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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 31259/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 11 MARCH 2022

SIGNATURE

In the matter between:

M[....] V[....] N[....]

obo T[....] N[....]

Plaintiff/Respondent

and

ESKOM HOLDINGS SOC LIMITED

Defendant/Excipient

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

On 12 February 2016, the plaintiff's son, then barely five years old, fell into an 8 metre deep hole dug alongside an electric pole outside the Dipere Primary School (also referred to in some of the papers as the De Beer Primary School). Fortunately, the school bus driver pulled him out. He was unconscious, taken to the principal's office and from there to the hospital. Again fortunately, apart from a scar on his forehead and nose, he has retained very little impairment from his ordeal. All this could be gleaned from reports from a Clinical Neuropsychologist and a Forensic Psychiatrist, delivered by the plaintiff in terms of Rule 36(9)(b). None of the reports however feature in the plaintiff's particulars of claim and the defendant has taken exception thereto on various grounds as more fully dealt with hereinlater.

[2] The particulars of claim:

The relevant portions of the plaintiff's particulars of claim reads as follows:

3.

“The cause of action arose wholly within the jurisdiction of the above Honourable Court.

4.

At all material times hereto and more specifically on the 12th February 2016 the Defendant had dug a hole in front of Dipere Primary School. The hole was dug by the Defendant's personnel who were at all material times acting within the course and scope of their employment and in furtherance of the interests of the Defendant.

5.

Alternatively to paragraph 4 supra, the personnel were duly authorised representatives of the Defendant tasked to fulfill their duties ...

6.

Furthermore, the Defendant's personnel owed a legal duty towards the Plaintiff's minor child ...

7.

The Defendant owed a legal duty towards the Plaintiff's minor child to manage and ensure that any hole dug should have warning signs that is deemed necessary ...

[allegations are then pleaded as to the breach of the duties and the actual falling of the child into the hole]

11.

As a result of the negligence aforesaid, the Plaintiff's minor child sustained the following injuries:

11.1 Head injury;

11.2 Lacerations on the forehead;

12.3 Emotional shock and trauma.

12.

As a result of the injuries sustained, the Plaintiff's minor child suffered and will suffer the following damages:

12.1 *Past hospital expenses* *R 5 000.00.*

The supporting documentations is not to hand and the amount claimed is an estimate.

12.2 *Past medical expenses* *R 5 000.00*

The supporting documentation not to hand and the amount claimed is an estimate.

12.3 *Future medical expenses* *R490 000.00*

The supporting documentation is not to hand and the amount is an estimate.

12.4 *Future loss of earnings* *R 500 000.00*

The supporting documentation is not at hand and the amount is an estimate.

12.5 *General damages* *R 1 000 000.00*

For pain and suffering, loss of amenities of life and disability.

R 2 000 000.00".

[3] The exception

In a notice of exception, the Defendant raised four objections to the particulars of claim:

3.1 First objection

The defendant contended that no facts had been pleaded to establish whether the delict had taken place within this court's area of jurisdiction. In fact, it was argued that maps indicate that the school is in fact situated in Mpumalanga and that this court therefore has no jurisdiction to entertain the action.

3.2 Second objection

The second objection is formulated succinctly in the following terms: *"The plaintiff has failed to identify who dug the alleged hole. The plaintiff did not provide particulars of the personnel that they allege to have dug this hole and such personnel or representatives are not included in this claim. The plaintiff did not provide the necessary averments that the alleged personnel are employees of the defendant"*.

3.3 Third objection

This objection is simply that the plaintiff has failed to attach supporting medical or expert reports to its particulars of claim and that *"upon every interpretation of the particulars of claim the plaintiff has failed to provide the necessary documentation to support their (sic) claim"*.

3.4 Fourth objection

This relates to paragraph 12 of the particulars of claim and the defendant avers that the plaintiff *"not only fails to justify the said amount but also fails to indicate as to how the quantum of damages has been calculated as required by High Court Rule 18(10)"*.

3.5 In all instances the defendant avers that the particulars of claim do not disclose a cause of action and, save in respect of the issue of jurisdiction, are vague and embarrassing.

[4] General principles

The applicable principles regarding exceptions and the consideration thereof are trite. They are:

- 4.1 The purpose of an exception alleging that a pleading lacks averments that are necessary to sustain action or defence is to dispose the leading of evidence at the trial. Such an exception must go to the root of the claim or defence. See: *Vermeulen 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 CC* 2008 (1) SA 67 (SCA).
- 4.2 An exception is decided on the allegations of the respondent only and cannot be used to solve a factual dispute. See: *First National Bank of SA Ltd v Perry NO* 2001 (3) SA 960 (SCA).
- 4.3 Pleadings must comply with the Rules of Court, particularly Rule 18(4), requiring clear, concise statements of the material facts on which the pleader relies for his claim.
- 4.4 In particular, Rule 18(10) provides that, in cases where a plaintiff is suing for damages for personal injury, he must plead the nature and effect of the injuries, the nature and effect of any disability and shall, as far as is practicable, plead particulars in respect of how claims are to be made up. The Rule reads as follows:

“A plaintiff suing for damages shall set them out in such manner as well enable the defendant reasonably to assess the quantum thereof: provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects

and duration of the disability alleges to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for –

- (a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;*
- (b) pain and suffering, stating whether temporary or permanent and which injuries caused it;*
- (c) disability in respect of –*
 - (i) The earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);*
 - (ii) The enjoyment of amenities of life (giving particulars);*
and stating whether the disability concerned is temporary or permanent; and
- (d) disfigurement, with a full description thereof and stating whether it is temporary or permanent”.*

4.5 A failure to satisfy the provisions of Rule 18(10) may, in addition to the rules relating to exceptions, lead to an application for dismissal of the particulars as constituting an irregular step.

4.6 The purpose of the requirements relating to claims for damages for personal injury is to enable the opposite party to reasonably assess the quantum for itself and to be able to reply thereto. See inter alia *Reid NO v Royal Insurance Co Ltd* 1951 (1) SA 713 (T) and *Rondalia Versekerings korporasie van SA v Mavundla* 1969 (2) SA 23 N.

- 4.7 It is not always necessary to annex medical reports, provided that the facts sustaining a particular claim and the computation thereof, has been pleaded with sufficient particularity. See: *Thonar v Union and South West Africa Insurance Co Ltd* 1981 (3) SA 545 (W).

[5] The jurisdiction issue

- 5.1 Section 21(1) of the Superior Courts Act 10 of 2013 provide that a particular division of the High Court has jurisdiction over all persons residing or being in its area of jurisdiction as well as over all causes of action which arose or took place within its area of jurisdiction.
- 5.2 In Magistrates Courts the summons must not only mention specifically that that court has jurisdiction but sufficient facts to sustain that allegation must be pleaded.
- 5.3 In the High Court it “*is not necessary in the ordinary course of events to make specific allegations concerning jurisdiction, provided that the underlying facts establishing jurisdiction are set out*”. See Harms, *Amler’s Precedents of Pleadings* under the heading “Jurisdiction”.
- 5.4 It was therefore not incumbent on the plaintiff to have made the averment it pleaded in paragraph 3 of its particulars of claim. Now that it had, the question is whether that rendered the pleading excipiable if it may not be a correct statement of fact. The veracity of factual statements are not to be tested by way of exception and ordinarily jurisdiction is determined on the pleadings. See *Gcaba v Minister of Safety and Security* 2010 (1) BCLR 35 (CC).
- 5.5 However, a plaintiff cannot merely allege a legal conclusion, it must allege the facts necessary to establish that the court has jurisdiction. See *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T).

- 5.6 In the present instance, had the plaintiff omitted to plead paragraph 3 of its particulars of claim (as it had been entitled to do), were the allegations pleaded in paragraph 4 of the particulars sufficient to establish jurisdiction based on a cause of action in the absence of an address, reference to a town or province? The defendant argues that, with reference to what it had established, the school is in Mpumalanga.
- 5.7 It is, in my view, not necessary to debate whether the court could take judicial cognisance of the address as alleged by the defendant or not, for even if the delict had occurred outside the area of jurisdiction of this court, it still has jurisdiction over the person of the defendant and the necessary facts in this regard has been pleaded.
- 5.8 So, even if the plaintiff's unnecessary pleading may factually be incorrect, an exception thereto would not dispose of the matter and neither would it oust the jurisdiction of this court. To uphold the objection would therefore have no practical consequence.

[6] The second objection

- 6.1 The defendant complains that the plaintiff has not identified the persons who actually dug the hole. The fact of the matter is probably that the plaintiff does not know, save that they work for Eskom. This is often also the position in, for example, actions based on unlawful arrest and detention. See the precedent in *Amler's* (above) 7th Edition at page 49, where the perpetrators are inter alia referred to as "*various other policemen whose names and ranks are unknown to the plaintiff*".
- 6.2 What the plaintiff has pleaded in this case, was that "*personnel*" (thereby implying employees) of the defendant or "*duly authorised representatives*

of the defendant” (such as contractors, one can imagine) had dug the hole and or failed to ensure that it was condoned off.

- 6.3 The plaintiff also made the averment that those who had dug the hole had been acting within the course and scope of their employment of the defendant or have been authorised to act in tis interest.
- 6.4 A party who relies on the applicability of the principles of vicarious liability must allege and prove that the person who has committed the delict had acted in the course and scope of his employment, which encompasses proof of employment. See *Standraad van Pretoria v Pretoria Pools* 1990 (1) SA 1005 (T) and *Masuka v Mdlalose* 1998 (1) SA 1 (SCA).
- 6.5 The plaintiff’s particulars allege those elements sufficiently for the defendant to be able to plead thereto. The actual employment (more than the course and scope of employment) might be difficult to prove, but has been alleged. This is sufficient at the pleading stage, even if the particular employees have not been named.
- 6.6 The individual employees need also not be joined and the objection of non-joinder should also fall away. It will be sufficient for the plaintiff if the employer can be held vicariously liable.
- 6.7 This objection should therefore not be upheld.

[7] The third and fourth objections

- 7.1 I refer to these objections jointly and because of their inter-related nature.
- 7.2 The mere listing of the minor’s injuries is insufficient to inform the reader of the pleading of the extent of the injuries or their consequences. For

example, was the head-injury a mere bump or was it a severe blunt force trauma incident. Did it result in any loss of consciousness, what were the Glasco coma scale results immediately thereafter or at admission to the hospital, did it result in a focal or diffuse brain injury or any brain injury? Did any of the injuries result in permanent impairment and if so, what? Does the minor now suffer from any disability? What is it and what are the consequences, prognosis or treatment?

7.3 The same lack of particularity is also glaringly absent in respect of the quantum formulation. There is a non-compliance with Rule 18(10) and this has been debated with coursed during argument. The argument that, subsequent to the service of the summons the two reports referred to in the introduction of this judgment had been forwarded to the defendant, provides no answer. Should the plaintiff wish to rely on the findings, conclusions or even descriptions contained in those reports as part of its case, they needed to be pleaded or the reports need to be incorporated in the particulars of claim.

7.4 It follows that these two objections are good and should be upheld.

[8] The upholding of an exception, attacks a party's pleadings but not the merits of its claim. Accordingly, the proper approach, even in those instances where an exception is upheld, is not to dismiss the claim, but to afford the offending party an opportunity to amend its pleading. See *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA).

[9] Costs

The general rule is that costs follow the event. In the present instance the "event" is equally balanced between the number of objections upheld and

those rejected. Even if the defendant were to claim that those that are upheld and which would result in an amendment of the particulars of claim constitute a substantial success, the plaintiff complained that the defendant repeatedly averred that the particulars of claim were vague and embarrassing. That would have obligated the defendant to first deliver a notice in terms of rule 23(1) in order to allow the plaintiff an opportunity to remove such alleged vagueness or embarrassment. This was not done. Taking all this into consideration, as well as the nature of the litigation, I am of the view that an order that costs be costs in the cause would be fair and just in the circumstances.

[10] Order

1. The defendants' exception to the insufficiency of the plaintiff's averments in respect of quantum as contained in paragraph 11 and 12 of the particulars of claim and the non-compliance with Rule 18(10) in this regard, is upheld.
2. The plaintiff is granted 15 court days from date of this order to deliver a notice of amendment to its particulars of claim to rectify same.
3. Costs of the exception, including the opposed hearing thereof, shall be costs in the cause.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 March 2022

Judgment delivered: 11 March 2022

APPEARANCES:

For the Plaintiff/Respondent: Adv K Letswalo

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