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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
REPUBLIC OF SOUTH AFRICA**

Case Number: 091082/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4) DATE: 20 October 2025
(5) SIGNATURE: _____

DESMOND MILLIGAN

Plaintiff/Respondent

(ID NO: 8[...])

And

THE MINISTER OF HEALTH

First Defendant

PFIZER LABORATORIES (PTY)LTD

Second Defendant/Excipient

(REG NO: 1954/000781/07)

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 20 October 2025.

JUDGMENT

COLLIS J

INTRODUCTION

1] This is an exception in terms of Rule 23(1) of the Rules of Court that was brought by the excipient (the second defendant in the action), against the respondent (the plaintiff in the action).

2] The exception to the particulars of claim is on the basis that it is vague and embarrassing, on the one hand, and that it does not sustain a cause of action, on the other hand.

3] The second defendant simultaneous with the Rule 23 (1) application also filed a Rule 30(1) notice this pursuant to a Rule 30(2)(b) notice as it contended that it raised the same or largely overlapping grounds.

4] In this regard it placed reliance on the decision *Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing*¹ as this approach i.e. pursuing both available remedies simultaneously, was recognized and endorsed by Southwood J as being an acceptable approach where defective pleadings are non-compliant with Rule 18 and excipiable. It is for this reason that the parties requested this Court to consider both applications simultaneously.

BACKGROUND

¹ 2001 (2) SA 790 (T) at 796F-H & 797B-C. In *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F-J the court referred to the choice of remedies as being Rule 23 or Rule 30.

5] In the present action the plaintiff sues the Minister of Health (first defendant) and Pfizer Laboratories Pty Ltd (the second defendant) for damages allegedly suffered by the plaintiff after having been vaccinated against the SARS CoV2 virus during the Covid-19 pandemic.²

6] The plaintiff pleads that he received the Pfizer-BioNTech mRNA/Cominarty vaccine on 20 July 2021 at the Van Heerden Pharmacy in Mbombela, Mpumalanga.³

7] The plaintiff pleads four claims. The plaintiff's primary claim is based on section 61 of the Consumer Protection Act (CPA) and the remaining three claims are pleaded in the alternative. The structure is as follows:

7.1 a claim for strict liability based on section 61 of the CPA (paragraphs 20-31).

7.2 a claim in delict (paragraphs 35 to 44).

7.3 a claim requiring the development of the common law (paragraphs 45 to 48); and

7.4 a claim for constitutional damages (paragraphs 51 to 67).

² FA to the Rule 30 Application, Annexure A, para 16.

³ Annexure A, paragraph 12.

8] On 12 January 2024, the second defendant delivered a notice in terms of Rule 23(1)(b) setting out its causes of complaint. The plaintiff failed to respond to the Rule 23(1)(b) notice and the second defendant then delivered its Rule 23(1)(a) notice of exception.

9] The complaint as per the exception is that the claims in delict and for constitutional damages do not sustain a cause of action and that the allegations identified are vague and embarrassing, such that the second defendant would be embarrassed to plead thereto.

10] Before this Court the second defendant persists with five of the eight grounds set out in the Rule 23(1) notice which can be listed as follows:

10.1 the **third ground**: that the plaintiff has failed to plead “the agreement” between the plaintiff and the pharmacy with sufficient particularity rendering the particulars of claim vague and embarrassing;

10.2 the **fourth ground**: that the allegations pertaining to the claim in delict do not sustain a cause of action in delict;

10.3 the **fifth ground**: that the allegations pertaining to the claim for the development of the common law are vague and embarrassing;

10.4 the **sixth ground**: that the allegations relating to constitutional damages do not sustain a cause of action against the second defendant; and

10.5 the **seventh ground**: that the incorporation of Dr Edeling's report into the particulars of claim renders the particulars of claim vague and embarrassing.

11] For ease of reference, the parties will be referred to as the excipient 'Pfizer', the plaintiff as the 'respondent' and the first defendant as 'the Minister'.

LEGAL POSITION

11] Now, when courts consider exceptions, the court must assume that the facts alleged in the particulars of claim are correct.⁴

⁴ Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) and Stewart v Botha 2008 (6)

12] Further that the Court must be satisfied that upon every interpretation which the Particulars of Claim can reasonably bear, no cause of action is disclosed.⁵

13] Pleadings must contain a clear and concise statement of the material facts upon which the pleader relies for his claim to succeed. These facts must be set out with sufficient particularity to enable the opposite party to reply thereto.

14] This approach to be adopted is in keeping with Rule 18(4) of the Uniform Rules of Court. In respect of the material facts relied upon, the pleader must set out the *facta probanda* which it relies upon for its cause of action.⁶

15] There is no exhaustive test of what constitutes 'sufficient particularity'. The question should be answered in relation to the circumstances of each case. However, it is incumbent on a plaintiff to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely upon

SA 310 (SCA) par 4.

⁵ Lewis v Oneanate (Pty) Ltd & Another 1992 (4) SA 811 (AD) at 817 F-G.

⁶ McKenzy v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23 and Makgae v Sentraoer (Ko-operasie) Bpk 1981 (4) SA 239 (T) at 245D- E.

and on which evidence will be led, in an intelligible and lucid form which allows the defendant to plead to it.

16] It has been held that a pleading becomes excipiable, if no possible admissible evidence led on the pleadings can disclose a cause of action.⁷

17] An excipient has a duty to persuade the court that upon every interpretation which the pleadings in question can reasonably bear that no cause of action is disclosed.

18] Thus, Rule 23 was designed to strike at vagueness and embarrassment which affects the whole cause of action so pleaded. Therefore an exception that the pleading is vague and embarrassing may be taken only when the vagueness and embarrassment strike at the root of the cause of action as pleaded and where the complaint falls into the category of insufficient particularity, the remedy of the defendant is to plead to the averments made and to obtain the particularity he requires either by means of the

⁷ See *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H, *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902H-I and *Nel NO v McArthur* 2003 (4) SA 142 (T) at 146-8.

discovery/inspection of documents procedure or by means of a request for particulars for trial.⁸

19] Therefore, an exception on the basis that a pleading is vague and embarrassing is supposed or intended to cover cases where, although a case appears in the claim, there is nevertheless some defect or incompleteness in the manner in which it is set out, or aptly put, how it was formulated, which results in embarrassment to the defendant. This kind of exception is not directed at a particular paragraph within a cause of action but instead goes to the whole cause of action so pleaded.⁹

20] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of a lack of particularity was summarised in the case of *Quilan v McGregor* 1960 (4) SA 383 (D) at 939F-H: In each case the court is obliged first of all, to consider whether the pleading does lack particularity to an extent amounting to vagueness. If there is vagueness in

⁸ *Kalinko v Nisbet and others* 2002 (5) SA 766 (WLD) at 780B -781B.

⁹ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H and *Lockhat v Minister of Interior* 1960 (3) SA 765 (T) at 777E).

this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of. In each case the court must make an ad hoc ruling as to whether the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he is compelled to plead to the paragraph in the form to which he objects. The eventual test as to whether the exception should be upheld or not is whether the excipient is prejudiced.

21] The *onus* is on the excipient to show both vagueness amounting to embarrassment and the embarrassment amounting to prejudice. Unless he can do this, an exception must be dismissed. A pleading is vague and embarrassing if it is susceptible to more than one meaning or if it is not reasonably clear what the pleading means. That much is clear from the decisions of *Leathern v Tredoux* 1911 NPD 346 at 348 and *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 390C-F.

22] The grounds of complaint are then turned to, and as mentioned Pfizer only persists with five of its eight grounds.

GROUND OF COMPLAINT

The Third and Seventh Ground

23] The third ground, i.e. that the plaintiff failed to plead the agreement between the plaintiff and the pharmacy with sufficient particularity rendering the particulars of claim vague and embarrassing, whereas the seventh ground relates to the incorporation of Dr. Edeling's report rendering the particulars of claim vague and embarrassing.

24] In this regard the excipient relied on the provisions of Uniform Rule 18(4) which states as follows:

"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, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

25] On behalf of the excipient it was argued that it is a basic principle that pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto.¹⁰

26] Pleadings must therefore be lucid, logical and in an intelligible form and the cause of action must appear clearly from the factual allegations made.¹¹

¹⁰ Trope v South African Reserve Bank 1992 (3) SA 208 (T).

Therefore, failure on the part of a pleader to set out the material facts on which he relies with sufficient particularity to enable the opposite party to reply thereto, may result in the pleading concerned being deemed an irregular step in the proceedings.¹²

27] In *Doyle v Sentra-boer (Co-operative)*,¹³ Mullins J cautioned that:

“An added difficulty arises when lengthy reports are incorporated into the pleadings. Although Rule 18(10) requires a plaintiff suing for damages to set out his damages in such a manner as will enable the defendant reasonably to assess the quantum thereof, this does not mean that a plaintiff must ignore the provisions of Rule 18(4), which requires every pleading to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim. . .'. To annex to his particulars of claim, as was done in the present case, eight medical reports running to 52 pages, hardly provides 'a clear and concise statement'.”

28] A pleading should therefore not include extensive excerpts from and references to other documents. In paragraph 18 of the particulars of claim,

¹¹ *Trope v South African Reserve Bank* 1992 (3) SA 208 (T).

¹² Uniform Rule 18(12) and *Trope v South African Reserve Bank* 1992 (3) SA 208 (T).

¹³ 1993 (3) SA 176 (SE) at 181E-F.

the plaintiff avers that the “nature and extent of his injuries and their symptoms” are more fully set out in the medico-legal report of Dr HJ Edeling dated 12 February 2023 attached as “M2” (‘the report’) and further pleads that the content of the report be incorporated “by reference”.¹⁴

29] In this respect the excipient had argued that the plaintiff by incorporating the content of the report “by reference”, the plaintiff has introduced substantial allegations which constitute evidence, into his particulars of claim in a manner which does not comply with the requirements of Rule 18(4), and which makes it impossible for the second defendant to properly plead thereto.

30] The plaintiff has sought to incorporate attachments and documents to which reference is made in the report, which are either not properly identified and/or which are not attached to the report to enable the second defendant to identify the documents and plead thereto.

31] Dr Edeling’s report runs to 62 pages (excluding his curriculum vitae) and he attaches a chronology referencing two volumes of documents which run

¹⁴ FA, Annexure A, para 18.

to hundreds of pages. It will be noted from the first page of that chronology that he refers to Volume 2, p765 (report at page 59 of 72 pages).

32] In this respect it was argued that the second defendant cannot be expected to meaningfully plead to the incorporated report which itself references a plethora of documents which have not been specified or attached to the report. It is manifestly prejudicial.

33] By incorporating the report "by reference" into the particulars of claim, the plaintiff has failed to set out a clear and concise statement of the material facts upon which he relies for his claim, as required by Rule 18(4). The plaintiff has failed to identify the specific allegations in the report to which he requires the second defendant to plead in accordance with Rule 18(4).

34] On behalf of the plaintiff the following arguments were advanced in opposition to these grounds. Firstly, the plaintiff contends that there is no basis alleged by Pfizer that the particulars of claim lack the averments to sustain a cause of action and this notwithstanding that not one of the plaintiff's claims against Pfizer is based on an agreement between him and Pfizer.

35] Secondly, the agreement of sale concluded between the plaintiff and the particular pharmacy is merely part of the facta probantia which the Court will have to take into consideration and does not form part of the facta probanda.

36] Thirdly, the terms of the agreement of sale concluded between the plaintiff and the particular pharmacy and the parties thereto, as opposed to the mere existence of such an agreement, counsel contended plays no role in the plaintiff's claim against Pfizer based on s 61 of the Consumer Protection Act 68 of 2008 or his claim based on delict nor his claim based on the development of the common law or his claim based on constitutional damages.

37] Further, that the plaintiff in any event alleges, where the agreement was concluded (Mbombela), who the parties were (the plaintiff and sister Susan Mocke), who represented the respective parties (plaintiff personally and Susan Mocke on behalf of the pharmacy), the subject matter of the agreement, i.e. the purchase and administration of the vaccine and the execution of the agreement, i.e. the administration of the vaccine and payment of same. Moreover, the document confirming the execution of the agreement is also attached to the particulars and nothing more is required.

38] It is on this basis that counsel submitted that nothing more was required to be pleaded and therefore that this court should find no merit in these grounds of complaint.

39] The sentiment expressed by the excipient, in respect of grounds three and seven, this Court agrees with, as Dr Edeling in his report clearly expresses an opinion in relation to the cause of health problems of the plaintiff subsequent to him receiving the specific Covid-19 vaccine.¹⁵

40] The opinion so expressed by Dr. Edeling, the second defendant is obliged to plead to all the facts, assertions and allegations in the report which has been “incorporated by reference,” and given the comprehensive nature of the report it would be impossible for the second defendant to do so in relation to a 62-page report which itself has referenced volumes of unidentified documents comprising hundreds of pages. The plaintiff as required by Rule 18(4) was required to plead material facts upon which he relies to enable the excipient to plead thereto. This the plaintiff has failed to do.

¹⁵ FA, Annexure A, Annexure “M”, para 1.1.

41] In addition thereto, the plaintiff in paragraph 23 of his particulars of claim, merely pleads that the agreement concluded between himself and the pharmacy was a transaction as envisaged in section 1 of the Consumer Protection Act, 68 of 2008 without specifically alleging whether the agreement so concluded was oral or in writing, who represented the parties, where the agreement was concluded, the relevant terms of the agreement relied upon and if the agreement was in writing there has been no copy annexed to the particulars of claim. What has been annexed is merely a document reflecting the execution of the agreement.

42] For the above reasons this Court concludes that there would also be prejudice to the second defendant in not having clear and concise pleadings to answer to, and as such on this ground also the plaintiff has failed to meet the requirements of Rule 18(4). Consequently, grounds three and seventh have merit.

The Fourth, Fifth and Sixth Ground

43] In relation to the fourth ground, the excipient avers that the plaintiff has failed to plead the basis that the allegations pertaining to the claim in delict and it does not sustain a cause of action.

44] In paragraph 37 of the particulars of claim the plaintiff formulated his claim in delict as follows:

“In the circumstances, the first and second defendants had a legal duty to inform the general public of all relevant information, including the side-effects of vaccine, with the view to enabling the general public to make an informed decision, i.e. a choice that individuals could make once they had all the information related to the decision topic, which involved analyzing potential outcomes, benefits and risks associated with each option before deciding which choice would be the best.”

45] The circumstances referred to in paragraph 37 above are to be inferred from what the plaintiff pleaded in paragraphs 1 to 19, with due regard to what is alleged in paragraph 36.

46] However, in paragraphs 1 to 19, the plaintiff does not allege a direct relationship between the plaintiff and the second defendant. The plaintiff merely alleges that the second defendant supplied the first defendant (per paragraph 7.1).

47] It is further also not alleged that the second defendant was a healthcare provider as contemplated by the National Health Act 61 of 2003 ("the NHA").

48] Section 6 of the NHA places the duty to inform a user on the health care provider and provides as follows:

"6 User to have full knowledge:

(1) Every health care provider ¹⁶ must inform a user of-

(a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;

(b) the range of diagnostic procedures and treatment options generally available to the user;

¹⁶ 'health care provider' means a person providing health services in terms of any law, including in terms of the-

- (a) Allied Health Professions Act, 1982 (Act 63 of 1982);
- (b) Health Professions Act, 1974 (Act 56 of 1974);
- (c) Nursing Act, 1978 (Act 50 of 1978);
- (d) Pharmacy Act, 1974 (Act 53 of 1974); and
- (e) Dental Technicians Act, 1979 (Act 19 of 1979).

(c) the benefits, risks, costs and consequences generally
associated with each option; and

(d) the user's right to refuse health services and explain the
implications, risks, obligations of such refusal. (own underlining)."

49] In this regard counsel for the excipient had argued that the plaintiff has failed to plead the explicit basis upon which the second defendant who is not a healthcare provider, is alleged to be under a legal duty to inform the general public, and it is therefore unclear on what basis the plaintiff imputes a legal duty on the part of the second defendant.

50] For this reason, counsel had argued that the plaintiff therefore pleads the conclusion of a duty without a factual basis for such duty.

51] Accordingly, the plaintiff's alternative claim in delict against the second defendant does not contain averments to sustain a cause of action against the second defendant in delict.

52] On behalf of the plaintiff, counsel appearing had submitted that there is no merit in this ground of exception.

53] This is so as the plaintiff counsel submitted that Pfizer produced the vaccine, that the vaccine was distributed to the general public for its intended use without warning of all its side-effects, that the vaccine was administered to the plaintiff as a result of which he was injured because the non-published side-effects materialized and that he would not have taken the vaccine if he had known of all its side-effects.

54] This submission made by counsel for the plaintiff is in direct contrast to the plaintiff's pleaded case in paragraph 15 of the particulars of claim, where the plaintiff had pleaded that it was unknown to him as to whether the vaccine administered to him was indeed produced by the second defendant.

55] Confirmation of such would have at the very least have been the factual basis for the legal duty relied upon by the plaintiff. Absent such factual basis and absent the second defendant falling within the definition of it being a healthcare provider, this Court must conclude that there is also merit in the fourth ground of complaint.

56] In relation to the fifth ground of complaint the excipient avers the plaintiff failed to plead on what basis there was a constitutional duty upon the second defendant not to perform any act that could infringe the plaintiff's rights. In this regard the excipient avers that the allegations relating to constitutional damages as pleaded do not sustain a cause of action as against the second defendant.

57] In paragraph 4.1 of the particulars of claim, the plaintiff alleges that the first defendant had a constitutional duty to "...protect, promote, improve and maintain the health of the population as envisaged in Section 27(2) of the Constitution read with Section 3 of the National Health Act", ¹⁷ but fails to plead on what basis there was a corresponding constitutional duty upon the second defendant.

¹⁷ 3 Responsibility for health:

(1) The Minister must, within the limits of available resources-

(a) endeavour to protect, promote, improve and maintain the health of the population;

(b) promote the inclusion of health services in the socio-economic development plan of the Republic;

(c) determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population;

(d) ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic as may be prescribed after consultation with the National Health Council; and

(e) equitably prioritize the health services that the State can provide.

(2) The national department, every provincial department and every municipality must establish such health services as are required in terms of this Act, and all health establishments and health care providers in the public sector must equitably provide health services within the limits of available resources.

58] In his particulars of claim, the plaintiff refers to his right to bodily and psychological integrity in section 12(2)(c) of the Constitution and the right not to be subjected to medical or scientific experiments without informed consent.

59] In paragraph 48 the plaintiff avers that the common law should be developed to hold the defendants strictly liable for any damages suffered in the circumstances set out in paragraphs 1 to 19. In other words, if the plaintiff cannot establish that the second defendant is strictly liable to him under the CPA, then the common law must be developed to establish strict liability against the second defendant.

60] On behalf of the excipient counsel had argued that a litigant seeking development of the common law must specify: (i) how or in what respect the common law is deficient; and (ii) in what respect the common law offends the spirit, purport and object of the Bill of Rights such that the common law requires development.

61] Herein, the plaintiff in his alternative claim had failed to aver how or in what respect the second defendant breached any constitutional duty owed to the plaintiff; nor has he pleaded in what respects the common law is deficient such that it would give rise to a claim as against the second defendant for development of the common law.

62] In respect of this ground of complaint, counsel for the plaintiff submitted that in terms of the common law there is no delictual claim based on strict liability of a manufacturer and that is the reason why the plaintiff contends that the common law should be developed to incorporate such a claim under the pleaded circumstances.

63] In any event counsel submitted that it would not be appropriate to deal with the merits of such a claim at the stage of exception.

64] To the stance adopted by counsel for the plaintiff, this Court holds a different view. The present exception has been raised before the plea of the defendant is formulated. It is therefore imperative that a claim faced by a defendant who is to plead thereto does not contain some defect or incompleteness which results in embarrassment to a defendant.

65] Support for this position is found in Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ¹⁸ where the Constitutional Court held with reference to Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd¹⁹; Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)²⁰ and Khumalo v Holomisa²¹ that:

“[31] The general approach to development of the common law under section 39(2) is that a court must: (1) determine what the existing common law position is; (2) consider its underlying rationale; (3) enquire whether the rule offends section 39(2) of the Constitution; (4) if it does so offend, consider how development in accordance with section 39(2) ought to take place; and (5) consider the wider consequences of the proposed change on the relevant area of the law.”

66] In Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ the Constitutional Court opted to decline the

¹⁸ CCT20/17) [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (31 October 2017).

¹⁹ [2015] ZACC 34; 2016 (1) SA 621 (CC).

²⁰ [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 40 and 80).

²¹ [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 41.

development of the common law as it then stood for a number of reasons including that:

“[96] First the issue was not pleaded and consequently was not determined by the trial court. Second, the Supreme Court of Appeal refused to entertain it on the ground that the point was not pleaded and did not form part of the case.”

67] For reasons extrapolated above, this Court agrees that this claim against the second defendant is vague and embarrassing, as it is premised upon the development of the common law in which the plaintiff seeks to hold the second defendant strictly liable, without the plaintiff having pleaded how and in what respect the common law is deficient and in what respect the common law offends the spirit, purport and object of the Bill of Rights such that the common law requires development.

68] In respect of the sixth ground of complaint, the excipient avers that the plaintiff's claim for constitutional damages lacks averments necessary to sustain a valid cause of action against the second defendant.

69] In this regard counsel for the plaintiff submitted that the plaintiff's claim is based on a constitutional remedy to be granted only in the event of it being found that plaintiff has no other adequate or appropriated remedy available in law. This much is alleged in paragraph 63 of the particulars of claim and as such he considered the stance adopted by counsel for the excipient as ill conceived.

70] The excipient however had argued that in paragraph 51 of the particulars of claim, the plaintiff avers a further alternative claim for constitutional damages.

71] In paragraph 53 the plaintiff further alleges that the defendants not only failed to realize the plaintiff's fundamental rights, but that their conduct constituted a refusal to realize such rights.

72] It is trite that constitutional damages are a punitive form of relief with the dual function of deterring future human rights violations and promoting constitutional values. They are sought primarily in the wake of egregious failures on the part of the State to fulfil its constitutional obligations, often leading to fatal consequences.²²

²² Fose v Minister of Safety and Security [1997] ZACC 6; 1997 (3) SA 786 (CC).

73] In this regard, the excipient had argued that there is no legal duty upon the second defendant to realize the plaintiff's fundamental rights enshrined in our Constitution and in order to sustain a claim for constitutional damages, the plaintiff is required to plead that there is no other adequate or appropriate remedy available to the plaintiff for the alleged breach.

74] The particulars of claim contain no averments to this effect and on this basis no cause of action has been pleaded against the second defendant.

75] As per the plaintiff's pleaded case per paragraph 54, the plaintiff alleges heads of damage which, provided all the elements of a delictual claim averred against the second defendant are proven, would constitute damages recoverable at common law. The plaintiff so the excipient contends, makes no distinction in his particulars of claim between what would constitute delictual damages recoverable at common law and otherwise constitutional damages. They are pleaded as being identical and on this basis also the excipient avers that the plaintiff's claim for constitutional damages lacks averments necessary to sustain a valid cause of action against the second defendant.

76] This complaint with reference to how the plaintiff's claim in respect of constitutional damages has been pleaded, this Court is of the opinion also has merit and consequently, it calls for it to be amended.

Rule 30 Application

77] Flemming J described the object of rule 30(1) as follows:

"I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed."²³

78] Rule 30(3) contemplates a two-stage process. A court must first satisfy itself that the proceeding or step is irregular or improper. If it is so satisfied, it has the wide power²⁴ to set the proceeding aside in its entirety or in part, grant leave to amend or make any order as it deems fit.

²³ SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O) at 333 G-H.

²⁴ Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others (CCT 54/22) [2023] ZACC 2; 2023 (4) BCLR 361 (CC) (24 January 2023) at para [26].

79] Before this Court there is certainly extensive overlapping with the relief sought in the Rule 30 application and that sought in the Rule 23 application. As the excipient has persuaded this Court to uphold the exception with the resultant consequence of affording the plaintiff an opportunity to amend the particulars, I deem it superfluous to rule on the merits of the Rule 30 application. Consequently the Rule 30 application is postponed *sine die*.

ORDER

80] In the result the following order is made:

80.1 The Exception is upheld.

80.2 The Rule 30 Application is postponed *sine die*.

80.3 The Plaintiff's particulars of claim is set aside.

80.4 The Plaintiff is ordered to amend his particulars of claim within 10 days of the date of this order, failing which the second defendant may apply to court for a dismissal of the plaintiff's claim.

80.5 The Plaintiff is ordered to pay the second defendant's costs on scale C for Senior counsel and scale B for Junior counsel, in respect of the Rule 23 application.

C. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES

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Date of Hearing: 11 November 2024

Date of Judgment: 20 October 2025