duty, it neglected to routinely inspect, repair or maintain its own infrastructure, or to warn members of the public, including the plaintiff, with warning signs indicative of the hazard.² The delict is thus attributed to the sole negligence on the part of the defendant.

[5] The claim of the plaintiff is comprised of damages claimed for past hospital and medical expenses R 28 091.20, future hospital and

¹ Paragraph 7 particulars of claim

² Paragraphs 1 – 6 particulars of claim

medical expenses R 200 000.00 and general damages in respect of pain and suffering and discomfort and loss of enjoyment of amenities of life, disability and psychological shock and trauma R 350 000.00 with a total amount of R 578 091.20 being claimed.³

[6] The exception raised by the defendant revolves around three causes of complaint to the particulars of claim which they allege are vague and embarrassing in that:

6.1 Sub - paragraphs 7.6 and 8.2 and 8.3 the plaintiff avers that she experienced pain and suffering but no particulars of the plaintiff's pain and suffering are provided and it is not clear if the pain is chronic, intermittent, acute, breakthrough, incidental of future,

6.2 Sub - paragraph 7.7 avers that the plaintiff will require further surgical intervention but no particulars thereof is provided and that,

6.3 Sub - paragraphs 7.8 read with 8.3 the plaintiff avers that the plaintiff suffered severe and permanent loss of enjoyment and amenities in life but it is unclear which amenities and enjoyment she lost.

[7] Although three causes of complaint have been raised, they are similar in nature as they relate to certain paragraphs of the particulars of claim not having sufficient particularity as to the nature

³ Paragraph 8 of particulars of claim

and extent of the plaintiff's injuries. The following sub – paragraphs are assailed by the defendant:

“7.6 She experienced severe pain, suffering discomfort, emotional shock, trauma and anguish and will continue to do so in future.”

7.7 She will, in due course, require further surgical treatment and or intervention

7.8 She suffered severe and permanent loss of the enjoyment and amenities of life

8.2 Future hospital and medical expenses R 200 000.00 (the amount claimed is an estimate and will be quantified upon receipt of medico legal reports)

8.3 general damages in respect of pain and suffering and discomfort, loss of enjoyment of amenities of life, disability and psychological shock and trauma R 350 000.00”

[7] The defendant contends in their heads of argument that their first complaint is indicative of the fact that they are unable to decipher the nature and extent of the alleged pain and suffering and have offered the case of **SIGOUMAY V GILLBANKS 1960 (2) SA 552 (A)** in support thereof.⁴ This argument is also extended to the second complaint that the lack of particulars does not clarify or specify what surgical intervention or treatment will be required in future.

[8] The third cause of complaint is that averments of loss of amenities of life does not disclose the actual amenities of life the plaintiff

⁴ Defendant's heads of argument P 5. Para 14

would have lost enjoyment of. This consequently renders the particulars of claim vague and embarrassing and that they (defendants) cannot plead thereto without the risk of embarrassment.⁵ They further contend that if the court should apply the principles and test laid down in *Trope v South African Reserve Bank* 1992 (3) SA 208 at paragraphs 201 -211, it should uphold the exception as it is impossible to plead to the vague particulars without embarrassment to themselves. I will return to these principles later. In short, they seek that the grounds for exception be upheld with costs.

[8] The plaintiff contends that the exception raised is premature taking into account that the defendant failed to make reference as to how the pleading does not comply with Rule 18(4) or Rule 18(10) of the Uniform Court Rules. They also state that the defendant's causes of complaint is not that the particulars of claim meaningless or capable of more than one meaning but rather that it does not provide sufficient particulars therein. They are also of the opinion that the defendant has not illustrated how lack of sufficient particulars will result in substantial prejudice to them as the excipients.⁶

[9] The plaintiffs are also of the view that the disputed paragraphs are in accordance with a widespread practice and employs the case of **Madlala v City of Johannesburg 2019 JDR 0591(GJ)** in support of their case where it was stated that personal injury claims are not fully quantifiable and quantum is usually assessed at a later stage due to expert reports being filed at pre-trial stages to clarify the

⁵ Defendants heads of argument P 7 para 20

⁶ Plaintiff's head of argument P10 para 6.

nature and the extent of the injuries as elucidated in paragraphs 58 – 60.

- [10] Furthermore, they have stated that the defendant has not shown that their pleading is vague or embarrassing to such an extent that it would amount to a substantial prejudice as the exceptions raised does not go to the root of the matter and such detail is not required for the formulation of a plea but can be later thrashed out in pre-trial proceedings. They are also of the opinion the defendants have adopted an over – technical approach and have not laid a proper case for the exception and it should thus be dismissed with costs.
- [11] The legal position and principles pertaining to exceptions requires the court to look at the pleadings with rules 18(4) and 18(10) of the Uniform Rules of Court in mind together with, Rule 23 (exception) and various case law dealing with the approach the court is to follow when an exception is raised. In terms of rule 18(4), every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto. This is the essence of *Trope v South African Reserve Bank* and Two other cases *supra* where it was stated that pleadings should be done in such a manner that each side come to trial prepared to meet each other and not be taken by surprise.

[12] Rule of 23 provides for exception to be raised when a pleading is vague and embarrassing or a pleading lacks the averments necessary to sustain a cause of action or a defence. The purpose thus of an exception alleging that a pleading is bad in law is to dispose of the leading of evidence at the trial and thus, the exception must go to the root of the problem.⁷ A successful challenge on the basis that pleadings are vague and embarrassing could result in an amendment to provide particularity see *Madlala v City of Johannesburg* supra at paragraph 28.

[13] The test as laid down in *Trope* is two - fold – does the pleading lack particularity to the extent that it is vague and secondly if that vagueness causes embarrassment of such a nature that the excipient is prejudiced? This test was also expanded upon in **Jowell v Bramwell – Jones and others 1998 (1) SA 836 (W)** where it was stated that an exception can only be taken when the vagueness and embarrassment strikes at the root cause of the action as pleaded .If the defendant knows which claim it must meet, the particulars cannot be said to be vague and embarrassing.

[14] This approach was also recently reiterated in **Du Toit NO and others v Steinhoff International Holdings (Pty) Limited and others and a related matter [2020] 1 All SA 142 (WCC)** at paragraph 32 – 32.5 where the court stated:

⁷ See *Vermuelen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) and *Trustees for the Time being of the Bus Industry Restructuring fund v Break Through Investments* 2008 (1) SA 67 (SCA)

“In so far as an exception on the basis that a pleading is vague and embarrassing is concerned, the following general principles apply:

For an exception to be upheld, the excipient has a duty to persuade the court that upon every interpretation of a pleading it can reasonably bear, particularly the document upon which it is based, the pleading does not disclose a cause of action or defence (*Gallagher Group Ltd and another v IO Tech Manufacturing (Pty) Ltd and others* 2014 (2) SA 157 (GNP) at 161E [also reported at [2013] JOL 29770 (GNP) – Ed]).

An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration: firstly, whether the pleading lacks particularity to the extent that it is vague; and, secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (*Trope v South African Reserve Bank*, supra, at 211A–B).

A statement is vague when it is either meaningless or capable of more than one meaning (*Lockhat and others v Minister of the Interior* 1960 (3) SA 765 (D) at 777C–D [also reported at [1960] 3 All SA 513 (D) – Ed]) or can be read in any one of a number of ways (see *General Commercial and Industrial Finance Corporation Limited v Pretoria Portland Cement Co Limited* 1944 AD 444 at 454).

Particulars of claim would be “embarrassing” if it is not possible for the pleader to determine what the actual meaning (if any) is conveyed by the pleading (see *Trope v South African Reserve Bank*, supra, at 211E).

As long as particulars of claim state the nature, extent, and grounds of the cause of action, the court will not as a rule strike out a paragraph as being vague and embarrassing as long as reasonably sufficient information has been provided for the defendant to plead thereto (*Lockhat and others v Minister of the Interior*, supra, at 777D–E).”

- [15] I now turn to the complaints raised by the defendant in the grounds exception. The first complaint relates to specific issues namely the nature and extent of the injuries suffered by the plaintiff. A simple

reading of the preceding paragraphs reveals that due to the transverse comminute fractures sustained due to the fall, orthopaedic surgery was performed on the plaintiffs foot where not only an open reduction and an internal fixation was inserted and a backslap was applied. The particulars of claim even state that when the plaintiff was discharged, she received an assistive device and pain killers.

[16] In my view, this complaint does not go to the root of the cause of action but rather specific issues such as the extent of the injuries which is *facta probantia* which is not required at this stage of the proceedings. Though the defendant was not clear at argument stage how they would suffer prejudice, I am unable to discern how this could be construed as non – compliance with rule 18(4) or rule 18 (10) .The plaintiff in any event, bears the risk to prove actual nature and extent of damages with expert testimony. I thus cannot discern how this can be construed as vague and embarrassing and more importantly, why the defendant will suffer prejudice when these offending paragraphs are read in context. This ground for exception must thus fail.

[17] The second and third complaint relates to the plaintiff's assertions in the particulars of claim that further surgical interventions will be required and that she has suffered loss of amenities of life. Admittedly, when these paragraphs are read in isolation, it is not immediately clear what exactly will be required in terms of medical intervention or how loss of amenities would be quantified. But can it really said to be vague to the extent that it is meaningless and the pleader (defendant) cannot determine the actual meaning of these

paragraphs in order to formulate a plea? In other words, are material facts absent?

[18] The pleading, when looked at in totality reveals that, should the surgical intervention (open reduction and internal fixation) for the fractured and splintered bone not work, further surgical intervention would be required. There is thus no guess work involved here. This can undoubtedly only be assessed by a medical expert to determine as already alluded to by the plaintiff that medico - legal reports were outstanding at the time summons was issued. I am thus not convinced that this is required for the purpose of a plea as it relates to *facta probantia*.

[19] It is also evident from the pleading⁸ that the plaintiff received an apparatus to assist her mobility together with analgesics (pain killers) and this speaks to the loss of amenities of life. The cause of complaint pertaining to loss of amenities of life cannot thus be seen as lacking in particularity to such an extent that it will lead to embarrassment and prejudice the defendant taking into consideration that the cause of action is based on alleged negligence on the part of the defendant.

[20] Paragraphs 4 and 5 of the particulars of claim speak to the root cause of the action and have in no manner been assailed in the exception. In my view, the defendant does not require these further details to formulate a plea as the plaintiff is duty bound in any event to present the evidence of experts to properly quantify its claim on these aspects as asserted to in the particulars of claim.

⁸ Particulars of claim paragraph 7.5

[21] I am not persuaded that the defendant will suffer prejudice where the second and third ground for exception as it has adopted an overly technical approach as to what is required at this stage of the proceedings. The defendant may obtain these details by seeking clarity in terms of rule 24 of 35 (Madlala supra paragraph 62) before the trial. In the prevailing circumstances, these two grounds for exception should thus also fail.

[22] Accordingly, I make the following order:

1. The exception is dismissed with costs.

OR MAJOSI, AJ

On behalf of Defendant:

Instructed by:

Adv. P.T Masihleho

Moroka Attorneys

BLOEMFONTEIN

On behalf of Plaintiff:

Instructed by:

Adv. HJ Van Der Merwe

Honey Attorneys

BLOEMFONTEIN