



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 no: 2674/2020

In the matter between:

SCHALK MELCHIOR GROBBERLAAR
MARIETJIE GROBBELAAR

First Plaintiff
Second Plaintiff

and

BUSAMED BRAM FISHCHER INTERNATIONAL
AIRPORT HOSPITAL (PTY) Ltd

Defendant

SEANDA HEALTH CARE (PTY) Ltd

Excipient/ Third Party

CORAM: C PAGE AJ

HEARD ON: 23 July 2021

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email on 15 September 202.

- [1] The plaintiffs instituted a claim in delict against the defendant, a private hospital averring, inter alia, that whilst admitted at the hospital, the first plaintiff contracted the human immunodeficiency virus (HIV) caused by the negligence of the staff employed by the defendant. The defendant is averred to be vicariously liable for the negligent conduct of the staff.

- [2] The Defendant denies vicarious liability and refers to a Professional Service Level Agreement, the terms of which makes it clear that the relevant staff is employed by the third party and not the defendant.
- [3] Seanda Healthcare (PTY) Ltd is joined as Third Party and with the leave of the court notified as a joint wrongdoer in terms of the Apportionment of Damages Act 34 of 1956 (The Act).
- [4] The defendant, in the third party annexure, prays for an order declaring the defendant and the third party to be joint wrongdoers and further to this that the court orders an apportionment of damages as the court may deem just and equitable.
- [5] The third party excepts to the annexures and prayers to the Third Party Notice on the basis that it does not disclose a cause of action, and in the alternative because it is vague and embarrassing.
- [6] The third party's argument is that on the facts pleaded by the defendant, the parties are entitled to assume that their relationship will be governed by the contract they concluded and therefore that, in the circumstances, the defendant is not entitled to a contribution arising from delict under the Apportionment of Damages Act.
- [7] The defendant, as is apparent from the annexures to the Third Party Notice requests the trial court to grant:
- "3.1 An order declaring the defendant and the third party are joint wrongdoers.
- 3.2 An order declaring that damages awarded to the first and/or the second plaintiff/s are apportioned between the defendant and the third party in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the first and /or second plaintiff/s..."
- [8] The parties agree that until the Third Party intervenes, the trial court could do no more than to apportion the degree of fault between the Defendant and the Third Party. This is the correct interpretation of the provisions of The Act.
- [9] The above declaratory order prayed for by the Defendant requests for damages to be awarded. I find this is embarrassing to the Defendant, who during

argument and heads of argument concede that the trial court could do no more than apportioning the degree of fault between the Defendant and the Third Party until such time the Third Party intervenes in the action.

- [10] The Third Party excepts on the basis that the Defendant is not entitled to a contribution or an indemnity, relying as it does on the Third Party's alleged delict read with the Act, where the parties have chosen to govern their relationship by contract.
- [11] The Defendant holds the opposite view and bases its argument on the relevant case law dealing with the concurrence of actions where the same set of facts may give rise to a claim in damages in delict and in contract permitting a party to choose which claim he wishes to pursue.
- [12] Counsel for the Defendant argues that it does not rely on breach of contract but rather on additional duties that arise independently in delict, against the Third Party. The Defendant relies on duties such as the legal duty of care of the Third Party towards the Plaintiff's or the public at large, and in the alternative that the Third Party is vicariously liable for the negligent actions of the employed nurse, who in providing the incorrect insulin injection to the First Plaintiff, failed to act with the degree of care and skill required of a reasonable medical person.
- [13] Having considered the Third Party Notice, the arguments submitted both orally and as per the heads of argument the following emerges:
 - 13.1 The Third Party is notified to be a joint wrongdoer by way of an order of court.
 - 13.2 The Third Party has not entered into the proceedings but instead excepted against the content of the Third Party Notice based thereon that it contains no basis for delictual liability on its part. Having read the annexure to the Third Party notice, I find that I agree with the Third Party.
 - 13.3 The Defendant pleads specifically to the breach of the service level agreement in issue in the annexure to the third party notice which seems to be accepted by the Defendant as a substantiation of the averred joint negligence of the Third Party.
 - 13.4 The Defendant further pleads that the Third Party is vicariously liable.
 - 13.5 The Defendant does not specify a claim in delict in the Third Party Notice and if so intended, it does not appear to be clear from the Third Party

Notice. The claim of vicarious liability therefore also is not clearly pleaded since such liability may arise delictually but could also arise if provided for contractually.

13.6 The prayer for an order declaring that an apportionment of damages be awarded in such proportions as the court may deem fit is not appropriate in the circumstances since the parties are ad idem that, in the event that it is accepted and appropriately pleaded in delict, the only relief granted by a court where the Third Party has not intervened in the proceedings, is an order of apportionment of the degree of fault between the Defendant and the Third Party.

[14] The Defendant argues that it does not rely on a breach of contract and relies on additional duties which arose independently in delict, but it is not clearly pleaded in the Third Party Notice.

[15] I agree with the Third Party's contention that what has been pleaded in the annexure to the Third Party a is a claim based on contract and not in delict. The argument of counsel for the Defendant does not correspond with what has been pleaded in the Defendant's papers.

[16] In the circumstances I find that the Third Party Notice is indeed vague and embarrassing.

[17] I make the following order:

1. The exception is upheld with costs.
2. The Defendant is granted leave to amend its papers within 20 (twenty) days of this order.

On behalf of the Excipient:
Instructed by:

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On behalf of Defendant:
Instructed by:

C/O

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