

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 21/41398

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	<u>4 June 2026</u>
DATE	SIGNATURE

In the matter between:

NICHELLE MOHAMMED

Plaintiff / Applicant

and

DR ABDUL JALIL MAHMOOD

First Defendant / Respondent

**AHMED KATHRADA PRIVATE
HOSPITAL (PTY) LTD**

Second Defendant / Respondent

JUDGMENT

DJ Smit, AJ

Introduction

- [1] This is an opposed application to amend particulars of claim.
- [2] The plaintiff (*Ms Mohammed*) sued the first defendant (*Dr Mahmood*) and the second defendant (*the hospital*) on 3 September 2021. Ms Mohammed alleges

that the defendants caused her bodily injury with the result that she suffered general damages (in the form of pain and suffering and various other pleaded sequelae) and past hospital and medical expenses.

- [3] Despite the passage of time since the summons was served, the hospital has not pleaded. It has raised objections against the particulars of claim, and attempts to amend it, four times. This is the first time that the hospital's objections serve before a court.
- [4] The hospital raises eight objections against the most recent iteration of Ms Mohammed's proposed amendments. I deal with each of them after setting out the relevant allegations in the particulars of claim (as it is sought to be amended).

Ms Mohammed's allegations

- [5] Ms Mohammed pleads (in her particulars of claim as sought to be amended) that:
- a. During or about 19 November 2014, she developed persistent abdominal pain, nausea and vomiting.
 - b. She presented herself at the hospital's casualty department, which admitted her as an inpatient.
 - c. The hospital, acting through its nursing staff, selected or assigned Dr Mahmood, a surgeon, to be her treating medical practitioner.
 - d. The hospital has a duty to ensure that the medical practitioner so appointed or assigned has the necessary skills and competencies to perform the medical procedures diligently and with care and skill.
 - e. Dr Mahmood diagnosed her with cholelithiasis (gallstones) and advised her to receive an endoscopic retrograde cholangiopancreatography.
 - f. She underwent this procedure after which Dr Mahmood advised her to undergo surgery (in the form of a laparoscopic cholecystectomy, i.e. removal of the gallbladder).

- g. She underwent the surgery. The hospital's nursing staff advised her that Dr Mahmood successfully performed the surgery, but that she had to be admitted to intensive care because the surgery had to be more invasive than initially thought and had resulted in excessive internal bleeding.
- h. After she was discharged, her abdominal pain persisted, which Dr Mahmood and the nursing staff attributed to the bleeding.
- i. She suffered various further sequelae which are not relevant for present purposes. In 2019, a physician established that her gallbladder had not been removed but had been damaged by the surgery which necessitated further treatment.
- j. Dr Mahmood and the nursing staff failed in their legal duties towards her in various ways. Particularly relevant, for present purposes, Ms Mohammed alleges that the nursing staff had to conduct the nursing care with the necessary care and skill and had to disclose to Ms Mohammed that her surgery was unnecessary and unsuccessful, which they did not do.

First objection: the citation of the hospital

- [6] The hospital objects against the way in which it has been cited. Ms Mohammed alleges that it is "*a duly registered private healthcare company, registered as such in terms of the National Health Act, 61 of 2003*".
- [7] The essence of the objection is that, legally speaking, private hospitals are not "*registered as such*" in terms of the National Health Act. The hospital submitted that private hospitals are inspected and licenced, but that this is a provincial competency. No register for private hospitals exists in terms of the National Health Act. The licencing of private hospitals is intended to ensure that the infrastructure of a hospital complies with the standards of a healthcare facility. This licencing is not a "*registration*" per se, and the private hospital industry in South Africa is an unregulated sector.

- [8] To assess this objection, as well as those that follow, one has to bear in mind the essential principles applicable to applications to amend and exceptions. They are, insofar as is relevant to this matter, as follows:
- a. The general principle is that amendments should normally be allowed unless the application to amend is *mala fide*, or unless such amendment would cause an injustice to the other side which cannot be compensated by costs.
 - b. The court will not allow an amendment to a pleading if the pleading as amended would be excipiable. But, an amendment will only be refused on the ground that the amended pleading would be excipiable if it is clear that the amendment would obviously render the pleading excipiable. If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.¹
 - c. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the court hearing the application for amendment. If the pleading is said to become excipiable on the basis that it is vague and embarrassing, the onus is on the excipient to show both vagueness amounting to embarrassment and to embarrassment amounting to prejudice. Where the excipient relies on embarrassment, such must be demonstrated by having regard to the pleadings only. The attack must arise from within the four walls of the pleading which is the source of the complaint and what is more, such embarrassment must not be frivolous, it must be substantial. Therefore, the ultimate test on whether an exception should be upheld is whether the excipient is prejudiced.²
 - d. Particulars of claim are excipiable as being vague and embarrassing only if the ground of objection goes to the root of the cause of action.³ They are

¹ *Crawford-Brunt v Kavnat* 1967 (4) SA 308 (C) at 310D-311A.

² *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) paras 5-6.

³ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902F-G.

excipiable on the ground that the pleadings do not disclose a cause of action only if the law affords no remedy even if the pleaded facts are true.⁴

[9] The hospital may well be right that a portion of its citation is poorly pleaded, incorrect in fact or even wrong in law. I express no view on that, as it may be an issue for another court. But even if it is wrong in fact or law, what follows from it? The hospital knows that it is it being cited. It can plead to the citation. It is not prejudiced in the way contemplated by the law on pleading. The wrong citation (if it is wrong) does not affect the cause of action, let alone go to its root or render it bad in law.

[10] Thus, the first objection has no merit.

Second objection: prescription

[11] The second to fifth objections all concern the introduction of paragraph 5.5 into the particulars of claim. Therefore, I quote it in full:

"5. During or about 19 November 2014, the plaintiff:

5.5 Presented herself to the casualties' department of the second defendant where the plaintiff was admitted to the hospital as an in-patient. The second defendant through its nursing staff selected and/or assigned the first defendant, to be the medical practitioner, to provide medical treatment and care to the plaintiff. The second defendant had a duty to ensure that the medical practitioner so appointed and/or assigned, has necessary skills and competencies to diligently perform the medical procedure with care and skill." (emphasis added)

[12] The hospital argues that the underlined portion of the pleading introduces a new cause of action which has become prescribed.

[13] This objection is fundamentally misconceived. Regardless of whether the amendment introduces a new cause of action (which I doubt, but find it

⁴ *Trope v South African Reserve Bank* 1993 (3) SA 264 (A).

unnecessary to decide), the test whether an amendment is objectionable based upon the introduction of a prescribed claim is not whether the amendment introduces a new cause of action, but whether it claims for a new debt (as that term is used in the Prescription Act, 68 of 1969).⁵

[14] Ms Mohammed still claims for the same debt before and after her amendment, i.e. general damages and past hospital and medical expenses flowing from her treatment by Dr Mahmood and the hospital in late-2014. There can be no question of prescription on this basis.

[15] Thus, the second objection is unmeritorious.

Third objection: lack of particularity

[16] The hospital complains that Ms Mohammed did not specify in paragraph 5.5 who admitted her. The allegation is that her pleading lacks the necessary particularity required by Rule 18(4), which specifies that:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[17] The fact that Ms Mohammed did not specify who admitted her may be due either to the fact that the identity of the person does not form a material part of her cause of action; or that she does not know and hopes that discovery will assist her, or both. In my view, the omission of the identity of the person who admitted her certainly does not leave her claim inchoate or incomprehensible. The hospital has not made out a case that she was obliged to specify the identity to complete her cause of action.

[18] The allegation under discussion is simply that she was admitted as an in-patient. The hospital is perfectly capable of pleading thereto: either she was admitted, or she was not. If it is part of the hospital's defence that an independent medical practitioner for whose actions the hospital takes no responsibility admitted her

⁵ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F–G.

(as is foreshadowed in the hospital's heads of argument), that is a matter which it may plead, and which will form part of the evidence at trial.

[19] The third objection has no merit either.

Fourth objection: Unspecified legal duty

[20] The hospital in argument laid specific emphasis on the fourth objection, which concerned the allegation that its the nursing staff "*selected and/or assigned*" Dr Mahmood to Ms Mohammed and had a "*had a duty to ensure that the medical practitioner so appointed and/or assigned, has the necessary skills and competencies to diligently perform the medical procedure with care and skill*".

[21] The hospital argues that its nurses do not admit patients or select treating medical doctors; other doctors for whose actions the hospital takes no responsibility do so. This is eminently an issue for a plea. It is not a matter of law (which may be susceptible to exception) but a matter of fact – what in fact happened when Ms Mohammed was admitted and Dr Mahmood attended to her.

[22] It could be true that nurses are not supposed to admit patients, or to "*select*" or "*assign*" medical practitioners to patients, but this could be (and what is pleaded to be) what in fact happened. The court does not know and has not conducted a trial. The hospital cannot object on the basis that the facts pleaded by Ms Mohammed are either untrue or are not what is "*supposed to happen*" – as I emphasise above, like an exception, an objection to an amendment is disposed of within the four corners of the pleading against which objection is taken.

[23] The hospital also argues that there is no legal duty on a hospital to ensure that a medical practitioner assigned (by its nursing staff) to a patient has the necessary care and skill, (perhaps) beyond being registered with the necessary regulator.

[24] There are several answers to this objection:

- a. The "*duty*" pleaded by Ms Mohammed is not of the same order as the "*legal duties*" raised in cases like *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) which the hospital raised in its heads and in argument. The legal duty raised in *Two Oceans Aquarium*,

and in similar cases, is the legal duty not to cause pure economic loss. It is trite that the law does not impose liability for pure economic loss absent facts which illustrate policy reasons to hold a defendant liable notwithstanding the fact that pure economic loss is concerned. Personal injury (which is what Ms Mohammed pleads she suffered) is not the same. If a defendant caused personal injury, as the hospital is said to have done, that is *prima facie* wrongful. Absent circumstances like self-defence or necessity, no policy considerations arise which would exclude liability if the other elements of a delict (*culpa*, causation, and loss) are present.

- b. As I read it, the duty pleaded by Ms Mohammed is not a duty in the abstract. It is a duty said to arise from the preceding pleaded facts, including that the nurses admitted her and selected the medical practitioner. Although this was not fully debated before me, and I therefore express no firm view on it, it seems that – at least notionally – a duty of appropriate admission and selection could arise if the facts pleaded by Ms Mohammed are true.⁶
- c. I am not convinced that the pleading of this “*duty*” would be excipiable in any event, given the principles set out above. It does not seem to me to be the only allegation on which the alleged liability of the hospital to Ms Mohammed is based; in argument, counsel for Ms Mohammed laid much more emphasis on the hospital’s alleged duty (through its nursing staff) to inform Ms Mohammed of the allegedly unsuccessful surgery. Thus, such an exception would not go to the root of the cause of action, and neither would it concern the legal validity of the (whole of) the cause of action.

[25] The misconceived approach to this objection (and others) appears from the hospital’s view (expressed in counsel’s heads of argument) that:

⁶ South African law in limited circumstances permits liability that flow directly from the actions of third parties if the defendant’s actions formed part of a sufficiently-proximate causal chain causing the damages and were guilty in themselves: see e.g. *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA); *Holtzhausen v Cenprop Real Estate (Pty) Ltd* 2021 (4) SA 221 (WCC); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

“At the heart of this opposition, is the Plaintiff’s fundamental misunderstanding of the private healthcare system in South Africa, and the roles and responsibilities of the First Defendant, the surgeon, an independent practitioner vis-à-vis the roles and responsibilities of the Second Defendant, a hospital where the patient was admitted, and which is legally only allowed to employ the nursing and auxiliary staff to assist in the running of the hospital.”

“These fundamental misunderstandings have been incorporated into the Plaintiff’s particulars of claim and which render them objectionable and will be perpetuated in the amended particulars of claim, should this amendment succeed.”

[26] The hospital may be right or wrong that Ms Mohammed fundamentally misunderstands the private healthcare system and the way in which hospitals, nursing staff and medical practitioners are supposed to interact. But that does not mean an objection lies at the level of pleading. These “*misunderstandings*” (if they are such) appear to me generally to be issues of fact, to be resolved at trial. This appears most obviously from the fact that the hospital attempted to introduce a series of propositions of fact in its heads of argument in order to correct what it perceives Ms Mohammed’s misunderstanding to be. Examples are the following submissions:

“The doctors who treated the patient at the Hospital, are independent practitioners who operate independently of the Hospital and are solely responsible for the surgeries and treatments they render to their patients as well as the medical services within the Casualty.”

“The Second Defendant as the operator of a hospital, does not make clinical decisions about the care of a patient, specifically was not responsible for the decision to admit the patient or any aspect of the surgical management of the patient.”

[27] These submissions may well be correct. But they fall to be proven at trial.

[28] The fourth objection has no merit.

Fifth objection: mutually destructive versions

[29] The hospital complains that there is a fundamental contradiction between the allegation in paragraph 5.5. of the particulars of claim (as it is to be amended) that the hospital had a duty to ensure that Dr Mahmood “*has necessary skills and competencies to diligently perform the medical procedure with care and skill*” and the allegation earlier that Dr Mahmood is a specialist rendering services for his own account.

[30] This objection fails for the reasons set out above: it is not beyond the realm of possibility, for example if the pleaded facts regarding “*selection*” or “*assignment*” are true, that the hospital could incur liability based upon its own negligence (assuming that such negligence is proven).

Sixth objection: conflation of duties of the hospital and the medical practitioners

[31] This objection was taken to paragraphs 11, 13, 14 and 15 of the particulars of claim (as they are to be amended). In these paragraphs, Ms Mohammed describes what she perceives to be the duties of Mr Mahmood and the nursing staff to treat her (medically, speaking) with the necessary care, skill and diligence.

[32] The hospital complains that these paragraphs in some respects conflate Dr Mahmood’s duties with those of the nursing staff. It submits, based on the relevant legislation and ethical codes, that the duties of the nursing staff differ from that of the medical practitioner.

[33] As a matter of law, it may well be true that nursing staff is not supposed to engage in certain activities (which may be reserved for medical practitioners). But that does not mean that, on the facts, they did not do so. Whether or not they did, and what consequences may arise from that, is a matter for trial.

[34] Further, Ms Mohammed clearly distinguished in the pleading between Dr Mahmood’s and the nursing staff’s respective duties to inform her, post-operatively, of what she perceives to be the unsuccessful nature and the adverse outcomes flowing from the surgery. Again, it is no answer to say that the nursing

staff's ethical code prohibits such discussions (if indeed it does). For example, if the nursing staff did inform her of certain repercussions, as a matter of fact, but misstated or omitted crucial information, it is not beyond the realm of possibility that a court could impose liability despite the ethical considerations highlighted by the hospital. Again, I express no firm view on that issue.

[35] For this reason, the sixth objection also fails.

Seventh objection: "obscure legal duty"

[36] For much the same reasons as set out above, the hospital specifically takes issue with Ms Mohammed's pleading that the nursing staff failed to inform her whether the surgery was conducted with the necessary diligence, skill, care and competence; and to inform her of its (allegedly) unsuccessful outcome.

[37] The hospital takes the view that there is no such duty on the nursing staff, for ethical and factual reasons, and that there is no causal connection between the failure to inform and Ms Mohammed's injury.

[38] I express the view above that such a duty could notionally arise, despite the ethical constraints mentioned by the hospital, if other allegations made by Ms Mohammed are true. Further, Ms Mohammed has pleaded a notional causal connection between the failure to inform and the injury in that she pleaded a continuation of her pain and discomfort between her discharge from the hospital in 2014 and her (putatively correct) diagnosis in 2019, which could have been prevented had she possessed what she describes as the true information.

[39] For this reason, the seventh objection lacks merit.

Eighth objection: lack of particularity regarding damages

[40] The essence of the eighth objection is that Ms Mohammed pleaded globular amounts in respect of medical and hospital expenses; and general damages. This is said to be inconsistent with the provisions of Rule 18(10):

"(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum"

thereof: Provided that a plaintiff suing for damages for personal injury shall specify his or her date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for —

(a) medical costs, hospital costs and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of —

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars) and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.”

[41] I do not think the way in which Ms Mohammed pleaded her injury and damages is ideal and, arguably, it is inconsistent with Rule 18(10). But this is not an application in terms of Rule 30(1) or 30A relating to irregular proceedings or non-compliance with the rules. The touchstone remains whether the hospital is prejudiced by the amendment.

[42] As Ms Mohammed pointed out, she has discovered and also annexed to her founding affidavit in this application, extensive medical records including her medical and hospital expenses. These will enable the hospital to discern and distinguish between her medical and hospital expenses, besides other information regarding her condition and treatment.

[43] In relation to general damages, they are necessarily more impressionistic. In addition, they will need to be particularised in expert reports to be delivered before trial. They are currently pleaded at a level which is understandable at the stage of formulating a claim. And they are not entirely devoid of detail either: Ms Mohammed pleads, for instance, that she suffered "*continuous abdominal pain and discomfort associated with the unnecessary surgery and the ill-advised subsequent treatment...*" and "*scarring being an unsightly keloid scar of the plaintiff's abdomen measuring 10 x 2 cm in diameter*".

[44] Thus, I conclude that the eighth objection also fails.

Costs

[45] Ordinarily, a party effecting an amendment of its pleadings is liable for the reasonable costs of the amendment. In the event of opposition, however, the appropriate costs order depends (among other potentially relevant factors) on whether the opposition was reasonable and not vexatious or frivolous. Costs may be awarded against the party opposing the amendment if the objection was "*devoid of substance*", "*raised an issue which fell to be decided on the facts of the case*", "*had no prospects of success*" or was "*unwarranted*".⁷

[46] For the reasons set out above, the hospital's opposition – although not frivolous or vexatious – was misconceived in principle and ill-advised, so that a costs order against it is warranted. Both counsel agreed that scale B would be appropriate.


Order

[47] I make the following order:

- a. The plaintiff is granted leave to amend her particulars of claim in accordance with her notice of intention to amend dated 25 October 2022.
- b. The plaintiff is directed to effect such amendment by serving and filing the amended pages of her particulars of claim within 10 days of the granting of the above order.

⁷ See e.g. *Gcanga v AA Mutual Insurance Association Ltd* 1979 (3) SA 320 (E) at 328F-329B.

- c. The second defendant is ordered to pay the costs of this application, including the costs of counsel on scale B.



DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 6 March 2026

Date of judgment: 4 June 2026

For the Applicant:

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For the Respondent:

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