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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 3600/2024

In the matter between:

R[...] O[...] K[...]

Plaintiff

and

SALEIGH ADAMS

First Defendant

THE UNIVERSITY OF CAPE TOWN

Second Defendant

**MEC FOR HEALTH: THE WESTERN CAPE
DEPARTMENT OF HEALTH AND WELLNESS**

Third Defendant

Bench: Vivier, P AJ

Heard: 30 August 2024

Delivered: 18 October 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Friday 18 October 2024.

JUDGMENT

VIVIER, AJ:

Introduction

- [1] The Plaintiff was at all material times a post graduate student at the Second Defendant, the University of Cape Town (*“the University”*). She was employed by the Western Cape Department of Health and Wellness (*“the Department”*) as a Registrar in the Department of Surgery (Plastic Surgery) at Groote Schuur Hospital.
- [2] The Plaintiff alleges that at the time of the alleged incident as referred to in paragraph [3] below –
- [2.1] the First Defendant was a Professor of Plastic Surgery and employed by the University as an Associate Professor: Head of Department - Plastic and Reconstructive Surgery;
- [2.2] alternatively, the First Defendant was employed by the Department as a Specialist Plastic Surgeon and Acting Head of the Department of Plastic and Reconstructive Surgery at Groote Schuur Hospital;
- [2.3] in the further alternative, the First Defendant was employed by both the University and the Department.
- [3] The Plaintiff alleges that on or about 3 March 2021, she was raped by the First Defendant when she attended at his office at the Hospital. She instituted an action against (a) the First Defendant, (b) the University and (c) the Third Defendant, being the MEC for Health: Western Cape Department of Health and Wellness, for damages suffered as a result of the alleged rape incident (*“the incident”*).

- [4] The University raised an exception to the Plaintiff's Particulars of Claim, on the basis that it lacks averments to sustain a cause of action, alternatively is vague and embarrassing.
- [5] The Third Defendant also raised an exception to the Plaintiff's Particulars of Claim, but only on the basis that it is vague and embarrassing.
- [6] The Plaintiff's main cause of action against the University and the Department, is based on their vicarious liability for the delict committed by their employee, the First Defendant. I shall for convenience henceforth refer to the University and the Department jointly as "*the Defendants*".
- [7] The Plaintiff's alternative cause of action against the Defendants is based on the breach of a legal duty which the Defendants owed to the Plaintiff.
- [8] The Plaintiff described the nature of this duty as follows in paragraph 10 of the Particulars of Claim:

"10. The second and third defendants and their employees, acting within the course and scope of their employment, were subject to a legal duty to ensure that employees, alternatively students, including the plaintiff, were not subjected to sexual and gender-based violence, which duty included (without limitation) the following obligations:

10.1 To ensure the common law rights of persons are respected and protected in respect of physical integrity.

10.2 To respect, protect, promote and fulfil the rights encapsulated in the Bill of Rights in order to prevent gender-based discrimination and to protect the dignity, freedom and security of women.

10.3 To take all reasonable steps to prevent any form of gender-based violence to prevent the commission of a rape, which constitutes a humiliating, degrading and brutal invasion of the

privacy, dignity and the person of a victim.

10.4 To ensure that persons are not subjected to any kind of physical, mental or emotional assault and not be subjected to any cruel inhuman or degrading treatment.

10.5 To ensure that persons are not be subjected (sic) to any form of sexual violation of any kind whatsoever.

10.6 To take all reasonably necessary measures to ensure that persons were not placed at risk by being subjected to any form of sexual abuse.” (Emphasis provided.)

[9] The Plaintiff described the basis of this legal duty as follows in paragraph 11 of the Particulars of Claim:¹

“The aforesaid legal duty arose from the legal convictions of the community arising (without limitation) and specifically from the fact that the defendants accepted that they had a duty to prevent any acts of gender-based violence as dictated in their respective sexual misconduct policies and codes of conduct relating to gender-based violence.”

[10] In paragraph 12 of the Particulars of Claim, the Plaintiff alleges that the incident occurred –

“[A]s a result of the failure of second and third defendants and their employees, acting within the course and scope of their employment to perform such acts as were necessary to discharge the aforesaid legal duty, including (without limitations) the acts contemplated in paragraph 10 above.

[11] The Particulars of Claim do not contain any allegation with regard to what specific acts the Defendants and their employees could and should have

¹ In paragraph 11 of the Particulars of Claim.

performed, but failed to perform, in order to discharge the legal duty they owed to the Plaintiff, which would have prevented the First Defendant from committing the rape. Simply put, the Plaintiff failed to allege how the Defendants breached the legal duty that they owed to the Plaintiff.

[12] The Plaintiff merely relies on the Defendants' general obligations as described in paragraph 10 of the Particulars of Claim, in relation to the nature and extent of the Defendants' legal duty. As is apparent from the Plaintiff's description of these obligations, as quoted in paragraph [8] above, they are of general application and have a wide ambit.

[13] With regard to the element of fault, the Plaintiff relies on –

[13.1] the following allegations in paragraph 14 of the Particulars of Claim:

“A reasonable person in the position of second and third defendants and of its employees, acting with the course and scope of their employment, would have performed such acts as were necessary to discharge the aforesaid legal duty, including (without limitation) the acts contemplated in paragraph 10 above.”

[13.2] the following conclusionary allegation in paragraph 15 of the Particulars of Claim:

“In the premises, the incident was negligently caused by the second and third defendants.”

[14] Again, the fundamental difficulty with the Particulars of Claim is that the reader does not know in what respects the University and/or the Department was negligent.

[15] The University gave notice in terms of rule 23(1) of its intention to raise an exception against the Particulars of Claim on the basis that it failed to disclose a cause of action, alternatively is vague and embarrassing, and that the Plaintiff

should remove the cause of the complaint within the prescribed period of 15 days.

[16] The cause of the complaint was set out as follows in the rule 23(1) notice:

- “4. The plaintiff has failed to allege the specific omissions by the second and third defendant – as separate and distinct parties – and their respective employees, acting in the course and scope of their employment, which could have prevented the incident occurring.
5. *The allegations made by the plaintiff in paragraph 12 of the Particulars of Claim ... are not sufficient to establish a breach of any legal duty owed by the second defendant, as alleged by the plaintiff, and the Particulars of Claim do not accordingly disclose a cause of action, alternatively are vague and embarrassing and the second defendant is prejudiced in pleading thereto.*” (Emphasis provided.)

[17] The Plaintiff failed to remove the University’s cause of complaint. The University accordingly filed an exception on the basis as set out in the rule 23(1) notice.

[18] The Department also raised an exception against the Particulars of Claim on the basis that it is vague and embarrassing, for one or more of five reasons. In its practice note, the Department abandoned three of these reasons, and the remaining reasons are as follows:

- “5.4 *The allegedly unlawful conduct (the manner in which third defendant and/or the unidentified employees acting in the course and scope of their employment omitted to act to discharge the pleaded duty of care) are not particularised; and*
- 5.5 *The allegedly negligent acts or omissions (what the third defendant and/or the unidentified employees acting in the course and scope of their employment are alleged negligently to have failed or omitted to*

do) are not particularised.”

Discussion

[19] At the hearing of the matter, Ms M O’Sullivan SC, together with Ms M Maddison, appeared for the University, Mr J van der Schyff for the Department and Mr D Maartens of Maartens & Le Roux Attorneys for the Plaintiff.

[20] Ms O’Sullivan contended that the allegations contained in paragraph 12 of the Particulars of Claim, as quoted in paragraph [10] above, are not sufficient to establish a breach of any legal duty owed by the University, as alleged by the Plaintiff, and therefore a cause of action is not disclosed in the Particulars of Claim. Ms O’Sullivan contended, in the alternative, that the Particulars of Claim is vague and embarrassing.

[21] I disagree with the first-mentioned contention.

[22] It is trite that in determining an exception on the basis that a pleading fails to disclose a cause of action, a court should avoid an over-technical approach because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Moreover, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.²

[23] In my view the Plaintiff has pleaded the bare bones of its main and alternative causes of action.

[24] With regard to the vicarious liability³ of the University and the Department for the First Defendant’s alleged unlawful conduct, the Plaintiff avers that –

[24.1] the incident occurred when the Plaintiff attended the First Defendant’s

² **Living Hands (Pty) Ltd v Ditz** 2013 (2) SA 368 (GSJ) at 374G; **Erasmus: Superior Court Practice**, 2nd Edition by D E van Loggerenberg, at D1 Rule 23-2.

³ Which the Plaintiff described as “*affirmative wrongful act*”.

office at the Groote Schuur Hospital; and

[24.2] the First Defendant at all material times acted within the course and scope of his employment with the University, alternatively the Department.

[25] With regard to the cause of action based on the breach of a legal duty, the Plaintiff alleges that –

[25.1] the University and the Department, and their employees, acting within the course and scope of their employment, were “*subject to a legal duty*” to ensure that employees, alternatively students, including the Plaintiff, were not subjected to sexual and gender-based violence, which duty included the obligations as described in paragraphs 10.1 to 10.6 of the Particulars of Claim;

[25.2] this legal duty arose from the legal convictions of the community and from the facts as alleged in paragraph 11 of the Particulars of Claim;

[25.3] the incident occurred as a result of the failure of the University and the Department, and their employees, acting within the course and scope of their employment, to perform such acts as were necessary in order to discharge this legal duty, which steps included (without limitation) the acts contemplated in paragraph 10 of the Particulars of Claim;

[25.4] the incident was “*wrongfully caused*” by the University and the Department;

[25.5] the incident was “*negligently caused*” by the University and the Department.

[26] However, as stated in paragraphs [11] and [12] above, the Plaintiff failed to allege what the steps are that each Defendant could and should have taken, but failed to take, in order to prevent the incident. The allegations contained in

paragraph 12 of the Particulars of Claim begs the question: What exactly the Defendants and their employees should have done in order to prevent the incident. The Particulars of Claim contains no particularity in this regard.

[27] It is trite that a statement is vague if it is either meaningless, or capable of more than one meaning. Simply put, the reader must be unable to distil from the statement a clear, single meaning.⁴

[28] The basic requirement is that the defendant must have a clear enough exposition of the plaintiff's case to enable it to take instructions and file an adequate response to the claim, in the form of a plea.⁵

[29] A plaintiff has a duty to provide sufficient particularity in the Particulars of Claim to convey to the defendant and the court, with reasonable distinctiveness, what case the defendant is called upon to meet.⁶

[30] In **Dharumpal Transport (Pty) Ltd v Dharumpal**,⁷ the Court stated the following with regard to this duty:

*"The object, of course, of all pleadings is that a succinct statement of grounds upon which a claim is made ... shall be set forth shortly and concisely; where a statement is vague, it is either meaningless, or capable of one of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence ..."*⁸

[31] In **Lockhat and Others v Minister of the Interior**,⁹ the Court held as follows in this regard:

⁴ **Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd** 2008 (4) SA 639 (C) at 644, par 11; **Erasmus**, *supra*, Rule 23-13.

⁵ **Absa Bank Ltd v Boksburg Transitional Local Council** 1997 (2) SA 415 (WLD) at 421I-J; **Venter v Barritt**, *supra*, at 645, par 15.

⁶ **Wilson v South African Railways & Harbours** 1981 (3) SA 1016 (CPD) at 1018G-1019A.

⁷ 1956 (1) SA 700 (A) at 705D.

⁸ This passage was quoted in **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (WLD) at 899D-E, and referred to with approval in **Venter v Wolfsberg Arch Investments**, *supra*, at par 12.

⁹ 1960 (3) SA 765 (D) at 777.

“If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purpose of his plea, is substantially embarrassed by the vagueness or lack of particularity. ... The object of all pleadings is that a succinct statement of the grounds upon which a claim is made or resisted shall be set forth shortly and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied upon by the pleader.” (Emphasis provided.)

[32] In **Absa Bank Ltd v Boksburg Transitional Local Council**,¹⁰ the following was found with regard to whether lack of particularity would render a pleading vague and embarrassing:

“I am not convinced that the third party is embarrassed in the sense which is required for a successful exception. It is true that, if a plaintiff’s pleading is seriously vague, it is wrong to blatantly say that a defendant is able to plead, even if it is then only a general denial. Once it is not such a flagrant fundamentally defective situation, the omission of detail will still either create vagueness to the extent that the other party does not adequately know what the plaintiff’s case is or, alternatively, the case will fall outside that deficient category.” (Emphasis provided.)

[33] In **Standard Bank v Hunkydory Investments (No 1)**,¹¹ the Court stated that prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent’s case. In **Levitan v New Haven Holiday Enterprises CC**,¹² the Court stated that although inability to produce an exception-proof plea is not the only or even the most important test for prejudice, a defendant is prejudiced if he is unable to plead specifically to Particulars of Claim.

¹⁰ *Supra*, at 421I.

¹¹ 2010 (1) SA 627 (CPD) at par 10. See also **Trobe v South African Reserve Bank** 1992 (3) SA 208 (T) at 211B-D.

[34] Mr Maartens for the Plaintiff attempted to explain and justify this lack of particularity on the following basis – when the Plaintiff’s action was instituted, the Plaintiff and her legal representatives did not (and still do not) have any knowledge of what the “*inner workings*” of the Defendants required of them, and their employees, with regard to the steps that were (or should have been) implemented in terms of their respective policies and codes of conduct, relating to gender-based violence. It would therefore amount to speculation and guesswork on the part of the Plaintiff as to “*what happened in the inner workings*” of the Defendants, and to plead the particularity as contended for by the Defendants. Mr Maartens contended, by implication, that the Defendants must know what these measures are and should therefore be able to plead to the case advanced in the Particulars of Claim, notwithstanding the lack of particularity thereof.

[35] These contentions are misconceived. The Plaintiff cannot, in answering to an exception, rely thereon that, apart from the allegations in the summons (or Particulars of Claim), the defendant on his own knowledge knows what case he is required to meet. In the majority of cases the defendant does know, yet this does not disentitle him to raise an exception successfully where the plaintiff’s case is not conveyed to him by the summons (or Particulars of Claim) with reasonable distinctness.¹³

[36] The Plaintiff alleges that the act was perpetrated by the First Defendant in his office at the University. It is difficult to imagine what the reasonable and practical steps are¹⁴ that the University, or the Department for that matter, could and should have taken, which would have prevented the First Defendant from committing this alleged abhorrent deed. Although it is an interesting but speculative exercise, it illustrates the inherent vagueness of the Plaintiff’s pleaded case. This deficiency is further underscored by the fact that, according to the Plaintiff, the acts that the Department failed to perform to prevent the

¹² 1991 (2) SA 297 (C) at 298H.

¹³ **Superior Court Practice**, *supra*, Rule 23-14.

¹⁴ **Media 24 Ltd and Another v Grobler** 2005 (6) SA 328 (SCA) at par 71.

incident, are exactly the same as those that the University failed to perform.

[37] As pointed out by Mr Van der Schyff for the Department, it is possible for the Department to plead a bare denial to the Plaintiff's general allegations with regard to the acts which the Defendants' employees failed to perform. The Department would, however, be no better informed as to what case it has to meet.

[38] I therefore conclude that the exceptions raised on the basis that the Plaintiff's Particulars of Claim is vague and embarrassing, are well founded, and should be upheld.

Costs

[39] Ms Maddison contended that costs should be granted under Scale B, alternatively Scale C of rule 69(7). In support of this contention, emphasis was placed on (a) the legal complexities of the matter, (b) the seriousness of the incident, and (c) the serious nature of the Plaintiff's allegations in support of her cause of action against the University. It was submitted that if the Plaintiff were to be successful with her action, it would result in significant liability for the University.

[40] I disagree that these considerations are relevant to setting an appropriate scale of costs. They may be relevant to an appropriate cost order that the University may be entitled to after the trial of the action, in the event of it being the successful party. The issues raised by the exceptions, are not unusually complex. The value of the Plaintiff's claim has no bearing on the determination of the exceptions. I am therefore not persuaded that costs should be granted under Scale C, or Scale B.

[41] It was also argued on behalf of the University that the costs order in its favour should include the costs of two counsel. This was opposed by the Plaintiff, on the basis that the employment of two counsel was not justified. I am not persuaded that one counsel with sufficient seniority and experience would not

have handled the matter properly on behalf of the University.¹⁵

[42] In my view, notwithstanding the importance of the matter for the University, the issues for determination in respect of the exception was not complex. It did not demand the employment of two counsel.¹⁶

[43] In the result I make the following order:

1. The Second and Third Defendants' exceptions to the Plaintiff's Particulars of Claim, on the basis that it is vague and embarrassing, is upheld.
2. The Plaintiff's Particulars of Claim is set aside and the Plaintiff is given leave, if so advised, to file amended Particulars of Claim within a period of one month from the date of this order.
3. The Plaintiff shall pay the Second and Third Defendants' costs. Costs are awarded under Scale A of rule 67A(3) read with rule 69(7).
4. The cost order awarded in favour of the Second Defendant shall not include the costs of two counsel.

VIVIER, AJ

APPEARANCES

For the Plaintiff:

Mr D Maartens

Instructed by:

MLR Attorneys

¹⁵ **Mafongosi and Others v United Democratic Movement and Others** 2002 (5) SA 567 (Tk) at par 36; **Mafongosi and Others v United Democratic Movement and Others** [2003] 1 All SA 441 (Tk) at 452.

¹⁶ **Wanderers Club v Boyes-Moffat** 2012 (3) SA 641 (GSJ); **Fluxmans Inc v Levenson** 2017 (20 SA 520 (SCA) at par 45; **McMillan v Bate Cubb & Dickson Inc** [2021] ZASCA 45 at par 42.

For 2nd Defendant/Excipient:

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Adv M Maddison

Instructed by:

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For 1st & 3rd Defendant:

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