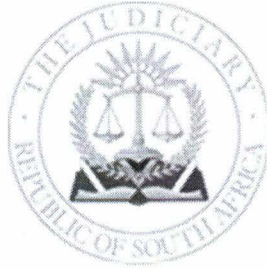


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 46318/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

16 August 2021

A handwritten signature in black ink, appearing to read "Mdalana-Mayisela", is written over a horizontal line.

In the matter between:

MAKHANYA GUGULETHU

Plaintiff/Excipient

and

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, GAUTENG PROVINCIAL GOVERNMENT**

Defendant/Respondent

JUDGMENT

Mdalana-Mayisela J

1. This is an exception delivered by the plaintiff against the defendant's plea on the grounds that the defendant's plea is vague and embarrassing and/or it lacks

sufficient averments necessary to sustain a defence and/or it fails to comply with the requirements of Rule 22(2) of the Uniform Rules of Court. The parties are, for convenience referred to as in the main action.

Background

2. The plaintiff has issued combined summons out of this Court seeking damages suffered as a result of the unlawful death of the plaintiff's child shortly after birth, which the plaintiff avers was caused by the defendant's employees at the Zola Clinic and/or the Bheki Mlangeni District Hospital and/or the Chris Baragwanath Hospital and/or the Raheema Moosa Mother and Child Hospital in the course and scope of their employment by the Gauteng Provincial Government.
3. The defendant filed a plea to the plaintiff's particulars of claim as well as a special plea. The plaintiff served a notice to remove cause of complaint in terms of Rule 23(1) of the Uniform Rules of Court dated 15 October 2020. The defendant declined to remove a cause of complaint. The plaintiff delivered an exception to the defendant's plea. The defendant filed an answering affidavit opposing the exception, pleading that the notice of exception was premature and that the special plea should be determined first.

Special plea

4. The plaintiff in her particulars of claim avers that the minor child's minority has pardoned her from compliance with any statutory time limitation, *alternatively*, on 22 October 2018 the plaintiff gave a written notice to the defendant in terms of section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002 ("the Act"), *further alternatively*, the plaintiff shall seek condonation for any non-compliance with any statutory time limitation.
5. The defendant in the special plea contends that it is not in receipt of the aforesaid written notice and there is no proof provided by the plaintiff that it was served on the defendant or its appointed attorneys. The defendant contends

that the plaintiff has not complied with the provisions of the Act, and therefore she is barred from instituting civil action against the defendant.

6. The defendant in the answering affidavit to the notice of exception contends that because the plaintiff is not excepting to the special plea, it therefore stands, and until the plaintiff has dealt with it the plaintiff is not properly before this Court.
7. The defendant has not brought an application in terms of Rule 30 of the Uniform Rules of Court setting aside the notice of exception as an irregular step, and therefore it is barred from pleading in the answering affidavit that the notice of exception was premature. Furthermore, an exception cannot be defeated by a suggestion that a replication could have preceded it.

Grounds of exception

8. The plaintiff excepts on thirteen grounds to the defendant's plea on the basis that same is vague and embarrassing, and/or lacks sufficient averments to sustain a defence, and/or it fails to comply with Rule 22(2). The plaintiff's complaints are in relation to paragraphs 2.1, 3.1-3.8, 3.15-3.16, 3.23-3.25, 3.28-3.35, 4.5, 5.4-5.6, 5.7, 5.9, 5.12, 5.19, 5.23-5.24 of the defendant's plea. It is not necessary to repeat the grounds as set out in the exception in this judgment.
9. The plaintiff complains firstly, that she is suing the defendant in a representative capacity as the person responsible in law for the various institutions that rendered medical treatment to the plaintiff, the defendant noted these averments but failed to admit or deny them, and therefore, the defendant has failed to comply with the requirements of Rule 22(2). The plaintiff avers that she is unable to ascertain from the whole plea whether the defendant is admitting or denying vicarious liability; whether the defendant alleges that the relevant individuals acted independently of the defendant and therefore should be joined in their own right; and if they acted independently upon what basis they were engaged or entitled to render services in such institutions on behalf of the defendant.

10. Secondly, the defendant in various paragraphs in the plea has referred to statutes and omitted to give details of those statutes, and as such the plaintiff is unable to plead thereto. Thirdly, it is not clear whether the defendant accepts the plaintiff's claim in common law as it stands; or wishes to allege that the common law should be developed; or whether the common law has been substituted by the statute, and if so which part of the common law has been substituted by the statute, which statute the defendant is referring to, and how such statute substitutes the common law.
11. Fourthly, the plaintiff has pleaded an oral agreement including the material terms relied upon in support of her claim, the defendant has not pleaded to the oral agreement in the main instead it pleaded in the alternative; and it is not clear from the plea whether the defendant is admitting or denying the oral contract and its material terms.
12. Lastly, the defendant has made material contradictory allegations in the plea. In paragraph 4.1 of the plea the defendant admits that on 27 June 2018 the plaintiff was admitted to the Clinic and immediately transferred to the Bheki Mlangeni District hospital, whereafter she was transferred to the Chris Hani Baragwanath Hospital, and on or about 28 June 2018 she was transferred to the Rahima Moosa Mother and Child Hospital, where she was admitted with her then unborn child. The defendant further admits in paragraphs 4.4 and 4.6 of the plea that on 29 June 2018 the plaintiff's child was born by way of a caesarean section and the child passed away shortly after birth. In paragraph 4.5 of the plea, despite the aforesaid admissions, the defendant denies all these allegations.

Discussion

13. During the argument Counsel for the plaintiff submitted that the main ground for the exception is that the defendant's plea is vague and embarrassing. The issues in this matter are narrow. The defendant in the answering affidavit has conceded to the aforementioned complaints by the plaintiff save for that the plea is contradictory in material respects. The defendant contends that the grounds of the exception do not strike at the root of the defence. The defendant

submits that the plaintiff ought to have brought an application in terms of Rule 30 of the Uniform Rules of Court rather than an exception, *alternatively*, the plaintiff could have delivered a request for further particulars to obtain the further particularity sought.

14. The plaintiff submits that the plea is excipiable on the basis that when read as a whole it is vague and embarrassing and is prejudicial to the plaintiff in that she is unable to replicate to the same nor determine what case she has to meet at trial. Furthermore, the way the plea has been formulated it does not comply with the provisions of Rule 22(2). The plaintiff further submits that she has a choice of remedies, she may either bring an application in terms of Rule 30 or an exception in terms of Rule 23.
15. In noting the exception, the plaintiff applied the principle in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen 1992 (4) SA 466 (W) at 469F-J*, where the Court stated that where a pleading does not comply with rule 18 of the Uniform Rules of Court the other party has the option to either proceed in terms of Rule 30 or Rule 23. In my view the plaintiff correctly noted the exception in this matter because the issues involved are substantive in nature.
16. Rule 22(2) of the Uniform Rules of Court provides that:
'The defendant shall in his Plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.'
17. Rule 18(4) of the Uniform Rules of Court provides that:
'Every pleading shall contain a clear and a 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.'
18. The object of pleading is to define the issues between the parties. In *Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition at page 113* it is stated as follows:

'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be obtained when each party states his case with precision.'

19. In *Absa Bank Limited v Mocke* (1324/2016) (2017) ZAFSHC 97 (15 June 2017) at paragraph (2) it was stated that the object of the pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form and the cause of action or defence must clearly appear from the factual allegations made.
20. Rule 23(1) of the Uniform Rules of Court provides that:
'Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing a cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.'
21. An exception that a pleading is vague and embarrassing involves a twofold consideration: The first is whether the pleading lacks particularity to the extent that it is vague; and the second is whether the vagueness causes embarrassment to such an extent that the excipient is prejudiced (*Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E-H). The excipients have to show that the pleading is excipiable on every interpretation that can reasonably be attached to it (*Theunissen en Andere v Transvaalse Lewendehawe Koop Bpk* 1988 (2) SA 493 (A) AT 500E-F).
22. The onus is on the plaintiff to show that the defendant's plea is excipiable on the ground of being vague and embarrassing. The plaintiff must show both the

vagueness and the prejudice and must do so within the ambit of the pleadings. In *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) it was held as follows:

'The onus is of course on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. Where the excipient relies on embarrassment, such must be demonstrated by having regard to the pleadings only. The attack must arise from within the four walls of the pleading which is the source of the complaint and what is more, such embarrassment must not be frivolous, it must be substantial. See in this regard Lockhat and Others v Minister of the Interior 1960 (3) SA 765 (D) at 777B-H. Therefore, the ultimate test on whether an exception should be upheld is whether the excipient is prejudiced. In this regard see for instance Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 © at 298 A-J.'

23. The defendant in paragraph 4.1 of the plea admitted that on 27 June 2018 the plaintiff was admitted to Zola Clinic with her unborn child, and immediately transferred to Bheki Mlangeni District Hospital, and on or about 28 June 2018 transferred to Chris Hani Baragwanath Hospital and later transferred to Rahima Moosa Mother and Child Hospital. In paragraph 4.4 the defendant admitted that on 29 June 2018 the plaintiff's child was born by way of a caesarean section and in paragraph 4.6 the defendant admitted that the child passed away shortly after birth. In paragraph 4.5 of the plea, despite the aforesaid admissions, the defendant denies all these allegations.
24. The allegations contained in the plea mentioned in paragraph 23 above are not pleaded in the alternative. These allegations are material to the plaintiff's claim in the main action against the defendant. The admissions in paragraphs 4.1, 4.4 and 4.6, and the denial in paragraph 4.5 of the plea are mutually destructive versions. They are contradictory in material respects and result in the plaintiff not knowing what case the defendant is advancing and hence not being in a position to replicate to the plea. These contradictory allegations make the plea to be vague and embarrassing and prejudicial to the plaintiff.

25. The defendant in paragraphs 3.2, 3.12, 3.13, 3.20, 3.25, 3.30, 5.5, 5.6, 5.19, 5.23, 7.36 and 7.37 of the plea referred to Statutes and statutory requirements without giving details thereof. The omissions by the defendant are material in considering the defences pleaded, that the plaintiff has no cause of action under common law because it has been substituted by statute; *alternatively*, the common law should be developed to bring it in line with the legislation and Constitution; and that the plaintiff also has no cause of action under statute law.
26. The defendant attempted to supplement the plea in the answering affidavit by clarifying which statutes are referred to in the plea. This is not allowed. In considering the exception, the court must look at the pleading as it stands, no facts outside those contained in the pleading may be considered. The defendant's plea does not comply with Rule 18(4) in that it fails to provide a degree of detail necessary in this case to inform the plaintiff of the case being advanced. In the result the plaintiff is prejudiced as she is unable to replicate to the plea. These omissions render the plea vague and embarrassing.
27. The defendant has not pleaded to the oral agreement in the main, instead it has pleaded in the alternative; and it is not clear from the plea whether the defendant is admitting or denying the oral agreement and its material terms. The defendant has failed to comply with Rule 22(2) which requires the defendant in the plea to admit or deny or confess and avoid all the material facts alleged in the combined summons. The plaintiff needs to know if the oral agreement is denied or admitted in order to replicate and to prepare for trial. It is essential for the plaintiff to know what the defendant's case is in this regard, because if it is the defendant's case that the parties never entered into an oral agreement, the defendant will be allowed during trial to adduce evidence to that effect; however, if it is the defendant's case that the defendant does not have knowledge of that agreement, the defendant will not be allowed to contradict any evidence adduced by the plaintiff of the existence of the alleged agreement; and if the defendant admits the existence of the oral agreement the need to lead evidence in that regard would be eliminated.

28. The defendant in paragraph 7.2 of the plea pleaded that the plaintiff received medical treatment at state institutions, such services were rendered in terms of the Constitution, and the state was obliged to render them. In paragraphs 5.1 and 5.2 of the plea the defendant admits that when the state is being sued as a defendant the MEC is cited as a defendant and that in this case the MEC has been cited as a nominal defendant. In paragraph 2.1 the defendant notes that he is being sued in a representative capacity. In paragraph 3.15 the defendant pleads that the health professionals who have not been joined in these proceedings, owe the plaintiff a duty of care whose content is to ensure that they do not cause harm to the plaintiff through their negligent conduct.
29. The plaintiff avers that she is unable to ascertain from the plea whether the defendant is admitting or denying vicarious liability; whether the defendant alleges that the relevant individuals acted independently of the defendant and therefore should be joined in their own right; and if they acted independently upon what basis they were engaged or entitled to render services in such institutions on behalf of the defendant. The allegations in the plea mentioned in paragraph 28 above are confusing. They do not comply with the requirements of Rules 22(2) and 18(4).

Conclusion

30. The defendant's plea failed to define the issues between the parties and to state the defendant's case with precision. The vagueness in it causes embarrassment of such a nature that the plaintiff is prejudiced. The vagueness goes to the roots of the defences referred to above. It is excipiable on each and every possible interpretation that could reasonably be attached to it. The plea stands to be set aside on ground that it is vague and embarrassing.
31. The plaintiff in her notice of motion has prayed for the defendant's special plea to be set aside. However, no grounds have been stated in the notice of exception in that regard. Therefore, the special plea stands.
32. I now deal with the issue of costs. The plaintiff in her heads of argument has asked for punitive costs against the defendant. However, in her notice of motion

she asked for normal costs. Counsel for both parties during argument agreed that there is no legal basis for punitive costs award in this matter. I am inclined to award costs on a party and party scale.

33. Counsel for the defendant asked for Magistrate Court scale costs to be awarded to the plaintiff if she succeeds on the merits of the exception, *alternatively*, that the costs be reserved. The defendant in the answering affidavit has not asked for such scale of costs. Counsel for the defendant referred me to the case of *Mbhele v MEC for Health for the Gauteng Province 2016 JDR 2144 (SCA)*. In that matter the Supreme Court of Appeal refused a claim for constitutional damages based on the right to rear a child. It allowed a claim for emotional shock and awarded R100 000.00 for general damages. It awarded costs of the appeal. It substituted the order of the High Court and awarded general damages and costs of the action.
34. The plaintiff in the main action is suing the defendant for damages in the sum of R3 555 000.00. The plaintiff's claim is based on contract, delict and the Constitution. Considering the issues to be determined by the Court in the main action and the amount claimed, it is my view that this matter deserves the attention of the High Court. Therefore, the costs are awarded on a High Court scale. Regarding the Counsel's alternative submission that costs of the exception be reserved, I do not agree. This Court is in a better position than a trial Court to determine the costs of the exception.

Order

35. Accordingly, the following order is made:
 - (1) The plaintiff's exception against the defendant's plea is upheld.
 - (2) The defendant's plea is set aside.
 - (3) Leave is granted to the defendant, within 20 days of the date of this order, to file an amended plea.
 - (4) The defendant shall pay the costs of the exception.



MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 16 August 2021

Appearances:

On behalf of the Plaintiff: Adv M Van Den Barselaar
Instructed by: MED Attorneys

On behalf of the defendant: Adv MR Latib
Instructed by: State Attorney, Johannesburg