

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 23236/2017

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

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SIGNATURE	DATE

In the matter between

MADLALA, NONTBEKO REJOICE

Plaintiff/Respondent

and

CITY OF JOHANNESBURG
Defendant

Excipient /First

JOHANNESBURG ROAD AGENCY (PTY) LTD
Defendant

Excipient

/Second

SUMMARY

[1] This matter arose out of the Plaintiff suing the First and Second Defendants (“the Defendants”) for damages due to her falling into an open manhole whilst walking on a sidewalk in Johannesburg.

[2] In her particulars of claim, the Plaintiff alleged that the Defendants were, at all material and relevant times, responsible for the design, maintenance, repairs and development of the road network, footways, traffic mobility and management of manhole covers within the city of Johannesburg. As a result, she was owed a duty of care by the Defendants who are responsible for taking the reasonable steps necessary to ensure that the sidewalk and roads are safe for users. Additionally, the Plaintiff claimed that this duty of care included the erection of signs to inform users of hazards on the footways or sidewalks. The Plaintiff alleged that as a consequence of the Defendants’ failure to act reasonably and exercise care, she sustained injuries.

[3] The Plaintiff averred that she sustained a fractured right ankle and toe as a result of her alleged fall and continues to experience pain on her right femur. Due to these alleged injuries, the Plaintiff sued for payment in the amount of R1, 300,000. This amount was divided into R600, 000 for past and future medical expenses; R400, 000 for past and future loss of income and loss of earning capacity; and R300, 000 for general damages as a result of pain and suffering, loss of amenities of life and disfigurement. Following the filing of her particulars of claim, the Plaintiff sought an amendment in terms of rule 28 of the Uniform Rules of Court in which she sought to clarify that the amounts claimed were estimated amounts and would only be qualified upon receipt of the relevant experts’ reports. The Plaintiff further sought to clarify that the ongoing pain she experiences since her injury is on her right ankle as opposed to her right femur.

[4] The Defendants delivered a notice of exception in terms of rule 23(1) based on five main grounds. Firstly, the Defendants complained that the Plaintiff referred to a duty of care owed to her by the Defendants in several paragraphs of the particulars of claim but failed to clarify whether this is one and the same duty, or if the said duties of care (should there be more than one) were in addition to, or in the alternative to each other. Secondly, the Defendants complained that the Plaintiff stated that she sustained a fracture on her ankle and toe but later complained of ongoing pain in her femur. The Defendants claimed that it was not clear whether the two injuries were the same injuries alleged or whether the Plaintiff was alleging alternative injuries. The third, fourth and fifth grounds related to the amounts claimed by the Plaintiff. The Defendants complained that the Plaintiff only provided globular figures without any particularity as to how they were made up, more specifically how they were capitalised, quantified, and what contingencies were taken into account. The Defendants claimed that

the Plaintiff failed to supply key information such as what employment she had prior to the incident; what employment she was currently able to do; the employment she would be capable of doing in the future; and whether her pain and suffering and disfigurement was temporary or permanent. The Defendants alleged that because the claim was not set out adequately, they were unable to reasonably assess the Plaintiff's quantum. On the basis of these five grounds, the Defendants claimed that the Plaintiff's particulars of claim were vague and embarrassing.

[5] As a starting point, the Court considered rule 18(4) which states that *"every Pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defense or answer to any pleading as the case may be, with sufficient particularity to enable the opposite party to reply thereto"*. The case of *Mckenzie v Farmers' Co-operative Meat Industries Ltd* was also taken into account in which it was stated that a cause of action should not comprise of every piece of evidence which is necessary to each fact, but rather every fact which is necessary to be proved.

[6] The Court held that whilst a pleading should not contain matters irrelevant to the claim, a plaintiff is not entitled to plead a jumble of facts and force the defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim. The Court further held that a particulars of claim should be so phrased that a defendant is able to reasonably comprehend what case he is called upon to meet and reasonably and fairly able to plead thereto without embarrassment. The Court cited the case of *Giant Leap Workspace Specialists (Pty) Ltd v Scoin Trading (Pty) Ltd T/A The South African Gold Coin Exchange* in which the Court held that *"[a]n exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. If the defendant knows which claim it must meet, the particulars of claim cannot be vague and embarrassing, and the exception cannot be upheld."*

[7] The Court emphasised that the whole cause of action must be demonstrated to be vague and embarrassing and that the exception must strike at the formulation of the cause of action and not its legal validity. Furthermore, the Court held the exception would not be allowed unless the excipient would be seriously prejudiced if the offending allegation were not expunged.

[8] In applying the legal principles, the Court expressed its reluctance to approach the matter on technicalities and its desire to adopt a practical approach thereto. The Court held that the resolution of matters on technicalities serves only to cause delay and an unnecessary escalation of costs.

[9] In considering the Defendants' exception, the Court found that the complaints against the Plaintiff's particulars of claim did not go to the formulation or the heart of the claim but rather to specific issues. The Court was of the view that the Defendants were able to plead to the particulars of claim and that it was possible to demonstrate whether or not they were liable in law to compensate the Plaintiff for her alleged loss.

[10] In respect of the first ground of complaint, the Court held that the Defendants were able to plead to the claim as formulated i.e. that they owed the Plaintiff a duty of care that she would not fall into the manhole as and when she did and under the circumstances set out in her particulars of claim. With regards to the second ground of complaint, the Court held that the medical reports recorded the injury as a fracture on the ankle and toe and that the subsequent and ongoing pain, whether to the ankle or the right femur, was clearly a sequelae of the main injury and therefore not another injury. The Court found that it could not accede to this complaint.

[11] In respect of the third to fifth grounds the Court held that these complaints dealt with the consequences of the alleged negligent conduct and did not speak to the core of the claim. The Court noted that a practice exists in the Gauteng main and local division whereby exact amounts claimed for medical expenses are resolved by an exchange of medical vouchers which may be more or less than what the Plaintiff claims. The Court found that it is for the Plaintiff to react to the subsequent revelation of the correct or objective amount arising from the exchange of the medical vouchers.

[12] The Court held that issues concerning general damages are often dealt with in expert medical reports filed only after the Plaintiff would have attended further relevant medical assessments to establish, with more certainty, the extent of her injuries and their sequelae. Prior to this stage, the Plaintiff is only required by the rules to put up a case where the Defendants can reasonably know what it is required of them. Furthermore, the Court held that the claims for payment of compensation, are almost always left for actuarial scientists to assist the Court to come to a just and equitable amount for compensation. Hence, whatever the Plaintiff claimed as monies due to her for compensation could not, absent this expert evidence, be the end of it all.

[13] The Court found that in many instances, the amounts claimed are merely estimates which are subject to the expert's evidence. Additionally, the Court noted that the Defendants had various rules of court at their disposal in order to obtain clarity or particularity on any issue— especially since they had not been left to guess what the Plaintiff's case was. Should

the Plaintiff fail to call upon the experts, she would run the risk of failing to prove her claim and this would be sufficient remedy for the Defendants.

[14] With regards to the missing information relating to the Plaintiff's employment and injury, the Court was satisfied that these issues could be dealt with through a proper pre-trial process. Accordingly, the Court held that the Defendants would not suffer any serious prejudice should the exception not be upheld.

[15] The Court therefore dismissed the exception. In respect of the Plaintiff's notice to amend her particulars of claim, the Court noted that she had failed to set the application for amendment down for hearing. Thus the Court made an order directing the Plaintiff to bring an application setting out justifiable reasons for the delay in setting down the application for amendment. The Court further ordered that should the Plaintiff fail, refuse, or neglect to set the application for amendment down, the Defendants would be granted leave to approach the Court and, on the papers filed of record, to seek an appropriate relief. No order was granted as to costs.