Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 121/2022

In the matter between:

FERRIS H J Plaintiff

and

THE NALEDI LOCAL MUNICIPALITY Defendant

DATE OF HEARING : 24 NOVEMBER 2022
DATE OF JUDGMENT : 06 DECEMBER 2022

FOR THE RESPONDENT/PLAINTIFF : ADV. JC VAN EEDEN
FOR THE EXCIPIENT/DEFENDANT : ADV. B STEYN

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 06 December 2022.

ORDER

Consequently, the following order is made:

(i) The exception is upheld.

(ii) The plaintiff is granted leave to amend its particulars of claim to disclose a cause of action, within fifteen (15) days from date of this judgment, failing which plaintiff's particulars of claim shall be struck out.

(iii) The plaintiff is ordered to pay the costs of the exception application on the scale as between party-and party, to be taxed.

JUDGMENT

HENDRICKS JP

Introduction

[1] The plaintiff/respondent instituted a claim for damages as a result of an injury/ies sustained when he fell into a manhole/pothole on the 01st June 2021. The claim is based on the duty of care which the defendant/excipient allegedly breached. A Notice of Intention to Defend was served and filed on 04 May 2022. On 23 May 2022 a Notice of Exception was filed after it was served on 19 May 2022. On 25 May

2022 a Notice of Intention to Amend in terms of Rule 28 (1) was served and filed by the plaintiff/respondent, indicating that he intend to amend his particular of claim. There was no opposition to the intended amendment and the particulars of claim was accordingly amended by it been replaced *in toto* with another particulars of claim. This amendment was effected on 09 June 2022. This did not detract the application for an exception by the defendant/excipient, which was argued on 24 November 2022.

[2] The plaintiff/respondent contended, in some sort of a point *in limine* raised, that the exception cannot proceed on the initial particulars of claim as same has been amended in its totality and been replaced by an amended particulars of claim. Adv. Van Eeden on behalf of the plaintiff/respondent contended that if an attempt is made to remove the cause of complaint by amending the pleading, as it happened in the present case, the other party is entitled, if not satisfied that the cause of complaint has been removed, to give his opponent notice "**once again**" that he intends taking an exception that the pleading in its amended form is vague and embarrassing. If the defendant/excipient was of the view that the amended particulars of claim would not remove the cause of complaint, it had to deliver a notice of intention to object to the proposed amendment in terms of Rule 28 of the Uniform Rules of Court. No such action was taken by the defendant/excipient. Seeing that the amendment was consequently properly effected, so it was further contended, the initial particulars of claim complaint about has been deleted and replaced by another set of particulars of claim. The notice

of exception filed, which relates to the initial particulars of claim, has become moot, so it was further contended, **alternatively,** it (exception) was taken against a pleading (particulars of claim) that no longer exist. It is still open for the defendant/excipient to deliver a new notice of exception, should it intend to do so, with regard to the amended particulars of claim. Reliance for this proposition was placed on the matter of **Trope v South African Reserve Bank** 1993 (3) SA 264 (A) and the work of the author **Erasmus**: **Superior Court Practice**, Second Edition, at D1-307.

[3] Adv. Steyn on behalf of the defendant/excipient holds a different view. He submitted that this Court should look at the original particulars of claim and compare same with the amended particulars of claim which, according to him, with the exception of some cosmetic differences are virtually the same. The same complaints raised with regard to the initial particulars of claim still remains applicable and valid even to the amended particulars of claim. To restart the very same process of filing a new exception, which will be costly and which will ultimately have the same result or effect, will be a waste of time and resources. It will also be impractical and would place form over substance. A careful look at the amended particulars of claim compared to the original particulars of claim shows that **but for** the insertion of some words referring to *inter alia* the plaintiff, the date of the event, ect. is almost *verbatim* the same. Therefore, so it was submitted, it will amount to the very same result. A new notice of exception will be filed, which may be opposed, new heads of argument will then need to be filled or regurgitated and the matter will

once again be enrolled on the opposed motion court roll to be argued at a later date, probably before a different court (judge) whereas and in actual fact, the same complaint is still valid and alive and ready to be argued already at this juncture. There is no need to come back to court at a later stage to do exactly the same which can be done and argued at this point in time.

[4] Adv. Steyn, in support of his submissions referred this Court to the matter of **Assmang (Pty) Ltd Black Rock Mine v Majeng**, Case no 398/2022, Northern Cape Division, Kimberley. This is a judgment by **Lever J**. This judgment is distinguishable from the present case on the basis that in the **Assmang** judgment, the amendment was not yet effected unlike in this case. In that case the excipient had the right to either object to the amendment under the provisions of Rule 28, or deal with it (the Amended Particulars of Claim which was filed simultaneous with the Notice of Intention to Amend) as an irregular step under the provisions of Rule 30.

[5] That court per **Lever J** state the following:

> *"13. Ms Nxumalo's argument on behalf of the respondent/plaintiff as I understood it was that I must judge the exception on the current state of the pleadings. The difficulty I have with her submission is that she includes the amendment in the current state of the pleadings. On the facts as set out above the amendment has not yet been effected.*

14. *In support of her argument Ms Nxumalo referred to an unreported judgment of Mr Justice Koen in the matter of THE MEC FOR HEALTH, FOR THE KWAZULU-NATAL PROVINCE & 2 OTHERS v MEDICAL INFORMATION TECHNOLOGY SA (PTY) LTD handed down in the Kwazulu-Natal Division, Pietmaritzburg on the 8 June 2022.*

15. *The difference between the facts of the matter decided by Koen J in the above matter and the present matter is that in the MEC Health KZN matter the amendment had been effected after the 10-day period contemplated in Rule 28 without their being any objection to such amendment, which was subsequently effected. In the present matter the excipient/first defendant at the date of the hearing of this matter had been afforded no such opportunity. Accordingly, the present matter will have to be decided on the basis that the proposed amendment has not as yet been effected and cannot be considered part of the pleadings.*

16. *Ms Nxumalo also referred me to the judgment of Justice Malindi in the matter of MADIRO v MADIBENG LOCAL MUNICIPALITY and 1 OTHER. My reading of the judgment of Malindi J supports my reasoning as set out above and not the submission made on behalf of the respondent/plaintiff herein.*

17. *Accordingly, I find that the exception is still apposite and is a good exception and the respondent/plaintiff has not raised facts that respond directly to such exception. Consequently, I must uphold the exception."*

This illustrate and accentuate the difference between that case and the present case.

[6] Adv. Steyn also referred to the case of **Madiro v Madibeng Local Municipality** 2021 JDR 2631 (GP), which was also mentioned by **Lever J** in the **Assmang** judgment. In the **Madiro** judgment penned by **Malindi J**, like in the present case, the plaintiff delivered a (second) Notice of Intention to Amend in terms of Rule 28 (1), to which the first defendant did not object. The plaintiff duly filed his Amended Particulars of Claim. A Notice of Bar was delivered to the first defendant to the latest amended particulars of claim. The first defendant, who had previously filed a Notice of Exception, contended that the exception was still alive and had to be determined by the court.

[7] The contents of paragraph [7] to [11] of the **Madiro** judgment is a good exposition of circumstances akin to the present case and for sake of completeness it is reproduced. It reads thus:

> *[7] The first defendant contends that its exception is still live and a determination in that regard has to be made by the Court. The plaintiff contends that the exception has been overtaken by events and the only live issue is whether the first defendant should plead to the amended particulars of claim, which it has not done and therefore stands barred. In response to the plaintiff's contention the first defendant submits that as it has objected to the plaintiff's Rule 28 notice of 14 August 2020, the plaintiff has taken another irregular step by delivering another Rule 28(1) notice and subsequently amending his particulars of claim without having launched an application to amend after the object to that notice.*

Rule 28

[8] Rule 28(4) stipulates that if an objection to a proposed amendment which complies with subrule (3) is delivered the party wishing to amend may lodge an application for leave to amend. The first defendant's objection did comply with subrule (3) and the plaintiff failed to comply with subrule (4), that is, to file an application for leave to amend thereafter. The provisions of subrule (4), though couched in discretionary terms, have to be complied with before an envisaged amendment is affected. I agree with counsel for the first defendant that what the plaintiff has done by filing a second Rule 28 notice was to cynically attempt to circumvent its failure to have brought this application within the 10-day period. This was also stated as the reason for the second Rule 28 by counsel for the plaintiff in argument.

[9] Furthermore, the first defendant indicated in its notice of objection that it persists with its objections in terms of Rule 23 and Rule 30 notices. This was in keeping with subrule (8) which states that any party affected by an amendment "may also take the steps contemplated in Rules 23 and 30" after an amendment is effected. I am of the view that this provision applies in this case even though the amendment had not been effected at this stage. The reiteration of its position kept the exception alive.

[10] I agree with Sutherland J, in ***Nqabeni Attorneys Incorporated v God Never Fails Revival Church and Others*** *that:*

> *"When a plaintiff accomplishes an amendment to a declaration, and no plea has yet been filed, the defendant is put on terms to comply with Rule 22(1) and thereby file a plea within 20 days."*

[11] In the case of the first defendant in this case it had already filed a pleading in the form of an exception. Rule 28(8) requires an adjustment of the already filed pleadings to respond to the amendment. The first defendant has elected to stand by its exception and therefore it has to be adjudicated since the second Rule 28 was an irregular step and consequently the purported amendment to the particulars of claim. The notice of bar delivered on 10 November 2020 is consequently an irregular step too. The plaintiff had no right to take any further steps until the exception had been disposed of. This is so because if an excipient loses it is ordered to file a plea within the time permitted by the Rules or within a time set by the Court.

[8] Unlike in the **Madiro** judgment, this matter will be judged on the amended particulars of claim. In paragraph [15] of the **Madiro** judgment **Malindi J** stated:

[15] I must observe that the plaintiff has made an oblique admission that the relevant particulars of claim are vague and embarrassing and do not disclose a cause of action or lack of necessary particularity hence the filing of the amended version.

The same sentiments can be expressed with regard to the matter at hand.

[9] The amended particulars of claim state in paragraphs [7] and [8] the following:

"7. At all relevant times hereto, and more specifically on 1 June 2021, the Defendant had a legal and / or statutory duty, alternatively a duty to take care, alternatively a constitutional duty to members of the public in general who use public roads and especially to the plaintiff to:

7.1 ensure that all the areas within the Municipality's jurisdiction, including the sidewalks and / or roads are safe for use by the general public and specifically the plaintiff, including but not limited to 1 June 2021:

7.2 ensure that members of the public are not injured while using any of the structures or facilities and I or roads within the Municipality's jurisdiction, moreover it was enquired to ensure that the plaintiff was not so injured on I June 2021;

7.3 ensure that all sidewalks and I or roads within the Municipality's jurisdiction are safe for pedestrians to use, and specifically to ensure the same for the plaintiff, including but not limited to the date of the incident and injuries, being 1 June 2021;

7.4 ensure that individuals from the general public are advised or informed of any unsafe and / or dangerous areas or structures and I or hazards situated within the Municipality's jurisdiction at or near roads I entrances where the general public walk I use the roads, and specifically that the plaintiff was so informed on 1 June 2021;

7.5 ensure that sidewalks and or roads within the Municipality's jurisdiction are free of defects which would render it unsafe for use by members of the public including the plaintiff on 1 June 2021;

7.6 implement a system through which all maintenance and repairs within the Municipality's jurisdiction are identified and addressed within a reasonable time to prevent or guard against the general public sustaining injuries as a result thereof and specifically to guard against the plaintiff sustaining injuries on 1 June 2021;

7.7 ensure that any system implemented in paragraph 7.6 is properly enforced and overseen;

7.8 ensure that repairs to structures, such as the sidewalk and or roads, are repaired within reasonable time including but not limited to the covering of manholes I potholes, alternatively the cordoning off of uncovered I unrepaired manholes I potholes, alternatively effecting safety measures near uncovered manholes 1 potholes, which might cause injuries to the public within its jurisdiction and specifically averting causing injuries to the plaintiff on 1 June 2021;

7.9 ensure that the necessary warning signs and boards were erected at the pothole in which the plaintiff fell on 1 June 2021.

8. The defendant and/or its employees breached the legal duty, alternatively duty of care owed to the plaintiff and were negligent in one or more or all of the following respects:

8.1 failed and / or neglected to ensure that all the areas within the Municipality's jurisdiction, including the sidewalks / roads are safe for use by the, general public, specifically the plaintiff;

8.2 failed and / or neglected to ensure that members of the public, including the plaintiff, are not injured while using any of the structures or facilities I sidewalks I roads within the Municipality's jurisdiction;

8.3 failed and I or neglected to ensure that all sidewalks / roads within the Municipality's jurisdiction are safe for pedestrians, specifically the plaintiff, to use;

8.4 failed and I or neglected to ensure that individuals from the general public, specifically the plaintiff, are advised or informed of any unsafe and I or dangerous I hazardous areas or structures / roads I sidewalks situated within the Municipality's jurisdiction;

8.5 failed and I or neglected to ensure that sidewalks I roads within the Municipality's jurisdiction was free of defects which would render it unsafe for use by members of the public, more specifically the Plaintiff on 1 June 2021;

8.6 failed and / or neglected to implement a system through which all maintenance and repairs within the Municipality's jurisdiction are Identified and addressed within a reasonable time;

8.7 failed and I or neglected to ensure that any system implemented in paragraph 8.6 is properly enforced and implemented and I or managed;

8.8 failed and I or neglected to ensure that repairs to structures / roads / sidewalks, such as where the plaintiff fell, are repaired / covered and / or made safe and secured within reasonable time; and

8.9. failed and I or neglected to ensure that the necessary warning signs and boards were erected at the pothole where the plaintiff fell.

8.10 The defendant's employees failed to erect any warning signs or visible indication to alert the plaintiff of the presence of the uncovered I unrepaired / rehabilitated pothole;

8.11 The defendant failed to take reasonable steps to ensure that the area of the uncovered manhole I pothole was not left to create a potential hazard for a material period of time and without derogating from the generality of the foregoing allegation, the defendant:

8.11.1 Failed to take care that no obstructions I hazards were placed in the way of the plaintiff when making use of the road and or uncovered manhole / pothole where the plaintiff fell;

8.11.2 Failed to ensure that proper materials, specifically suitable coverings I fillers I material was used to ensure the safety of the plaintiff when making use of the road and or pothole where the plaintiff fell;

8.11.3 Failed to ensure that the area in the road and or pothole where the plaintiff fell was properly lit at night to ensure the safety of the plaintiff using the road / sidewalk.

8.12 The defendant failed to exercise reasonable control over the roads and / or sidewalks in its jurisdiction and acted I failed to act in one more or all of the instances supra, thereby wrongfully violating its duty towards plaintiff, it being wrongful having regard to the boni mores and contrary to public policy.

8.13 The defendant failed to take reasonable steps to protect the plaintiff against injury when using the road and or sidewalk where the plaintiff fell, thereby wrongfully violating its duty towards

plaintiff, it being wrongful having regard to the boni mores and contrary to public policy."

[10] The exception is summarized as follows:

"Grounds of exception

1. *The Respondent's claim against the Excipient as set out in paragraphs 7 and 8 thereof, is premised on an alleged breach of a duty of care owed by the Excipient to the Respondent, and an alleged negligent omission on the part of the Excipient.*

2. *The Respondent however fails to plead any factual basis upon which the Excipient would have attracted such alleged legal duty duties of care as set out in paragraph 7 (including sub-paragraphs) of the particulars of claim.*

3. *The Respondent furthermore fails to plead the factual basis upon which the alleged negligent omission of the Excipient would be wrongful.*

4. *The Respondent's failure to plead a factual basis upon which the Excipient would have attracted such legal duty / duties of care, and a factual basis upon which such alleged omission would be wrongful, renders the Respondent's claim excipiable and bad in law."*

[11] Rule 18 (4) of the Uniform Rules of Court provides that 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. It is trite that the function of an exception is to dispose of the case, in whole or in part, to avoid the unnecessary leading of evidence. An exception must therefore be determined on the pleadings as they stand, assuming the facts stated therein to be true; and no facts outside those stated in the pleadings can be brought into issue and no reference may be made to any other document.

[12] In **Nel & Others NNO v M^{c} Arthur & Others** 2003 (4) SA 142 (T), the Court set out the following additional general principles:

- In order for an exception to succeed, it must be excipiable on every interpretation that can reasonably be attached to it.

- A charitable test and a benevolent interpretation are used on exception, especially in deciding whether a cause of action is established.

- The pleadings must be read as a whole, no paragraph can be read in isolation.

- Conclusions of law need not to be pleaded. Together with this, certain allegations expressly made may carry with them implied allegations, in which case the pleading must be read in such a manner.

- The excipient bears the onus to persuade the court that the pleading is excipiable.

[13] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity, insofar as it is relevant hereto, is summarised in **Erasmus, Superior Court Practice** D1-231, as follows:

- In each case the Court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness, in other words, whether it is meaningless or capable of more than one meaning.

- In that event, the court is obliged to undertake a quantitative analysis of the embarrassment to the excipient.

- 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 if he is compelled to plead to the pleading in that form.

- The onus is on the excipient to show both vagueness amounting to embarrassment, and embarrassment amounting to prejudice.

See also:
- **Gallagher Group Ltd & Another v IO Tech Manufacturing (Pty) Ltd & Another** 2014 (2) SA 157 (GNP)
- **Nel & Others NNO v M^{c} Arthur & Others** 2003 (4) SA 142 (T)
- **First National Bank of Southern Africa Ltd v Perry NO & Others** 2001 (3) SA 960 (SCA).

[14] To borrow from the article "**Civil Procedure – Taking exception in the High Court**" by Danie van Loggerenberg SC, Leon Dicker and Jacques Malan, the following general principals must be borne in mind that applies to exceptions:

a) Exceptions should be dealt with sensibly; an over-technical approach destroys their utility.
b) An exception that the pleading lacks averments which are necessary to sustain an action or defence, will not succeed unless no cause of action or defence is disclosed on all reasonable constructions of the pleading in question.
c) Pleadings must be read as a whole; no paragraph can be read in isolation.
d) Minor blemishes are irrelevant.
e) A distinction must be drawn between the *facta probanda*, or primary factual allegations, which every plaintiff must make and the *facta probantia*, which are the secondary allegations on which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited.
f) Only facts need to be pleaded, conclusions of law need not be pleaded.
g) Bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleading must be so read.
h) If evidence can be led that can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A

pleading is excipiable only on the basis that no possible evidence led on the pleading can disclose a cause of action.

i) A pleading is vague and embarrassing if it is capable of more than one meaning or if the meaning cannot reasonably be ascertained. It is also vague and embarrassing if it has a determinable meaning but is so vague that the excipient does not know what the other party's case is. Averments in a pleading that are contradictory and are not pleaded in the alternative, are patently vague and embarrassing.

j) An exception that the pleading is vague and embarrassing may be taken only when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. It is therefore incumbent on a plaintiff to plead only a complete cause of action that identifies the issues on which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. An attack mounted by a defendant that particulars of claim are vague and embarrassing cannot be found on the mere averment that they are lacking in particularity.

See: **McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526D–E; Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd** 1982 (4) SA 371 (D) at 377, 379;

Jowell v Bramwell-Jones and Others, above at 902G-903E;

Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd 1999 (1) SA 624(W) at 632D;

South African National Parks v Ras 2002 (2) SA 537 (C) at 543A;

Nel and Others NNO v McArthur and Others 2003 (4) SA 142 (T) at 416F-4181;
Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards authority SA, above at 465H.

[15] In **Koos v Rustenburg Local Municipality and Another** (1240/15) [2017] ZANWHC 56 (3 August 2017) this Court per **Gutta J** (as she then was) stated:

"[11] Liability depends on the wrongfulness of the act or omission of the defendant, in other words the conduct complained of must be legally reprehensible. The plaintiff must allege and prove the act or omission on which the cause of action is based. In the absence of wrongfulness, first defendant cannot be held liable. Plaintiff must allege facts from which wrongfulness can be inferred. If a specific duty of care is relied on, the nature of the duty must be stated.

[12] The enquiry into the existence of a legal duty is discrete from that into negligence. A mere allegation that the defendants "failed to comply with the legal duties and obligations" is insufficient because the existence of a duty to prevent loss is a conclusion of law depending on all the circumstances of the case.

[13] Where wrongfulness cannot be inferred from the nature of the loss suffered, the defendant's legal duty towards the plaintiff must be defined and the breach alleged. In the Supreme Court of Appeal (SCA) decision of Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd, the court held that:

*"[12] Recognition that we are dealing with a claim for pure economic loss brings in its wake a different approach to the element of wrongfulness. This results from the principles which have been formulated by this court so many times in the recent past that I believe they can by now be regarded as trite. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. By contrast, negligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages (see e.g Minister of Safety and Security v Van Duivenboden **2002 (6) SA 431** (SCA) ([2002] 3 All SCA 741) paras 12 and 22; Gouda Boerdery BK v Transnet 2005(5) SA 490 (SCA) ([2004] **4 All SA 500)** paras 12; Telematrix (supra) paras 13 – 14; Trustees, Two Oceans Aquarium Trust (supra) paras (10 – 12).*

[14] The proposition that a plaintiff claiming pure economic loss must allege wrongfulness, and plead the facts relied upon to support that essential allegation, is in principle well founded. In fact, the absence of such allegations may render the particulars of claim excipiable on the basis that no cause of action had been disclosed. (see e.g Trope v South African Reserve Bank and Another and Two Other

cases 1992(3) SA 208 (T) at 214A – G; Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992(1) SA 783 (A) at 797E; Telematrix (supra) para 2)".

[14] The general norm is that, where conduct takes the form of an omission, such as in this case, such conduct is prima facie lawful. The plaintiff must prove the omission on which the cause of action is based. The fact that an act was negligent does not make it wrongful.

[15] Plaintiff's claim is for loss resulting from an omission as plaintiff attempts to show that defendant created a potential risk of harm by creating a hole filed with water and failed to take reasonable steps to prevent the risk materialising. Plaintiff alleged that the defendants failed to comply with its legal duties and obligations but failed to allege what the legal duty is on which the cause of action is based. The allegations in the particulars of claim are insufficient as the question remains whether the first defendant had a legal duty towards the plaintiff to act and the legal duty was not defined.

[16] Counsel for the plaintiff, in response to a question posed by the court, submitted that plaintiff is relying on both a common law right and a statutory duty. In casu, it was incumbent on plaintiff to set out the specific allegations in support of the common law and statutory duty. In the absence of those allegations wrongfulness cannot be inferred as liability depends on wrongfulness.

[17] As plaintiff failed to define first defendant's legal duty towards plaintiff in circumstances where he relies on a specific duty of care this renders the particulars of claim is excipiable on the grounds that it lacks averments to sustain a delictual cause of action."

[16] I find this *dictum* quite opposite in the present matter. So too, the *dictum* in the **Madiro** case, supra, at paragraphs [21] and [23] thereof which states:

> *"[21] The Court Order obliges the first and second defendants to collectively carry out certain "steps and actions" required to prevent any future occurrences after having taken initial actions to stop such occurrences. The plaintiff's counsel contended herself with the submission that it is within the knowledge of the two defendants to know what each other's duties, functions and obligations are in respect of what the Court Order obliges them to do. This cannot be a sufficient answer in view of the authorities referred to above. The first defendant is entitled to be apprised of the case against it in the particulars of claim in respect of its legal duty and wrongfulness of its conduct or omissions.*
>
> *and*
>
> *[23] As I have held that the amended particulars of claim constitute an irregular step it does not come to the plaintiff's avail that he has removed the causes of complaint thereby. Even if I am wrong in this regard, the provided amendments do not remove the causes of complaint. The grounds of opposition referred to in paragraph 22 above run through the plaintiff's heads of argument and are unsustainable."*

[17] I am of the view that (even) the amended particulars of claim is excipiable in that it fails to plead a cause of action against the defendant. The amended particulars of claim therefore does not come to the assistance of the plaintiff and need to be rectified. I am not inclined to

strike the pleading out. The exception must succeed. The costs should follow the result and be awarded in favour of the successful litigant, the defendant/excipient.

Order

[18] Consequently, the following order is made:

(i) The exception is upheld.

(ii) The plaintiff is granted leave to amend its particulars of claim to disclose a cause of action, within fifteen (15) days from date of this judgment, failing which plaintiff's particulars of claim shall be struck out.

(iii) The plaintiff is ordered to pay the costs of the exception application on the scale as between party-and party, to be taxed.

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R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG