

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, THOHOYANDOU.

CASE No. 1541/2020
1542/2020
1543/2020
1637/2020
1638/2020

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
01.09.2026 DATE..... SIGNATURE..... 	

In the matter between:

SOUTH AFRICAN CUSTODIAL MANAGEMENT (PTY) LTD

APPLICANT

And

MINAH JIYANE

FIRST RESPONDENT

ERIC ELMON JIYANE

SECOND RESPONDENT

GLADYS JIANE

THIRD RESPONDENT

MPEKE MORE

FOURTH RESPONDENT

KHUMBULANI RADEBE

FIFTH RESPONDENT

LUBABALO MDODA

SIXTH RESPONDENT

SIVO MOLO MOYO

SEVENTH RESPONDENT

SABELO DLAMINI

EIGHTH RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10:00 on 01 September 2026.

JUDGMENT

SEMENYA DJP.

- [1] The first, second and third respondents, collectively referred to as Jiane plaintiffs, are plaintiffs in case No. 1541/2020 in the main action. The fourth and fifth respondents (collectively referred to as Radebe and, an More plaintiffs) are plaintiffs in case No. 1542/2020. The sixth respondent (Mdoda) is plaintiff in case No. 1543/2020. The seventh respondent (Moyo) is the plaintiff in case No.1638/2020.
- [2] The plaintiffs have all sued South African Custodial Management (Pty) Ltd (SACM), a private company that operates and manages correctional facilities through private-public partnership with South African Department of Correctional Services, for damages arising out of separate incidents that allegedly took place within at Kutama Sinthumule Correctional Centre. SACM took exceptions against each of the plaintiffs' particulars of claim in all five matters on the grounds that they do not disclose the cause of action. The exceptions have been consolidated.
- [3] The plaintiffs in the Jiane matter allege that their brother, Siyabonga Siyani (the deceased) was incarcerated at Kutama Sinthumule Correctional Centre during October 2020. Siyani in custody at that Centre. The allegations in the particulars of claim are that the deceased was circumcised at the Centre's health facility on 14 October 2020. On 27 October 2020, the deceased was hospitalized when he

experienced excruciating pain and bleeding emanating from the effect of circumcision. He was discharged two days thereafter. On 30 October 2020 the deceased complained about the persisting pain which caused his co-inmates, Radebe and More, to call SACM employees by pressing the intercom button. The employees failed to respond to the calls and to give the deceased the necessary medical attention. The employees arrived after his passing. The deceased later died in the cell in the presence of Radebe and More. Radebe and More were removed from the cell to be returned shortly thereafter. The two are the first people to tell the Jiane plaintiffs about the deceased's passing.

- [4] The plaintiffs in Jiane, Radebe and More cases aver that they suffered emotional trauma, shock, depression, humiliation, degradation, contumelia and constitutional damages as a result of SACM's failure to provide the deceased with prompt access to medical attention, proper medical treatment and to inform them forthwith about the death of the deceased.
- [5] Radebe and More allege that they were made to see the deceased's sufferings and were frustrated by SACM employees' failure to timeously respond to their calls. They further aver that the conduct of SACM violated their right to dignity and a healthy environment. SACM's conduct further caused emotional stress and contumelia.
- [6] Mdoda was serving a prison term at Kutama Sinthumule as of the 20 August 2020. He alleges that he was assaulted by SACM employees for refusing to be relocated to Block H. He was undressed and assaulted further while in a naked state. He

avers that he sustained grievous injuries as a result of the assault. He is claiming damages for contumelia, pain and suffering and constitutional damages.

- [7] Moyo was incarcerated at Kutama Sinthumule Correctional Centre as of 29 October 2020. He alleges that on 27 October 2020 he was assaulted by employees of SACM for requesting permission to see officials from the Department of Correctional Services and a psychologist. He claims damages for pain and suffering, constitutional damages, contumelia and unlawful detention.
- [8] Dlamini avers that he was serving a prison term at Kutama Sinthumule as of 03 January 2017. On that date and again on 6 May 2020, he was assaulted by employees of SACM. He was thereafter isolated from other prisoners for a period of 49 days after the assault.
- [9] SACM has taken an exception to the claims for constitutional damages in all five claims on the basis that (i) the claim, as pleaded, does not exist in law and is not legally competent, and (ii) the particulars of claim do not sustain a cause of action for constitutional damages. The exception taken against the claim for contumelia in respect of Jiane and Radebe and More is that the plaintiffs failed to make out a case for the requirements of wrongfulness and causation. SAMC further argue that the plaintiffs failed to set out facts to sustain the cause of action for defamation in support of the claim for infringement of their right to dignity. In as far as the claim for burial costs, SACM contends that the Jiane plaintiffs failed to plead the basis on which they were responsible for the burial costs of the deceased. The exception

against the Dlamini and Moyo case relates to the claim for constitutional damages only.

[10] In the Dlamini case, SACM contends that the plaintiff pre-empted the raising of a special plea of prescription. This is so in that Dlamini pleads that he was assaulted in 2017. Dlamini pleads further that he gained knowledge that SACM is the joint debtor with the prison officials when he consulted with his attorneys of record on 12 November 2020. He further avers that prescription was interrupted by the threats made by SACM employees that he will be poisoned should he lay charges against them.

[1] In considering an exception whether the particulars of claim do not sustain a cause of action, the court must assume that the averments made in the plaintiffs' particulars of claim are true.¹

[12] The plaintiffs in all five cases plead constitutional damages on top of common law damages. They contend that constitutional damages will best afford them the protection of the enforcement of their constitutionally entrenched rights. Plaintiffs further plead that common law damages for emotional shock and trauma '*will not be broad enough to encompass 'appropriate relief' to remedy the violation of the plaintiffs and the deceased and other prisoners who may find themselves in similar position*'.

[13] SACM contends that where a litigant has an action in delict arising out of an infringement of a constitutional right, compensation for that infringement in the form

¹ Living Hands (Pty) Ltd v Ditz 2013 (2) SA 368 GJ at 374G

of delictual damages would suffice. SACM relies on **Fose v Minister of Safety and Security**² and in **Komape and Others v Minister of Basic Education and Others**³ where it was held that the award of damages arising out of delict or common law will be a powerful vindication of the constitutional rights and would require no further vindication by way of an additional award of constitutional damages. The allegations made by the plaintiffs in the five cases will, if proven, lead to an award for general damages that would, as stated in Fose and Komape, vindicate the plaintiffs' rights. The courts in both cases found that an award for constitutional damages over and above these damages would amount to punitive damages.

- [14] The plaintiffs in all five cases failed to plead facts which justify punitive damages. They simply aver that common law damages will not be enough compensation for the harm that they allegedly suffered as a result of SACM conduct. For this reason, I find that the exception taken against the claim for constitutional damages should be upheld on that basis.
- [15] SACM contends that the plaintiffs in Jiane and Radebe and More cases failed to plead, first, a legal duty imposed on SACM by the constitution or a statutory provision in relation to them. Second, facts from which it can be inferred that the relationship between the plaintiffs and SACM gives rise to a legal duty owed to the plaintiffs by SACM in relation to the treatment of the deceased. SACM contends that the plaintiffs rely on an omission as opposed to positive conduct and that in such a case, the plaintiffs are required to plead that SACM owed a legal duty to the plaintiffs.

² 1979 (3) SA 786 (CC)

³ [2019] ZASCA 129

- [16] SACM contends that the plaintiffs are required to plead and prove that SACM acted wrongfully. In relation to Jiane, Radebe and More cases, plaintiffs plead that section 12 of the Correctional Services Act⁴ create a legal duty on SACM to provide medical care on the deceased and the plaintiffs. The plaintiffs, on the other hand, contend further that in terms of section 35(2)(e) of the Constitution, SACM has a duty to detain the deceased, Radebe and More in a manner which is consistent with human dignity. The plaintiffs further plead that SACM's conduct of discharging the deceased from the medical center and of failing to provide medical treatment or to urgently transfer Radebe and More from the cell where the deceased died to another cell was *prima facie* wrongful. It is further alleged that SACM had a legal duty to provide the deceased with medical care.
- [17] Section 12 of the Correctional services Act provides that the Department of Correctional Services must provide, within its available resources, adequate health care services, based on the principle of primary health care, in order to allow every inmate to lead a healthy life. Subsection (2) provides that every inmate has the right to adequate medical treatment, but no inmate is entitled to cosmetic medical treatment at State's expense.
- [18] SACM correctly argued that the provisions of section 12 of the Correctional Services Act and 35(2) (e) of the Constitution, are not available to the plaintiffs in Jiane case in that all three plaintiffs were not inmates at Kutama Sinthumule Centre. SACM bore no duty to provide medical treatment to them at the Department's expense. SACM therefore owed no legal duty to detain the Jiane plaintiffs in conditions that

⁴ 111 of 1998

are consistent with human dignity, as pleaded in this case. SACM's submission that the court cannot find that it acted wrongfully as there is no legal duty that rests on it to act in terms of section 12 of the Correctional Services Act or 35(2) (e) of the Constitution in relation to Jiane plaintiffs is valid. The exception therefore stands to be upheld on the basis that the plaintiffs failed to plead sufficient facts that shows that SACM's conduct was wrongful.

[19] In contrast to the Jiane plaintiffs, the right to be detained in an environment that is consistent with human dignity and to be provided with adequate medical treatment is available to Radebe and More. SACM contends that even if it can be inferred that the relationship between the plaintiffs and SACM gives rise to a legal duty owed to plaintiffs, there are compelling public policy considerations that trump any right to emotional well-being enjoyed by plaintiffs.

[20] The Supreme Court of Appeal held in **Nohour v Minister of Justice and Constitutional Development**⁵ that:

"[14] Wrongfulness is an essential element in delict. The Constitutional Court held in this regard that the element of wrongfulness acts 'as a brake on liability' and that conduct is not to be regarded as wrongful if public or legal policy considerations determine that it would be 'undesirable and overly burdensome to impose liability'. In *Le Roux and Others v Dey*, the Constitutional Court confirmed that the criterion of wrongfulness depends on a judicial determination as to whether it would be reasonable to impose liability on the defendants, which reasonableness has nothing to do with the

⁵ [2020] ZASCA 27 at 14

reasonableness of the defendant's conduct or omissions. Therefore, even if it were to be found that there was negligence herein, the mere fact of such negligence may not make the omission wrongful. In order to prevent the 'chilling effect' that delictual liability in such cases may have on the functioning of public servants, such proportionality exercise must be duly carried out and the requirements of foreseeability and the proximity of harm to the action or omission complained of, should be judicially evaluated."

- [21] SACM contends that factors to be taken into consideration in this case are (a) the interest of the public in having resources spent on effective custodial management rather than on litigants who claim emotional harm, not because of any positive conduct against them, but on omissions in relation to a sibling who is a prisoner or a fellow prisoner (I will call them secondary victims); (b) that awards of compensation for emotional harm and contumelia would have chilling effect on the functioning of SACM, because it would deplete resources that could otherwise be spent on effective custodial management; (c) a facility management entity, such as SACM would be unduly and unreasonably burdened and hamstrung in its operations if it were to have to guard against a legal duty owed to co-inmates and siblings of prisoners who die in their custody and arising out of omissions relating to such prisoners; and (d) any conduct that may have the effect of triggering emotional harm or contumelia, would have to be avoided in order to escape liability, which is impractical and desirable, particularly with regard to prisons.

[22] In **Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng**⁶ it was held that:

“[22] Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful. However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property– the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not *prima facie* wrongful. Our law of delict protects rights, and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.”

[23] The plaintiffs’ averments that the conduct of SACM in Jiane and Radebe and More cases is *prima facie* wrongful is without merit. There is no allegation in the particulars of claim that the plaintiffs suffered physical harm in their persons or to any of their properties. In the circumstances of this case, where no physical harm was suffered, wrongfulness cannot be inferred.

[24] In line with Nohour, above, it is my view that it would be unreasonable to infer wrongfulness on the part of SACM simply because the next of kin was informed about the death two days after the occurrence. Furthermore, in Fose, the court discouraged a situation where government entities are burdened with damages

⁶ [2013] ZASCA 161 (26 November 2013)

arising from the performance of their functions as this will have the effect of depleting the minimal funds allocated to them. The Constitutional Court in Fose warned against this situation.

[25] Counsel for the plaintiffs contends that SACM failed to raise a special plea of prescription and that on that basis, this court should find that Dlamini's 2017 claim has not prescribed. SACM contends that Dlamini pleaded his case in such a way that prescription was pre-empted. On what a defendant faced with such pre-emption should do, the court in **Sanan v Eskom Holdings Ltd**⁷ held that:

"[20] In regard to the question of a defence being either an exception or a special plea Herbstein and Van Winsen, Fifth Edition *supra* at 599 and 600 has the following to say:

"The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any fresh matters. Special pleas, on the other hand, do not appear *ex facie* the pleadings. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from

⁷ 2010 (6) SA 368 at para. 20

outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas the special plea is appropriate when it is necessary to place facts before the court to show that there is a defect. The defence of prescription appears to be an exception to this rule for it has been held that that defence should be raised by way of special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption.”

- [26] The issue of prescription in this case appears *ex facie* the plaintiffs' particulars of claim. SACM was within its right to address it by way of an exception. I agree with SACM that Dlamini has raised issues that were supposed be addressed in replication in his particulars of claim. In so doing, he anticipated a special plea of prescription. SACM was, in line with Sanan, entitled to do what it did in this case. It was not necessary for it to raise a special plea of prescription.
- [27] Regarding interruption of prescription, SACM contends that section 14 (1) of the Prescription Act, 1969, lays down circumstances that interrupt the running of prescription. It provides that prescription is interrupted by the express or tacit acknowledgment of liability by the debtor. SACM contends that the pleaded facts on prescription, being that Dlamini did not claim timeously because he was threatened with violence by the employees of SACM is not a condition that interrupts the

running of prescription. The exception on prescriptions stands to be upheld on this basis.

- [28] The plaintiffs plead that *"The defendant is liable for the damages suffered by the in terms of common law duly developed in terms of section 39 (2) of the Constitution. The Defendant has not paid any of the plaintiffs damages the have suffered."* SACM contends, with reliance on **Mohun and Another v Phillips NO obo Shearer and Another**⁸ that there is no deficiency in the common law remedies requiring any further development r the provision of constitutional damages in addition to common law remedies. The SCA in Mohun referred to the Constitutional Court decision in *Mighty solutions CC t/a Orland Service Station v Engen Petroleum Ltd and Another*⁹ where it is laid down that the court must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and objects of the bill of Rights and thus requires development before it can proceed to develop common law.
- [30] The plaintiffs contend that SACM did not take an exception to the claim for the development of the common law and cannot raised it by way of argument. Be that as it may, the principle laid down in *Mighty Solutions* stands, and unless the plaintiffs amend their particulars of claim accordingly, there will be no cause to develop the common law.
- [31] On the claim for funeral expenses, SACM contends that the particulars of claim fail to allege facts on why the plaintiffs in *Jiane* were responsible funeral expenses. The plaintiffs simply aver that they had to incur funeral expenses as a result of SACM

⁸ (1219/2021) [20222]] ZASCA 186 (22 December 2022)

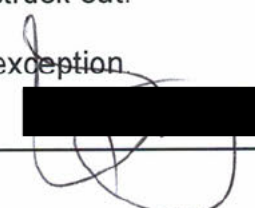
⁹ 2016 (1) sa 621 cc

wrongful, alternatively, negligent conduct. I agree that the facts as, pleaded, do not disclose the cause of action on funeral expenses claim.

[32] On the issue of costs, SACM contends that plaintiffs' pleaded facts do not raise constitutional issues and, on this basis, Biowatch is not applicable. The plaintiffs relied on the Bill of Rights as the basis of some of the claims. The main consideration in this case is whether they pleaded is not whether the claims will succeed at this stage. The question is whether the pleaded facts disclose a cause of action. I am of the view that this is a case where each party should bear its own costs.

[33] In the result the following order is made:

1. The defendant's exception in the consolidated cases is upheld.
2. The plaintiffs' particulars of claim are struck out.
3. Each party is to pay own costs of the exception.



MV SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION

APPEARANCES:

For the Applicant: TJ Bruinders SC with Yusur Peer

Instructed by: Norton Rose Fulbright South Africa Inc.

For the Respondents: SO Ravele

SO Ravele Attorneys

Date heard: 13 May 2026

THOHOYANDOU HIGH COURT