



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

CASE NO: 027168/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
15 November 2023	
DATE	SIGNATURE

In the matter between:

ZAMAKHUHLE PRIVATE HOSPITAL

First Applicant

and

ZANELE PETHILE HLATSWAYO

Respondent

JUDGMENT

NOKO J

Introduction

[1] This application is brought in terms for rule 23(1) of the Uniform Rules of Court for an order setting aside the respondent's particulars of claim. The applicant contends that the particulars of claim are excipiable on the basis that they lack a cause of action and further that they are vague and embarrassing.

[2] The respondent has served notice of intention to oppose the application but did not file answering affidavit. The respondent contends that it was not necessary as the issues raised only implicate question of law. The applicant's counsel contended that though it is an anomaly and irregular not to file answering affidavits the application can still be argued and adjudicated upon as is.

Background

[3] It is common cause that the respondent issued summons against the applicant, (cited as the second defendant) together with Dr Kazeem Adesina Okanlomo (*Dr Okanlomo*) as the first defendant. The respondent avers in the particulars of claim that she was diagnosed with ovarian cyst and had to undergo laparoscopy procedure to remove the cyst. She was admitted and signed consent for the said procedure but without obtaining consent for a different procedure her two ovaries were removed by Dr Okanlomo. The respondent alleges that the unauthorised removal of her ovaries was as a result of negligent conduct of both Dr Okanlomo and the nurses who were in the employ of the applicant.

Pursuant thereto summons was sued out for the damages against Dr Okanlomo and the applicant on the basis of vicarious liability.

[4] The applicant served notice to defend and then notice on terms of rule 23(1) of the Uniform Rules of court (*Rule 23*). The respondent then served notice in terms of rule 28 of the Uniform Rules of Court conveying her intention to amend the particulars of claim. The applicant in turn served notice to object as the proposed amendment did not address the complaints set out in the rule 23 notice. Instead of approaching the court to apply for the leave to amend the particulars of claim the respondent waited for her rule 28 notice to lapse. Subsequently a revised notice of intention to amend was served to which no objection was delivered by the applicant. The respondent subsequently filed her amended pages.

Submissions by the parties

[5] The applicant contends that Dr Okanlomo is not an employee of the applicant and as such the particulars of claim are excipiable as the principle of vicarious liability applies in respect of defendants who have an employer employee relationship *inter se*. Further that the respondent was made aware at her admission that medical practitioners, including Dr Okanlomo are independent contractors and not employees of the applicant. In these regards, so the argument went, patients who are admitted at the hospital sign indemnity forms which clearly spells out the status of the medical practitioners (as independent contractors) and further provides for the indemnification of the applicant for their conduct which led to injuries.

[6] When asked by the court as to whether the indemnity form is attached to the court papers, counsel for the applicant in retort submitted the indemnity form has not been submitted to the court, but it is common cause between the parties.

[7] The respondent's counsel contended that the respondent was not furnished with a copy of the alleged indemnity form and as such the contention that it is common cause between the parties is rejected. Further that it is inappropriate in exception proceedings for a party to rely on external evidence.

[8] Further that even if there is such an alleged indemnity the respondent would have nevertheless persisted with the contention that the applicant still owed the respondent duty of care. The counsel for the respondent referred to the judgment in *Langley Fox Building Partnership Pty Ltd v De Valance* 1991 (1) SA 1 where he contended that the court held that under certain circumstances the employer of an independent contractor may still be found liable for the negligent conduct of such a contractor.

[9] The applicant's counsel initially submitted that even the nursing staff are also independent contractors and therefore the principle of vicarious liability would find no application in this *lis*. The applicant's counsel adopted a *volte face* stance after consultation with the applicant's instructing attorneys, applicant's counsel and disavowed the contention that the nursing staff are not employees of the applicant. That notwithstanding, the counsel continued, the particulars of claim did not clearly spell out any negligence on the part of the nursing staff.

[10] In retort the respondent's counsel contended that the nursing staff should have ensured that the respondent provides an effective consent for the removal of the ovaries

and not only the removal of the ovarian cyst for which the respondent has consented. In this regard, it was argued, the applicant should be held vicariously liable for the conduct of the nursing staff.

[11] The respondent contended that further grounds raised by the applicant as underlying rule 23 notice were unsustainable because the argument advanced did not pass the test of what authorities have set out for the exception to be sustained. This included the contention that is not apparent from the papers that the claim is based on delict and or contract. Also, the point raised in respect of the calculation of the how the quantum was arrived at.¹ The counsel for the applicant having conceded that in practice it is not irregular for a claim to include a globular amount which would be quantified in detail during the exchange of pleadings.

Legal principles and analysis.

[12] The principles underpinning exceptions have been crystallised in several court pronouncements that the object is, *inter alia*, to dispose of the case or a portion thereof expeditiously and without having to incur unnecessary legal costs. One of the considerations as referred to in the respondent's argument is that "...over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit."² In addition, exception would ordinarily

¹ The applicant having contended that the amounts have not been set out with particularity for the applicant "... to make a decision as to whether or not it has a good defence". See Applicant's Heads of Argument, para 53 CL 04-27.

² See para 15 in *Living Hands (Pty) Ltd NO and Another v Ditz and Others* 2013 (2) SA 368 (GSJ).

be upheld where the excipient can demonstrate that “... *upon every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed.*”³

[13] The applicant’s contention that there is an indemnity form signed by the respondent which the applicant failed make a copy available to court present an insurmountable hurdle for the applicant’s case. To this extent I find myself constrained to make decision in favour of the applicant.⁴ Even if the applicant could be correct that there is an indemnity signed elsewhere which would sustain the contention that there is no employer employee relationship between Dr Okanlomo and the applicant, the particulars of claim would remain unscathed to the extent that it alleges vicarious liability in relation to the nursing staff.⁵

[14] It must be conceded that the crafting of the particulars of claim does not necessarily brandish perfect traditional draftmanship of a claim but the essence of the *lis* is apparent from the papers and exception process is not aimed at addressing technical or grammatical shortcomings of the papers.

[15] It is also noteworthy that the fact that the exception is dismissed does not bar an excipient from raising the same issue again to be argued at trial.⁶ The applicant would therefore be able to raise the question of the indemnity at a later stage and attach same to the papers to proof its defence.

³ *Francis v Sharp* 2004 (3) SA 230 (C) at 237D-I.

⁴ “[I]t follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue and no reference can be made to any other document.” See Superior Court Practice at B1-151.

⁵ The respondent having contended “... *the Second Defendant’s nursing staff breached their duty of care in the following ways...*”. See para 12 of the amended particulars of claim.

⁶ Erasmus Superior Court Practice, 2nd ed, at D1-295.

[16] The contention that the quantum of damages does not comply with the provisions of rule 18 of the Uniform Rules of court is unsustainable as the respondent did set out how the claimed amount is computed. In any event it is not unusual that the quantum claimed would be globular at the initial stage and be detailed during the exchange of pleadings. The counsel for the applicant having contended that non-compliance with rule 18 may be construed as irregular and susceptible to a rule 30 application⁷. Based on those assertions, exception becomes an inappropriate route to undertake.

[17] Having stated that the pleadings do present the case which the applicant can readily plead to there is no reason why other grounds raised need to detain me. In the premises the application is bound to fail.

Costs

[18] The applicant contended that the application should be granted with costs. On the other hand, the respondent's counsel contended that the cases on medical negligence are ordinarily complicated, and this justifies engaging more than one counsel. In this instance two junior counsels were appointed and ergo the application should be dismissed with cost including costs for two counsels.

[19] Rule 69 of the Uniform Rules of Court provides that where costs are awarded without reference to two counsels costs for one counsel would be allowed on party and party scale. It is trite that the issue of costs falls within the discretion of the court. In exercising the discretion, the factors at play would include the length of the hearing, the

⁷ See Applicant's Heads of Argument at 54 CL 04-27.

importance and complexity of questions of law involved.⁸ It was held in *Clarkson v Gelb*⁹ that there was no important principle of law or practical difficulties warranting employment of two counsels, hence the court could not award costs for two counsels.

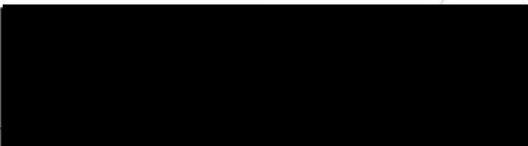
[20] The attempts by the respondent's counsel to persuade the court were derailed by the failure to appreciate that what serves before me is an exception and not arguments on the merits of the case. In addition, the medical negligence cases are not unique and the contention that they are generally complicated is, without more, found wanting. The contention that since the matter is complicated and need more than one counsel is defeated by the fact that two junior counsels are on brief, at least, consistent with contention that matter is complicated, it would have meant that the respondent would have appointed at least a senior and a junior counsel.

[21] In the premises the prayer for costs for two counsels is unsustainable.

Conclusion

[22] I grant the following order:

The exception is dismissed with costs



Mokate Victor Noko

Judge of the High Court

Gauteng Local Division, Johannesburg

⁸ *Motaung v Makhubela and Another NNO* 1975 (1) SA 618 at 631.

⁹ 1981 (1) SA 288 (W)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 15 November 2023.

Appearances.

Counsel for the Applicant	Adv M Mpakanyane
Instructed by:	Norton Rose Fulbright South Africa Inc
Counsel for the Respondent:	Adv B Lukhele
Instructed by	Qhali Attorneys
Date of hearing:	8 November 2023
Date of Judgment:	15 November 2023.