



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No.: 3074/2016

In the matter between:

TILANA ALIDA LOUW

Plaintiff

and

STEPHEN PAUL GROBLER

1st Defendant

NETCARE UNIVERSITAS HOSPITAL

2nd Defendant

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 12 MAY 2017

DELIVERED ON: 1 JUNE 2017

- [1] The claim by the Plaintiff, against the First Defendant is based on alleged incidents which occurred during 1 April 2005 to 7 April

2015 during which the First Defendant allegedly, continually and with intent to injure the Plaintiff verbally abused the Plaintiff in the Universitas Private Hospital, Bloemfontein's operating room by hurling profanities, insults, blasphemous language and obscenities at the Plaintiff in the presence of operating theatre staff. It is alleged in particular that during April 2014, the First Defendant, in a bout of uncontrolled rage, threatened and intimidated the Plaintiff and hurled profanities, insults, obscenities and blasphemous language at the Plaintiff when she sought to protect the interest of a patient. It is further alleged that as a cumulative result of the First Defendant's conduct, the Plaintiff suffered damages in a certain amount of money.

- [2] As far as the Second Defendant is concerned, the Plaintiff alleges that in regards to the incident(s) referred to, the Second Defendant breached its legal duty it owed towards the Plaintiff to:

2.1 create a work environment free from verbal abuse and intimidation; and

2.2 to take reasonable care for the Plaintiff's safety which included a duty to protect her from psychological harm.

- [3] The Second Defendant raised an exception in terms of Rule 23(1) against the Plaintiff's particulars of claim on the basis that it lacks averments which are necessary to sustain a cause of action against the Second Defendant, alternatively, are vague and embarrassing.

- [4] As far as the first cause of complaint is concerned, the Plaintiff, according to the Second Defendant, in the first instance failed to plead a basis for vicarious liability on the part of the Second Defendant in respect of the alleged unlawful conduct on the part of the First Defendant. During argument of the matter, however, *Mr Prinsloo*, on behalf of Second Defendant, did not pursue this point any further. As far as the first ground of complaint is concerned, the Second Defendant's exception is further based on the ground that no allegation is made that the Second Defendant was at fault in failing to come to the Plaintiff's assistance during the incidents referred to and that no culpability is therefore demonstrated on the part of the Second Defendant. The Second Defendant contends that the Plaintiff failed to establish a claim against the Second Defendant founded in delict.
- [5] As far as the second ground of exception is concerned, the Second Defendant contends that the Plaintiff pleads that during the period 1 April 2005 to 7 April 2015, being a period of approximately ten years, the First Defendant verbally abused the Plaintiff. The Plaintiff then also refers to a specific incident that occurred during or about April 2014. In the premises, the formulation of the relevant paragraphs renders, according to the Second Defendant, Plaintiff's particulars of claim vague and embarrassing.
- [6] In order to disclose a cause of action, the Plaintiff's pleading must set out every material fact which would be necessary for the Plaintiff to prove if traversed, in order to support his right to judgment of the Court. This means every fact which is necessary

to be proved. In **McKelvey v Cowan N.O.** 1980 (4) SA 525 Z D - E, Beadle, AJ said as follows:

“It is the first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.”

[7] The excipient has a duty to persuade the Court that upon every interpretation which a pleading can reasonably bear, no cause of action or defence is disclosed. (See: **Francis v Sharpe** 2004 (3) SA 230 (C) at 233.

[8] The Plaintiff's claim against the Second Defendant is based upon the breach of a duty of care which it owed towards the Plaintiff as an employee of the Second Defendant. In this regard *Mr Van Aswegen*, on behalf of the Plaintiff, referred me to the matter of **Minister of Police v Ewels** 1975 (3) SA 590 A where in particular, at p. 597 A – B in regards to an omission to act, the following was said:

“Om te bepaal of daar onregmatigheid is, gaan dit in gegewe geval van late, dus nie oor die gebruikelike ‘nalatigheid’ van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om op te tree.” (My emphasis).

[9] The importance of this passage is that it deals with the requirement of wrongfulness in regard to delict. For liability to an act by a party which causes harm to another party is in itself

insufficient to give rise to delictual liability. For liability to follow, prejudice must be caused in a wrongful, that is, a legally reprehensible or unreasonable manner. If wrongfulness is absent, a Defendant may not be held liable. (See **Law of Delict**, Neethling - Potgieter - Visser, 5th Edition, p. 31). This is the one requirement of a delict.

- [10] It is further accepted that fault (*culpa* in a wide sense) is a general requirement for delictual liability. In practice two main forms of fault are recognised: Intention (*dolus*) and negligence (*culpa*) in a narrow sense. (See: **Law of Delict** *supra*. P. 109). In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. In regards to negligence and duty of care, the learned authors in the latter work of **Law of Delict** at p. 137 said as follows:

“Negligence is, as stated above, generally determined according to the test of the reasonable person. On occasion our courts have not applied this test and instead have followed English law in applying the so-called ‘duty of care doctrine.’ According to this approach one must first establish whether the defendant owed the plaintiff a duty of care (the ‘*duty issue*’), and thereafter whether there was a breach of this duty (the ‘*negligence issue*’). If both questions are answered in the affirmative, negligence is said to be present.”

- [11] In the event of a duty of care a Plaintiff therefore also needs to prove negligence in regards to breach of such duty of care. Many of the authorities dealing with breach of duty of care indeed

refers to “negligent duty of care”. (e.g. Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 AD). In Minister van Polisie en Sekuriteit v Geldenhuys 2004 (1) SA 515, the following was said:

“Dit lei tot die vraag of een of meer van die polisiebeamptes wat tydens Geldenhuys se aanhouding aan diens was, nalatig was in sy of haar versuim om die voorgenoemde regsplig teenoor Geldenhuys na te kom.” (My emphasis).

- [12] The *actio legis aquiliae* enables a Plaintiff to recover patrimonial loss (including purely economic loss) suffered through a wrongful and negligent act of a Defendant. A Plaintiff for purposes of an *actio legis aquiliae* must allege and prove that the Defendant was negligent.

- [13] The Plaintiff’s claim in the present matter, against both Defendants and in particular the Second Defendant is based on the *actio legis aquiliae*. It can therefore be taken that one of the *facta probanda* which the Plaintiff must allege and prove is indeed negligence.

- [14] Upon consideration of the particulars of claim, it is clear that it contains no express allegation to the effect that the Second Defendant was indeed at fault, more in particular negligent in its breach of duty of care towards Plaintiff. For purposes of an exception it is, however, necessary to consider whether, as stated above, upon every interpretation of the particulars of claim no cause of action or defence is disclosed. Furthermore, one

should consider whether as stated in **McKelvey v Cowan** *supra* any possible evidence may be led on the pleading which can disclose a cause of action.

- [15] The particulars of claim, in regards to the Second Defendant refers to certain incidents which allegedly took place during the period April 2005 to April 2015 during which incidents the First Defendant allegedly abused the Plaintiff as referred to above. It further refers to a particular incident during approximately April 2014. In regards to the Second Defendant, the following allegations are then contained in the particulars of claim:

“12. The Second Defendant:

- 12.1 failed to come to the assistance of the Plaintiff, notwithstanding her request;
- 12.2 failed to act against the First Defendant notwithstanding the fact that it was common knowledge that the First Defendant treated the Plaintiff and Second Defendant’s nursing staff in a similar way;
- 12.3 failed to deal with allegations of verbal abuse against the First Defendant seriously and expeditiously;
- 12.4 permitted the First Defendant wide latitude in his conduct towards the Second Defendant’s staff, in particular the Plaintiff;
- 12.5 failed to create a working environment in which the employees of the Second Defendant was not subjected to verbal abuse;
- 12.6 failed to take all or reasonable steps to preserve and protect the psychological wellbeing, mental tranquillity and dignity of the Second Defendant ‘s employees in particular that of the Plaintiff.

13. By virtue of the foregoing, the Second Defendant breached its legal duty it owed to the Plaintiff to:

13.1 create a work environment free from verbal abuse and intimidation;

13.2 take reasonable care for the Plaintiff's safety which included a duty to protect her from psychological harm."

[16] If the Plaintiff can prove every fact as set out in paragraphs 12 and 13 (amongst others), the Plaintiff will be successful in proving negligence. I therefore cannot see how it can be said that the Plaintiff's particulars of claim, paragraphs 12 and 13 in particular, do not disclose a cause of action. That being so, the exception must fail as far as the first ground of complaint are concerned.

[17] In regards to the second ground of complaint, an exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged. In this regard a pleading will not cease to be prejudicial merely because it is possible to draft an unexcepiable response to it. Prejudice to a litigant who is faced with an embarrassing pleading must ultimately lie in an inability properly to prepare to meet the opponent's case. (See: Levitan v New Haven Holiday Enterprises CC 1991 (2) SA 297 C at 298); Francis v Sharpe *supra* at 240. In this particular instance the mechanism provided for in Rule 21 in regards to a request for further particulars for trial purposes, is also of importance.

[18] The Second Defendant contends that the vagueness in the Plaintiff's particulars of claim in *casu* results therein that the particulars of claim lacks particularity that results that the Second Defendant is embarrassed to plead to the particulars of claim. In this regard the Second Defendant, relies, amongst others, on **Quinlan v MacGregor** 1960 (4) SA 383 D. In dealing with potential prejudice in consideration of an exception, Burney AJ said the following:

“In the present case it seems to me that as long as excipient is informed, albeit by implication, that it is alleged that he has failed to pay some of the instalments, he is not blatantly embarrassed in pleading merely because he is not informed of the precise amount which the Plaintiff says he has failed to pay.”

[19] I am in agreement with *Mr Havenga* on behalf of the Second Defendant that each alleged occasion that the Plaintiff was insulted by the First Defendant constitutes a distinct and separate unlawful act and gives rise to a separate and distinct claim. I am furthermore in agreement that in the premises the claim in respect of any damages that follow from an insult that occurred more than three years prior to date of service of the summons has prescribed in terms of the provisions of section 11 of the Prescription Act, 68 of 1969. However, although the particulars of claim may be vague in this regard, the Second Defendant may already at this stage plead that any incidents which might have occurred more than three years prior to the institution of the action has prescribed in terms of the Prescription Act referred to.

- [20] In the same breath, in dealing with paragraph 6 of Plaintiff's particulars of claim, and in particular the wording "includes, but were not limited to" certain profanities, insults and obscenities, the Second Defendant at this stage is indeed in a position to plead and is not seriously prejudiced.
- [21] In regards to the special circumstances which Second Defendant contends need to be alleged and proven for damages to be claimed, judging from the alleged utterances by the first defendant, this is not a case where the plaintiff was obliged to plead that, although the words in their ordinary sense did not have a defamatory or injurious meaning, there are special circumstances in the case which gave the words used a special or secondary meaning in which sense they were injurious. It appears that the words in the ordinary sense in probability already have defamatory or injurious, meaning being, "profanities, insults, obscenities and blasphemous language. Therefore no special circumstances needed to be pleaded showing why such words are now injurious. (See **Ciliza v Minister of Police** 1976 (4) SA 243 N at 248 A – B).
- [22] The availability of the mechanism of Rule 21 is again of importance. The Second Defendant will, of course, after receipt of such particulars for trial purposes have the opportunity to amend its plea if necessary. I am therefore of the opinion that the exception in regards to the particulars of claim being vague and embarrassing should also fail.

In the premises the following order is made:

ORDER:

[23] The exception is dismissed with costs.

J.J.F HEFER, AJ

On behalf of the Excipient:

Adv. D Havenga

Instructed by:

Oosthuizen Du Toit Berg &
Boon Attorneys

c/o McIntyre & Van der Post
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On behalf of the Respondent/Plaintiff:

Adv. W A van Aswegen

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