



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 975/2018

In the matter between:

VIRIATO BEN NHASSENKO

1st Plaintiff

VUSI G CHAMBISSÉ

2nd Plaintiff

RATHIPE TRAIVERSE MOLUPE

3rd Plaintiff

JAIME CHAMBISSÉ

4th Plaintiff

OLGA ZANDILE KUNENE

5th Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, FREE STATE PROVINCE**

Defendant

HEARD ON: 24 AUGUSTUS 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 12 OCTOBER 2018

- [1] This judgement deals with exceptions that have been raised against particulars of claim delivered by the plaintiffs in the action.
- [2] The first plaintiff is the husband of the deceased. The second plaintiff is her brother. The third plaintiff is cited as her brother-in-law. The fourth and fifth plaintiffs are her father and stepmother respectively. The defendant is cited as the Member of the Executive Council for Health, Free State.
- [3] On/or about 29 September 2016 the deceased was admitted at Bongani Hospital, Welkom for the purpose of giving birth to an unborn child. It is in dispute whether the child had died in utero at that time or not. In the event that the unborn child had already died, the admission was only for the purposes of removing the stillborn child. Regrettably she developed post-partum haemorrhage and passed away on 30 September 2016. It is on this basis that the plaintiffs issued summons against the defendant.
- [4] In broad outline, the allegations made in the plaintiff's particulars of claim are to the following effect viz:-

8.1 At all relevant times hereto:

- 8.1.1 First Plaintiff was the husband of the deceased.
- 8.1.2 Second Plaintiff was the brother of the deceased.
- 8.1.3 Third Plaintiff was the brother-in-law of the deceased.
- 8.1.4 Fourth Plaintiff was the father of the deceased.
- 8.1.5 Fifth Plaintiff was the stepmother of the deceased.

- [5] This judgement deals with exceptions that have been raised against particulars of claim delivered by the plaintiffs in the action. For consideration of ease of reference I will refer to the parties herein as in the main action.
- [6] The first exception relates to *locus standi*. The contention is that the plaintiffs have not pleaded sufficient direct interest for *locus standi*. In essence there are no factual submission(s) to sustain the claim of *locus standi*.
- [8] The second exception relates to the contention that particulars of claim as currently pleaded are deficient in that the defendant is unable to discern whether the claim is in delict or contract. Essentially the defendant is of the view that there are no essential averments to sustain a claim in delict or contract.
- [9] The main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial.¹ Counsel for the defendant relied on and quoted the test laid in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers*. In that matter this court said that:-
- “... 'the direct interest' required by the Appellate Division decision must be an interest in the right which is the subject-matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation.”²**
- [10] In **Mars Incorporated v Candy World (Pty) Ltd** the court emphasized a party instituting legal proceedings must allege and

¹ *Barclays National Bank v Thompson* 1989 (1) SA 547 (A) at 553 H

² 1953 (2) SA 151 (O) at 169 H

prove locus standi. Such onus rests on the part of the plaintiff.³ This was not sufficiently set out by the plaintiffs and in accordance with the decision of the court in **Anirudh v Samdei & Others** the defendant was entitled to take an exception under Uniform Rule 23.⁴

[11] The issue of whether a litigant has sufficient interest to the matter was dealt with in **Jacobs v Waks** Botha JA writing for the undivided bench concluded that no hard and fast rule can be laid down. Each case depends on its own facts.⁵ Although this issue is a procedural matter, it is also a matter of substance.

[12] In the first exception the defendant seek to limit the category of those who can institute a claim against it. This aspect has been answered by the Supreme Court of Appeal in the following manner:-

“I can find no general, 'public policy' limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the *onus* of proof. It is not justifiable to limit the sort of claim now under consideration, as has been offered as one solution, to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc. Of course, in determining limitations a court will take into consideration the relationship between the primary and secondary victims. The question is one of legal policy, reasonableness, fairness and justice, ie was the relationship between the primary and secondary victims such that the claim should be allowed, taking all the facts into consideration. It is true that in the previous South African cases where the plaintiffs have succeeded in damages claims for psychiatric injury, there has been either a blood or a legal relationship.”⁶

The first exception ought to fail.

³ 1991 (1) SA 567 (A) at 575 H

⁴ 1975 (2) SA 706 (N) at 708B - E

⁵ 1992 (1) SA 521 (A) at 534 D

⁶ Road Accident Fund v Sauls 2002 (2) SA 55 (SCA) at 62 I – 63 B

- [13] Counsel for the plaintiffs pointed out that the second exception has become moot seeing that the particulars of claim have been amended. I agree with him. However, all this was embarked upon after the defendant has launched the application. The amended pages have been filed after the defendant did not object to the application for amendment. In my view, this move by the plaintiffs was an unequivocal admission that their particulars of claim did not contain clear and concise statement of the material facts as required. Thus the pleadings were excipiable because no possible admissible evidence led on the pleadings as they stood disclosed a cause of action. Thus the defendant was unable to plead.
- [14] I will deviate from the general rule that the costs follow the event. I have explained that part of this application has been overtaken by events. In any event each party is partly successful. It will be appropriate that each party bears its own costs.
- [15] The following order is made:-
- 15.1 The application is dismissed.
 - 15.2 Each party pays its own costs.

MATHEBULA, J

On behalf of applicants:

Instructed by:

Adv. M C Louw

McIntyre & vd Post Attorneys

Bloemfontein

On behalf of respondent:

Instructed by:

Adv. L Mtukushe

State Attorneys

Bloemfontein

/roosthuizen