



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

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| (1) | REPORTABLE: No |
| (2) | OF INTEREST TO OTHER JUDGES: No |
| (3) | REVISED: Yes |

Case 2024-026615

Date: 11 February 2025

In the matter between:

NHLANHLA GUMEDE

Plaintiff

and

THE MINISTER OF HOME AFFAIRS

Excipient / Defendant

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and emailing the parties' attorneys of record. The deemed date and time of the delivery are 10H00 on 11 February 2025

JUDGMENT

DU PLESSIS J

Introduction

[1] The plaintiff ("Mr Gumede") sued the defendant, the Minister of Home Affairs ("the Minister"), for damages due to alleged negligence of the employees of the Department of Home Affairs ("the Department"). Mr Gumede sets out the following in his plea. He applied for his first identity document in 2017 and produced his birth certificate to indicate his identity number. After the application, he constantly followed up on the progress of his application. After being informed of a "technical glitch", he had to submit another application. Again, whenever he followed up, he was told to come back later. Finally, on 21 July 2023, he was issued an identity card by the Department. Unfortunately, the identity number on the card did not correspond with the identity number on his birth certificate. The plaintiff states that between the years 2017 and 2023, his life was practically at a standstill due to this

[2] The Department has not explained why there is a discrepancy between the identity numbers. The Department has also not provided a letter to confirm the change in identity numbers, so his matric certificate (bearing the old number) is of no help to him. This has precluded him from further studies, even though he complied with the requirements to apply at for a bachelor's degree, diploma or higher certificate studies.

[3] Mr Gumede also explains that he could not find employment after completing his higher certificate, because of a lack of an identity document. He also cannot apply for a driver's license or passport nor can he register to vote in the elections. The obligation to provide a valid identity document to Mr Gumede rests on the Department. Their failure to do so, Mr Gumede submits, is a breach of the Department's obligations, and this breach is due to the negligent conduct of the Department, that caused his life to grind to a halt.. Over and above this, Mr Gumded also sumits that the Department also infringed on his fundamental rights to trade, occupation and to education. Mr Gunmede pleads that, due to this delay, he suffered a loss of R 1 million of past income and R1,5 million of future earning capacity.

[4] The Minister takes exception to the particulars of claims on the grounds that the claim lacks the averments to sustain a cause of action. In its exception, the Minister submits that the failure or conduct of the Department does not, on the averments made by Mr Gumede, entitle him to any delictual claim under statutory or common law. This is because Mr Gumede should have relied on the Promotion of Administrative Justice Act¹ ("PAJA") for his cause of action. It is not up to Mr Gumede to hold the state liable in terms of the common law for damages if PAJA applies, because of the principle of subsidiarity.²

[5] Mr Gumede, in his heads of argument, submits that he is challenging a decision as defined in s 1 of PAJA and that PAJA provides for damages or compensation in s 8(1)(c)(ii)(bb), which is what he is seeking. However, he had to institute action proceedings because he anticipates a material dispute of fact.

[6] Both reasonings are problematic, for the reasons set out below.

The law

[7] The principle of subsidiarity in South African constitutional law requires litigants to rely first on specific legislation enacted to give effect to constitutional rights rather than invoking the Constitution directly. When applied to PAJA, this means that if a dispute concerns administrative action, a litigant must challenge it under PAJA first instead of relying directly on section 33 of the Constitution (the right to just administrative action). However, Mr Gumede is not challenging the administrative action – in other words, this is, in my view, not a review of the administrative action, but rather a claim for damages based on delict.

[8] In this case, it may be that the conduct that forms the basis of the claim is an administrative act, but that does not necessarily, in my view, bring it in the realm of administrative law. Administrative law is concerned with reviewing the action. What the plaintiff seeks to do in this instance is to sue for damages based on the common law. The essential allegations for a claim based on delictual damages are a wrongful act or omission, fault, causation and damages. The only thing for this court to

¹ Act 3 of 2000.

² *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC41, para 46.

determine is whether Mr Gumede pleaded the Minister's negligent conduct to show that he suffered loss due to this conduct, with sufficient particularity, in his particulars of claim.

[9] The requirement is that pleadings must contain clear and concise statements of the material facts upon which the pleader relies. It must be particular enough to enable the opposite party to reply to that.³ The *facta probanda* are pleaded, not the *facta probantia*.⁴ The substantive law will determine the *facta probanda* in a particular case. It does not require that the evidence to prove each fact be pleaded, but rather, the facts that need to be proven.⁵ If evidence can be led to disclose a cause of action alleged in the pleadings, the pleading is not excipiable.⁶ It is only excipiable if no evidence led, on the pleading, can disclose a cause of action.

[10] According to Rule 23 of the Uniform Rules of Court, there are two grounds for objections: one is that the pleading is vague and embarrassing;⁷ the other is that the pleading lacks the averments necessary to sustain a cause of action (thus bad in law).⁸ In this case, the Minister relies on the second ground. In such a case, the Minister must show that the pleading is excipiable on every interpretation of the pleadings,⁹ assuming their allegations are true. A pleading will then be excipiable if it is impossible to lead any evidence to prove, or disprove, the claim or defence.¹⁰

[11] An exception is raised to achieve a swift and cost-effective resolution of a dispute. If no cause of action is apparent in the pleading, the exception will help avoid

³ Rule 18. See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC), 2012 (1) SA 256 (CC) para 52.

⁴ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T) para ?

⁵ *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

⁶ Herbststein & Van Winsen, *The Civil Practice of the Superior Courts of South Africa*, 2022, p 23.

⁷ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T) para ?

⁸ *Trope v SA Reserve Bank* [1993] 2 All SA 278 (A), 1993 (3) SA 264 (A para ?

⁹ See also *Pets-Warehousing and Sales CC v Dowsink Investment CC* 2000 (3) 833 (E) at 839G-H.

¹⁰ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H.

presenting unnecessary evidence, as it eliminates claims or defences that lack legal merit.¹¹

[12] An exception is tested by determining if, under every possible interpretation of the facts, a cause of action is made out.¹² The Minister must show that any interpretation of the facts cannot support the legal conclusion the plaintiff seeks.

[13] Mr Gumede alleges that the Minister unlawfully delayed and failed to issue a correct identity document to him, violating his rights under the Bill of Rights. He claims negligence by the Department's officials, and that the Minister is thus vicariously liable. He outlines the harm caused and the damages sought. Whether he will succeed in proving this, is for the trial court to determine.

[14] The particulars of claim, thus, discloses a cause of action that is pleaded.

Order

[15] The following order is made:

1. The exception is dismissed with costs, which costs are to be taxed on scale A.

W.J. du Plessis

Judge of the High Court

Gauteng Division, Johannesburg

Heard on: 10 February 2025

Decided on: 11 February 2025

For the plaintiff: S.I. Vobi instructed by Oni Attorneys
Incorporated

For the respondents: N. Kekana instructed by the State Attorney,
Johannesburg

¹¹ *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* [2015] 4 All SA 58 (ECP) para 9.

¹² *Trustees for the time being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* [2012] ZASCA 182.