



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO: 761/2923

In the matter between:

MANDISI MPHAHLWA

Excipient/Plaintiff

And

MEC FOR HEALTH: EASTERN CAPE

Respondent/Defendant

JUDGMENT

NKELE AJ.

INTRODUCTION:

[1] The Excipient instituted a medical negligence claim against the defendant for damages arising out of the mistreatment of tuberculosis of the spine at Bedford Orthopaedic Hospital, Mthatha, in 2019. For convenience the parties will be referred to as the plaintiff and the defendant. The action is being defended by the defendant and a plea and a special plea has since been filed. The excipient filed an exception to the defendant's plea and special plea on the basis that it is vague and embarrassing and/or lacks the necessary averments to disclose a defence.

FACTUAL BACKGROUND.

[2] In the special plea, the defendant raises two special pleas namely non-compliance with the provisions of Section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act No.40 of 2002 (see para 1 defendant's plea page 12 of the bundle) and the plea of prescription in terms of section 11(d) of the Prescription no. 68 of 1969

[3] In response to the defendant's plea, the plaintiff has excepted to the defendant's special plea and a plea over. The exception was served upon the State Attorney on 3 July 2024 and filed of record on the 8th of July 2024. The exception is on the basis that it is vague and embarrassing and/or lack averments which are necessary to disclose a defence.

[4] As regards the first special plea, to the effect that the plaintiff has failed, prior to the institution of the present proceedings, to give notice as contemplated in section 3(1) of Act no. 40 of 2002, the plaintiff excepts on the basis that in order for such a special plea to disclose a defence, the defendant must plead when the creditor ("plaintiff") had had knowledge of the identity of the debtor ("defendant") and the facts giving rise to the debt. The import of the plaintiff's exception in this regard is that now that because the especial plea fails to state when the creditor acquired knowledge of the identity of the debtor and the facts giving rise to the debt, it has failed to disclose a defence and for that reason the special plea is excipiable.

[5] The excipient further takes an exception to the second special plea of prescription on the basis that it fails to state the facts which the excipient was required to have knowledge of before prescription could commence running and to state when did he acquire actual or deemed knowledge of such facts. Accordingly, the excipient avers, the second special plea is excipiable because it fails to address sufficiently the two above mentioned issues.

[6] Following the service and filing of the exception, on 12 July 2024, the defendant filed a notice in terms of Rule 30 and 30A. The Rule 30 and 30A notice, in effect, notified the excipient that the exception filed in terms of Rule 23 is an irregular

step in that, although it purports to be a notice in terms of Rule 23(1)(a), it fails to give the defendant an opportunity to remove the cause of complaint. The defendant's notice aforesaid also complains of the impermissible or irregular use of the provisions of Rule 23 and gave the excipient an opportunity to remove the cause of complaint.

[7] He plaintiff then filed heads of argument on the 08 of July 2024 and served a notice setting the matter down for the hearing of the exception on 10th October 2024.

REGULATORY LEGAL FRAMEWORK

[8] Rule 23(1)(a) of the Uniform Rules of Court provides that where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, within 15 days from which such reply is due, deliver the exception.

[9] There are two forms of exceptions namely, that the pleading is vague and embarrassing. In other words, the exception strikes at the formulation of the cause of action or plea and another exception could be taken on the basis that the pleading lacks averments to sustain a cause of action or defence. That means its legal validity is in question¹.

[10] It is trite that an exception goes to the root of the entire claim or defence and it is excipiable if no possible evidence led in the pleading can disclose or make out a cause of action or defence. In ***Vermeulen v Goose Valley Investments (Pty) Ltd***, Marais JA stated the position as follows: "*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*

¹ B.Neukircher, HR Fourie SC, LC Haupt SC High Court Motion Procedure A Practical Guide page 1-33, Jowell v Brown-Jones and Others 1998 (1) SA 836 (W) at 898 -899.

facie the allegations made by a plaintiff and any other document upon which his or her cause of action may be based, the claim is (not may be) bad in law².

[11] Therefore, it is a well settled principle of our law that a party cannot use exception as means of complaining about a lack of sufficient information for trial³. Where a party wants to take an exception to a pleading on the basis that it is vague and embarrassing, it is compulsory to afford the opponent an opportunity to remove the cause of complaint and the provisions of Rule 23(1)(a) are peremptory in application⁴.

[13] In terms of Rule 23(3) *“whenever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated”*. The sub-rule obliges the excipient to state in clear and concise terms the particulars upon which his exception is passed and it is not sufficient to just state that the pleading discloses no cause of action or is vague and embarrassing⁵. An excipient is obliged to confine his complaint to the stated grounds of his exception⁶.

[15] In an exception, the excipient bears the onus to show both vagueness amounting to embarrassment, as well as embarrassment amounting to serious prejudice⁷. In the case of an exception that the pleading is vague amounting to embarrassment and such embarrassment amounts to prejudice, the excipient bears the onus⁸. In that instance, the pleading will be looked at as a whole to determine if it goes to the whole cause of action or defence, which must be demonstrated to be vague and embarrassing⁹.

² 2001 (3) SA 986 (SCA) para 7.

³ Motion Court Procedure page 1-33.

⁴ Motion Court Procedure 1-34, Rule 23(3)(a), LAWSA Vol 4 para 191 page 135, *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O).

⁵ *Herbstein & Van Winsen* Vol 2 page 24-30, Erasmus D1-310G.

⁶ *Alphina Investments LTD v Blacher* 2008 (5) SA 479 (CPD) at 483D-E, Erasmus Superior Court Practice D1-298, *Feldman NO v EM1 Music Publishers (Pty) Ltd* 2010 (1) SA 1 (SCA) at 5A.

⁷ Motion Court Procedure page 1-35.

⁸ Erasmus D1-305.

⁹ *Nel and Others NNO v MacArthur* 2003 (3) SA 142 at 149F-H.

[16] The court, in deciding an exception, is bound by the factual allegations in the pleadings excepted against¹⁰. The court may allow the question to stand over for decision at the trial court, especially in a case where the question to be decided is intertwined with the evidence that will be led at the trial¹¹.

[17] An exception that a pleading is vague and embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged¹². This exception can therefore be taken only if the vagueness relates to the cause of action¹³.

[18] Where an exception is taken on the basis that a pleading lacks averments that are necessary to sustain a defence such an exception will only succeed if the pleading does not justify the conclusion drawn therein¹⁴.

[19] A Court will, when adjudicating an exception to a pleading, consider whether a party will be prejudiced if the pleading is allowed to stand. Such prejudice will exist if the excipient is unable to meet his opponent's case properly due to the vagueness of the pleading¹⁵.

[20] A court has the discretion to stand over the decision on the exception for trial where the exception is bound up with the merits of the dispute or where it raises a point of law¹⁶.

RULES REGULATING PLEADINGS GENERALLY

[21] In terms of Rule 18(4) of the Uniform Rules of Court every Pleading shall contain a clear and concise statement of material facts upon which the pleader relies

¹⁰ LAWSA Vol 4 para 193 page 136, *Versluis v Greenbalt* 1973 (2) SA 271.

¹¹ LAWSA Vol.4 para 193.

¹² *Gallagher Group Ltd v Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 166G-H.

¹³ *Keely v Heller* 1904 TS 101 at 103. For a pleading to be construed to be vague a reader must be unable to distil from a reading of it a clear and a single meaning. Also see *Venter and Others v Barrit; Venter and Others v Wolfsberg Arch Investments 2 (PTY) Ltd* 2008 (4) SA 639 (C) at 644B.

¹⁴ Erasmus D1-310A.

¹⁵ *Pete Civil Procedure A Practical Guide* 2nd Ed page 195, Oxford.

¹⁶ *Herbstein & Van Winsen ibid* page 24-40.

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.

[22] A cause, in terms of Rule 18(4), was interpreted *in Mckenzie v Farmers co-operative Meat Industry Ltd* as meaning;

“every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to each fact, but every fact which is necessary to be proved¹⁷”.

[23] By definition, pleadings are *“written statements of the parties served by each party in turn upon the other which must set out in summary form material facts on which each party relies in support of his claim or defence, as the case may be¹⁸”.*

[24] The object of the pleading is to define the issues so as to enable the other party (and the court) to know what case has to be met. In *Phakula v Minister of Safety and Security*, the Supreme Court of Appeal explained the position as follows: *“It is trite that the whole purpose of pleadings is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being disadvantaged by the introduction of matters not fairly ascertainable from pleadings. In other words, a party should know in advance, in broad outline, the case that they will have to meet at the trial¹⁹”.*

[25] The extent or degree of particularity will depend upon the circumstances of each case. A pleading will be considered to contain sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to

¹⁷ 1922 AD 16 at page 23.

¹⁸ Van Ballen and another v ABSA Bank (22652/2022) [2024] ZAGPPHC 2 (3 January 2024) para 22
¹⁹ [2020] ZASCA 109 (23 September 2020) para 13, Erasmus ibid page D1-228.

understand what they are²⁰. An exception is a pleading and it must therefore comply with the provisions of Rule 18 regulating pleadings²¹.

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

[26] As I indicated earlier, the defendant raised two special pleas namely failure to issue a notice in terms of section 3(1) of Act no. 40 of 2002 and prescription of the excipient's claim. Effectively the special pleas raise points of law for adjudication.

[27] The effect of the exception raised by the excipient is that the defendant's special pleas are vague and embarrassing and/or lack averments which are necessary to disclose a defence.

[28] During argument, the excipient's counsel, Mr. Mati, was asked why the defendant was not given notice that the plea is vague and embarrassing and afforded an opportunity to remove the cause of complaint, in compliance with the provisions of Rule 23(1)(a). He responded that it was not necessary to do so in this matter because the excipient does not solely rely on that ground for the conception. He further argued that there is an alternative ground that the plea lacks averments to sustain a defence and for that reason, it was necessary to issue a notice to remove the cause of complaint, prior to filing the exception.

[29] I respectfully disagree with the excipient's argument in this regard, in respect of the excipient's that the defendant special pleas is vague and embarrassing. It should have, but failed to comply with the peremptory proviso and a condition precedent to the step of taking an exception, which is that the opposite party should be given to remove the cause of complaint²². The notice to remove the cause of complainant is mandatory when an exception is taken on the ground that a pleading is vague and embarrassing. The purpose thereof is to afford the opposite party an opportunity to consider the objection and, if possible, effect an amendment to it. It is only once such notice has been given that an exception can be taken, and only if the

20 Phakula Judgment *ibid* para 13, Erasmus page D1-234.

²¹ Rule 33(3) *Joosub v J I Case SA (Pty) Ltd* (now known as Construction Special Equipment Co (Pty) Ltd 1992 (2) SA 665 (N) at 682 N - I

²² Erasmus D1-310C.

other party has failed to take heed of the notice remove the cause of complainant, by affecting an amendment that the excipient can file an exception²³. What the plaintiff should have done, when faced with the uncertainty regarding the construction of the averments in the defendant's plea and special plea, was to resort to the *provisio* to Rule 23(1)(a) and seek clarification of the defendant's intention. My view in this regard is reinforced by the remarks of Howie J in ***Callender-Easby v Grahamstown Municipality*** when he said "it seems to me that what the third party ought to have done was to seek clarification of the defendant's intention, either by way of an appropriate request for particulars or a notice referred to the proviso to Rule 23(1) concerning vague and embarrassing pleadings. What is clear is that the uncertainty attaching to the pleader's intention cannot avail the third party unless he shows that on either construction defendant's claim is excipiable²⁴.

[30] In ***NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk*** where a notice to remove the cause of complaint was not given at all, an exception that the pleading is vague and embarrassing was dismissed for want of the notice²⁵. Even in the instant, matter the plaintiff has not given the defendant the mandatory notice requiring it to remove the cause of complaint in its plea. This is despite that part of the exception part of the falls under or is regulated by the provisions of Rule 23(1)(a), which requires a party that intends to take an exception on the ground that a pleading is vague and embarrassing to afford the other an opportunity to remove the cause of complaint.

[31] **McCreath J** considered the meaning and scope of the basis of an exception on the ground that a pleading is vague and embarrassing and stated the legal position as follows:

"An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is

²³ *Gartner & Another v University of Cape Town & 2 Other* [2021] 4 All SA 143 (WCC) at paras 23 -24, Herbstein & Van Winsen 24 – 29 to 24 – 30.

²⁴ 1981 (1) SA 810 (E) at 812H-813A.

²⁵ 1973 (2) SA 680 (T) at 688C-E, Herbstein & Van Winsen *ibid* page 24-30, Rule 23(1).

prejudiced.... as to determine whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important test. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by surprise may well be defeated.

Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise, to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing. It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveying by the pleading ²⁶".

[32] The then Appellant Division explained the function of an exception on the ground that it lacks the necessary averments to sustain a claim or defence in the following manner:

"It seems clear that the function of a well-informed exception that a plea, or part thereof, does not disclose a defence to the defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that the exception cannot be taken to be part of the plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea.....

It has been said that 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. Save in exceptional cases, such as those where a defendant admits to allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him.....an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of unnecessary evidence²⁷".

²⁶ 1992(3) SA 208 (T) at 211 A-F.

²⁷ Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A)N at 553G-I.

[33] In my view the fact that the exception has been crafted to raise the vague and embarrassing ground and/or that the averments that are necessary to sustain a defence are lacking, does not, and should not, give a party latitude or leeway to sidestep the strict application of the provisions of Rule 23(1)(a). Otherwise the whole purpose of having pleadings crafted in a clear and concise manner, in accordance with Rule 18(4), to enable the opposite party to understand and respond thereto accordingly would not be achieved. So a pleading needs to be clear and concise so as not leave the opponent guessing. Jansen AJA in **Roberts Construction Ltd v Dominion Earthworks Ltd** lucidly explained the position in the following words:

“Whether the alleged inference is justified or whether the conduct, if explicitly so pleaded as being the basis of the alleged implied contract of agency, would suffice, is necessary to decide. The inquiry is not – is there somewhere a cause of action wrapped up in the particulars of the plaintiff and further particulars? The inquiry relates to embarrassment arising from the form of pleadings. The plaintiff is certainly not entitled to pleading a jumble of facts and force the second defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim”. (fn 1968 (3) SA 255 (A) at 262H-263A.)

[34] As is apparent from the authorities, the test to determine whether a pleading is vague and embarrassing is different from the one used to determine whether it contains the necessary averments to sustain a cause of action or defence. It is therefore imperative, in my view, that the two grounds be treated differently in the sense that the exception taken on the ground that it is vague and embarrassing must be preceded by a notice prescribed in Rule 23(1)(a).

[35] A notice affording the excipient an opportunity to remove the cause of complaint was necessary as it would have clarified the reason for the embarrassment in clear and concise terms to enable it to deal with the complaint in the appropriate manner. It was ill-advised of the excipient to ignore the defendant’s notice in terms of Rule 30 and 30A of the Uniform Rules of Court in which he was notified that he should have given the excipient prior notice of the cause of complaint and afford it an opportunity to remove it.

[36] On receipt of that notice the excipient should have taken a step back and re-considered its approach. However, instead of doing so the plaintiff decided to persist with the exception by filing heads of argument and setting it down for argument and thus affording no time to the defendant to take further action, following the Rule 30 and 30A notice. In my considered view, the taking of an exception without affording the defendant to remove the cause of complaint, at least for the part of the exception that is considered to be vague and embarrassing, was an ill-fated move and in contravention of the peremptory provisions of the clear provisions of Rule 23(3).

[37] Secondly, the exception does not comply with the provisions of Rule 18(4) in that it does not contain a clear and concise statement of material facts upon which the excipient relied for the exception, with sufficient particularity to enable the defendant to respond thereto. In this regard the defendant was left guessing as to which part of its plea and special plea vague and embarrassing and which one lacks the necessary averments that are necessary to sustain a defence. In my considered view, that practice is completely bizarre and should be discouraged by this court., as it encourages litigation by ambush by the relevant Rule, in particular, and by the Uniform Rules, in general. On that basis, it follows that the exception is irregular and has no basis and should be dismissed.

[38] On receipt of that notice the plaintiff should have taken a step back and re-considered its approach. However, instead of doing so the plaintiff decided to persist with the exception by filing heads of argument and setting it down for argument and thus affording no time to the defendant to take further action, following the Rule 30 and 30A notice. In my considered view, the taking of an exception without affording the defendant an opportunity to remove the cause of complain, at least for the part of the exception that is considered to be vague and embarrassing, was an ill-fated move and in contravention of the peremptory provisions of the Rule.

THE NOTICE IN TERMS OF SECTION 3 OF ACT 40, 2002

[39] It is settled law that where an organ of state intends to object to the validity of a claim lodged against it on the ground that no notice has been given to it in terms of

section 3 of Act 40 of 2002, the proper course of action to take is either to object to the notice in terms of the Act or to deliver a special plea. The delivery of the special plea will allow the plaintiff to file a replication in terms of Rule 25. In such case there will be a proper ventilation of the issues relating to condonation²⁸.

[40] The purpose of the notice referred in section 3(1) of Act 40 of 2002 is well known and it is to inform the Organ of the State of sufficient particularity relating to the claim to enable it to investigate the matter so that a decision may be taken whether to defend the claim²⁹.

[41] Non-compliance with section 3(1) and (2) is a jurisdictional fact which cannot be waived by agreement between the parties. Where there has been non-compliance, an application for condonation should be made by the affected party as soon as is reasonably possible³⁰.

[42] In my considered view the defendant was well within its right to raise non-compliance with the provisions of section 3(1) of Act 40 of 2002 by way of a special plea, as it did. There is no better way to do it and the light of the defendant's right to raise the special plea of non-compliance with the provisions of section 3(1) of Act 40 of 2002, the excipient's exception thereto cannot be understood. I can find no fault at all to the defendant's special plea in this regard. There is nothing vague or embarrassing in the special plea, either as alleged in the exception, or at all. Nor is there anything that could be lacking in averments that are necessary to sustain a cause of action.

[43] All that the plaintiff should have done, on receipt of the special plea, is to replicate in terms of Rule 25 and to consider applying for condonation. Therefore, the exception relating to non-compliance with the provisions of Act 40 of 2002 is without substance.

²⁸ *Cochrane v City of Johannesburg* 2011 (1) SA 553 (GSJ) at 559E-G.

²⁹ See *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) para 183.

³⁰ *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at 118B, Erasmus page D11-6.

[44] As far as the exception relating to the special plea of prescription, section 17(2) of the Prescription Act no. 68 of 1969 provides that “a party to litigation who invokes prescription shall do so in the relevant document filed of record in the proceedings³¹”. The proper way to raise prescription in a plea is by way of a special plea³².

[45] In this matter, the defendant, as a matter of right, raised prescription as a special plea in its plea. In that paragraph, the defendant states that “the plaintiff should have instituted his claim within a period of three (3) years from September 2019 in terms of the provisions of section 11 of the Prescription Act No. 68 of 1969”.

[46] Again at paragraph 5 of the special plea, the defendant explains why it is of the view that the plaintiff’s claim has prescribed when it states that “the three (3) year period within which the claim ought to have been instituted for damages reflected in paragraphs 15 to 20, of the Particulars of Claim expired on or about September 2022”.

[47] At paragraph 6 the defendant gives an explanation or reason for its assertion that the plaintiff’s claim has prescribed as follows “the plaintiff instituted the action on 11 October 2023 way after the period within which the claim ought to have been instituted, which is three years after the cause of action and the debt became due.

[48] The special pleas raised by the defendant, to which the excipient has raised an exception, are matters of law and are intertwined with the merits of the plaintiff’s claim. Therefore, I am of the view that a trial court will be in a better position to deal with the issues of prescription and failure to issue the requisite notice in terms of section (3)(1) of Act no. 40 of 2002.

[49] In the circumstances the following order is made:

(a) The exception is dismissed with costs.

³¹ Erasmus D11-283.

³² *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 392A-B, *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) 204A-B.

T.A NKELE
ACTING JUDGE OF THE HIGH COURT

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