



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

Not reportable

Case no: 2745/2023

In the matter between:

DR THABANG LEROKO

Excipient/First Defendant

and

MARY MASABATA SEDIKO

Respondent/Plaintiff

In re:

MARY MASABATA SEDIKO

Plaintiff

and

DR THABANG LEROKO

First Defendant

DR A P ANYISHA

Second Defendant

Neutral citation: *Sediko v Lereko & others (Case no 2745/2023)*

Coram: **MAHLANGU AJ**

Heard: **23 AUGUST 2024**

Delivered: **5 SEPTEMBER 2024**

Summary: Exception – rule 23(1) – Failure to disclose the cause of action.

ORDER

1. The exception is dismissed
 2. The first defendant to pay costs on party and party scale B.
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JUDGMENT

Mahlangu AJ

INTRODUCTION

[1] This is an exception against the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action in the terms of Rule 23(1) of the Uniform Rules of Court.. This exception was only noted by the first defendant. The plaintiff did not remove the cause of complaint as per the first defendant's notice, which precipitated this application before me. I shall refer to the parties as they are cited in the main action

[2] Briefly, the plaintiff issued summons against the first and second defendants on the basis that they were both negligent when performing a laparoscopy operation on her. The plaintiff alleges that the first defendant negligently performed the laparoscopy by stitching the intestine together with the umbilicus. Both the first and the second defendants owed the plaintiff reasonable skill, diligence and care as they are both specialist gynaecologists. The first defendant excepted to the plaintiff's claim in that she did not plead the terms of the oral agreement that was entered into. Plaintiff submitted in para 5 of her particulars of claim that an oral agreement was entered into between herself and the first defendant. Rule 18(6) provides that a party which relies upon a contract must state whether the contract is written or oral, and when, where and by whom it was concluded. It is my view that the plaintiff complied with Rule 18(6) in that she mentioned that the oral agreement was entered into and that the material terms of the oral agreement was that the first defendant would perform the pap smear

which, upon obtaining the necessary results, resulted in the laparoscopy operation being performed.

[3] It was further submitted on behalf of the first defendant that the plaintiff made a legal conclusion by establishing the causal link between any action or omission of the first defendant and any loss sustained by the plaintiff. I do not agree with this submission. The plaintiff had to state, chronologically, all the events that led to the plaintiff's use of the colostomy bag as she had a free faecal matter in her abdomen.

[4] Further, the first defendant's other ground of exception was that the plaintiff failed to establish a duty of care in her pleading. In response to this exception, the plaintiff avers that the first defendant is a specialist gynaecologist, and the level of care is one that is naturally expected from a specialist doctor in his position. The oral contract entered into between the plaintiff and the first defendant obliges the plaintiff to fulfil his mandate with reasonable skill, diligence and care.

LEGAL PRINCIPLES

[5] It is important that I firstly deal with the requisites of pleadings in terms of rule 18(4). In terms of this rule, the pleading 'should contain a statement of (i) fact, not law, (ii) material facts only, (iii) facts, not evidence, and (iv) facts stated in summary form' and that 'material facts' are all facts which must be proved in order to establish the ground of claim or defence. According to rule 18(4) every pleading must contain a clear and concise statement of the material facts, preferably in the chronological order, 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 to it. Furthermore pleadings must be read as a whole and no paragraph can be read in isolation.

[6] The object of a pleading is to define issues between the parties. It is to enable each side to come to trial prepared to meet the case of the other and not to 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.

[7] In *Trope v South African Reserve Bank*¹ McCreath J said the following in respect of pleadings:

'Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.

It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirements that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. (Harms Civil Procedure in the Supreme Court at 263-4. (My emphasis.)

In *Buchner and Another v Johannesburg Consolidated Investments Co Ltd*² De Klerk J stated as follows:

'... It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rule of law and draws conclusions as regards the rights and obligations of the parties and gives judgement. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgement without first scrutinising the facts upon which the opinion is based.'

[8] As such, it is clear that the excipient has a duty to persuade the court that every interpretation upon which the pleading can reasonably rely, no cause of action is disclosed.

[9] The following are two major grounds of exception:

- (i) The pleading fails to disclose a cause of action or defence;
- (ii) The pleading is vague and embarrassing.

¹ *Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at 210F-H.

² *Buchner and Another v Johannesburg Consolidated Investments Co Ltd* 1995 (1) SA 215 (T) at 216H-J.

[10] The onus of showing that a pleading is excipiable rests upon the excipient. In *Jowell v Bramwell-Jones and Others*³ (Jowell) Heher J summarized the general principles to be borne in mind when considering exception:

- (a) minor blemishes are irrelevant;
- (b) pleadings must be read as a whole; no paragraph can be read in isolation;
- (c) a distinction must be drawn between the fact probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence.
- (d) only facts need be pleaded; conclusions of law need not be pleaded;
- (e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleading must be so read.'

[11] In *Mosothokazi v Broll Auctions and Sale*⁴ Van Der Linde J similarly and very succinctly set out the principles applicable to exceptions, as follows:

'The first principle is that exceptions are there to weed out unmeritorious causes, whether claims or defences. They are not there to exact perfection in pleading.

The second principle is that in considering whether a pleading is excipiable, the pleading must be viewed from the perspective of every reasonable interpretation that it can bear. Unless thus viewed the pleading remains vague and embarrassing, the exception cannot succeed.

The third principle is that an exception on the basis that the pleading is vague and embarrassing needs to strike at the pleadings as a whole, and not only certain paragraphs, before it will succeed.

The fourth principle is that a plaintiff need only set out the framework of its cause of action in its particulars of claim; evidence is not required to be pleaded.'

³ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 903A-B.

⁴ *Mosothokazi Share Trust & others v Broll Auctions and Sale (Pty) Ltd & Another, In re: v Broll auctions and Sale (Pty) Ltd & Another v Mosothokazi Share Trust & Others* [2016] ZAPGPJHC 111 paras 4 to 7.

[12] Finally, in *Ocean Echo Properties v Old Mutual Life Assurance Company*⁵ Ponnann JA restated the duty of an excipient:

'Since these are proceedings on exception, Old Mutual has the duty as excipient to persuade the court that upon every interpretation which the plea can reasonably bear, no defence is disclosed. The main purpose of an exception is to avoid the leading of unnecessary evidence. By the nature of exception proceedings the correctness of the facts averred in the plea must be assumed. Because Old Mutual chose the exception procedure – instead of having the matter decided after the hearing of evidence at the trial – it had to show that the plea is (not may be) bad in law.' (My emphasis.)

[13] The aforesaid authorities set out the general principles applicable to pleadings. Counsel for both parties have also referred me to several authorities that enabled me to come to make a decision in this matter. In the present matter, the excipient's complainant is that the particulars of claim do not set out a cause of action. In *McKenzie v Farmers' Co-operative Meat Industries*⁶ the Appellant Division defined 'cause of action' as follows:

... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.' (My emphasis.)

[14] In *Jowell* it was stated that:

'... (T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.'⁷

⁵ *Ocean Echo Properties 327 CC and Another v Old Mutual life Assurance Company (South Africa) Limited* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9.

⁶ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23

⁷ Footnote 3 at page 913B-G

[15] In *Luke M Thembani and others v President of the Republic of South Africa*⁸ it was stated that:

'Whilst exceptions provide a useful mechanism 'to weed out cases without legal merits', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognized cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the Court that the conclusion of law for which the Plaintiff contends cannot be supported on every interpretation that can be put upon the facts.'

[16] It is stated in *McKelvey v Cowan NO*⁹ that:

'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose the 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 pleading can disclose a cause of action'.

[17] In *Vermeulen v Jooste Valley Investments*¹⁰ it was stated that:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by plaintiff and any document upon which his or her cause of action maybe based, the claim is (not maybe) bad in law'.

[18] The prejudice which justifies an exception is if the allegations in the particulars of claim are of such a nature that the defendant is unable to formulate a proper pleading.

DISCUSSION

[19] The exception test is whether a pleading is vague and embarrassing or whether an intelligible cause of action can be ascertained. If the answer is in the negative, the

⁸ *Luke M Thembani and others v President of the Republic of South Africa* [2022] ZASCA 70; 2023 (1) SA 432 (SCA) para 14.

⁹ *McKelvey v Cowan NO* 1980(4) SA 525(2) at 526D-E.

¹⁰ *Vermeulen v Jooste Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) at 997.

plaintiff's claim needs to be dismissed, but if the answer is in the positive, the defendants' exception can be dismissed. It should further be determined whether the plaintiff's particulars of claim have been formulated with the necessary clarity to enable the first defendant to know what case to meet. In addition, pleadings must be read as a whole and no paragraph can be read in isolation. It has been established that an exception is procedural means to avoid the leading of unnecessary evidence at the trial.

[20] From a consideration of the particulars of claim and the exception, the crisp issues for determination are whether the first defendant was negligent when performing the laparoscopy operation on the plaintiff. In para 8 of the plaintiff's claim, it is stated that the first defendant failed to, *in casu*, take further steps to observe the plaintiff after the operation. She further alleges that as a result of the negligence of both the first and the second defendants, she is using the colostomy bag which causes her pain, suffering and discomfort and has exhausted her medical aid. Further she cannot cope with her daily use of the colostomy bag at work, which in turn, could result in her losing her employment. As stated herein above, the plaintiff need only set out the framework of its cause of action and not the evidence. Her cause of action is based on negligent, evidence will be dealt with during the hearing of this matter.

[21] The defendant submitted that, the plaintiff had to plead that foreseeable harm will be caused and what reasonable steps should be taken by the first defendant to avoid such conduct. It is my view that the first defendant is a specialist doctor and he should have been aware of what level of care was reasonably expected from him as a specialist doctor. It is stated in the case of *Jowell supra* that minor blemishes are irrelevant, the framework of the cause of action is more important.

CONCLUSION

[22] It must not be forgotten that the object of pleadings 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 113, it is stated as follows: 'The object of pleadings 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.'

[23] I have applied the aforementioned tests to the particulars of claim before me. I have to be persuaded by the first defendant that the pleading is excipiable on every interpretation that can be reasonably be attached to it. I have been unable to find that the plaintiff's claim fails to show the cause of action. The particulars of claim in my view disclose a cause of action with sufficient clarity to enable the first defendant to plead thereto.

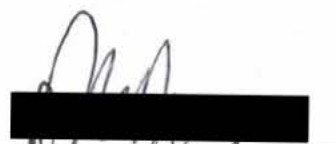
[24] In support of my view, I rely on *MN v AJ*¹¹ where the court held that: 'while pleadings must be drafted carefully a court should not read them pedantically nor should it over-emphasize precise formalistic requirements: the substance of the allegations should be properly considered.'

[25] In all the grounds raised by the first defendant, I am not satisfied that he has discharged the required onus of proof for this Court to uphold the exception. It is trite that costs follow the results and I do not have any reason to deviate therefrom.

ORDER

[26] I therefore make the following order:

1. The exception is dismissed
2. The first defendant to pay costs on party and party scale B.


MAHLANGU, AJ

¹¹ *MN v AJ* [2011] ZAWCHC 5; 2013 (3) SA 26 (WCC) para 24.

Appearances

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