



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: No

Date: 28 August 2026

Signature: 

CASE NO: 43868/2018

DATE: 28 August 2026

In the matter between:

THABO SENWAMADI

Plaintiff

and

DEPARTMENT OF HEALTH, GAUTENG PROVINCE

Defendant

Coram: M Van Nieuwenhuizen, AJ

Heard on: 21 and 22 April 2026

Delivered: 28 August 2026

Flynote: Civil procedure - Special pleas - Medical negligence - Six special pleas raised at advance stage of proceedings - Rule 37 pre-trial proceedings - Admission and concessions identifying and crystallising issues for trial - Express admission that medical personnel acted in course and scope of employment not withdrawn - Defendant bound thereby - Subsequent amended plea not, without more, reviving admitted issue - Non-joinder - Claim against doctor withdrawn in 2020 - Doctor's conduct potentially relevant to causation but no direct and substantial legal interest in relief sought - Exception and special plea distinguished - Objections apparent from particulars of claim ordinarily raised by exception - Contractual pleading deficiency not defeating independently pleaded delictual claim - Wrongfulness and negligence distinguished - Expert not amending

pleadings or creating unpleaded cause of action - Six special pleas dismissed with costs.

Summary: The plaintiff instituted an action for damages arising from alleged negligent medical treatment received at public hospitals falling under the control of the defendant. He alleges, amongst other things, that medical personnel employed by the defendant negligently prescribed medication, failed adequately to examine and monitor him, failed appropriately to respond to adverse consequences of the medication, and failed timeously to involve specialist ophthalmological care following the development of Stevens-Johnson Syndrome.

The defendant pleaded to the action in 2019. Dr Kurata was initially cited as the second defendant, but the action against him was withdrawn in August 2020. The litigation thereafter continued against the present defendant and proceeded through expert and Rule 37 pre-trial processes.

During the pre-trial process the defendant expressly admitted, *inter alia*, that the doctors and nurses involved were acting in the course and scope of their duties, while expressly declining to admit medical negligence. At a considerably later stage, the defendant amended its plea and raised six special pleas concerning non-joinder, vicarious liability, the sufficiency of the pleaded delictual cause of action, failure adequately to plead a contract, reliance upon contract and delict, and failure to allege a legal duty.

Held: Pre-trial proceedings serve to identify and crystallise the issues requiring determination at trial. The trial proceeds upon the dispute remaining after admissions and concessions have been made. An express pre-trial admission which has not been withdrawn cannot, without more, be undone by the subsequent delivery of an inconsistent pleading: *Nel and Others v Cilliers* (197/2023) [2024] ZASCA 57; *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA).

The defendant's admission concerning course and scope was deliberate and unambiguous. Its contemporaneous refusal to admit negligence demonstrated that it consciously distinguished between what was made common cause and what remained in dispute. The subsequent special plea concerning vicarious liability could not revive course and scope as an issue. Negligence and causation, however, were not admitted and remained for determination at trial.

The non-joinder plea concerning Dr Kurata was dismissed. His involvement was known from the outset and the action against him had been withdrawn in 2020. The defendant thereafter continued to participate in the litigation before raising non-joinder at a considerably later stage. The aforesaid procedural history was relevant but not determinative: delay or prior participation cannot dispense with joinder where a person has a direct and substantial legal interest in the order sought.

The decisive question was whether Dr Kurata possessed a direct and substantial

legal interest in the order sought. Although his treatment might be relevant to factual and legal causation, no relief was sought against him and no order would determine his rights or liabilities. An interest in factual findings which might be made concerning his treatment was not, without more, a direct and substantial legal interest requiring joinder. The defendant remained entitled to advance any properly pleaded causation defence based upon his treatment.

The vicarious-liability plea was inconsistent with the defendant's express admission concerning course and scope. The effect of the admission was limited. Negligence and causation were not admitted and remained for determination at trial.

Held further: There is a material procedural distinction between an exception and a special plea. An exception ordinarily tests the legal sufficiency of the plaintiff's pleading upon the allegations contained therein, whereas a special plea ordinarily introduces matter extraneous to the pleading which, if established, defeats or postpones the plaintiff's claim: *Jugwanth v Mobile Telephone Networks (Pty) Ltd* (529/2020) [2021] ZASCA 114.

The third, fourth and fifth special pleas were substantially directed at alleged deficiencies apparent from the particulars of claim themselves and were accordingly objections of the kind ordinarily raised by exception. The Court nevertheless considered the substance of the objections.

The fourth special plea complained that the plaintiff's contractual allegations did not comply with the requirements applicable to a contractual cause of action. No finding was made that the plaintiff had adequately pleaded a separate contractual cause of action or complied with 18(6). The alleged deficiency did not, however, constitute a special defence defeating or postponing the independently pleaded delictual medical-negligence claim.

The simultaneous presence of contractual and delictual allegations did not render the independently identifiable delictual claim fatally defective. The latter concerned bodily injury allegedly caused by negligent medical treatment and did not depend for its existence upon the alleged contract.

The sixth special plea was dismissed. Wrongfulness and negligence are distinct enquiries. The particulars contained the factual foundation upon which the plaintiff relied for both. A medical-negligence claim is not legally deficient merely because some of the conduct complained of consists of omissions. Whether the omissions were wrongful, negligent and causally connected to the plaintiff's harm remained matters for determination at trial.

Expert joint minutes perform an important case-management and evidential function in narrowing issues, but experts cannot amend pleadings or create an unpleaded cause of action. That principle is distinct from the effect of an express admission made by a litigant itself during the Rule 37 process.

The significance of the procedural history could not be ignored. The defendant had pleaded to the action, participated in its subsequent conduct and made express admissions during the pre-trial process before introducing special pleas which, in material respects, sought either to revisit matters previously made common cause or to challenge alleged deficiencies apparent from the plaintiff's pleadings at an earlier stage. The aforesaid history did not itself determine the special pleas but formed part of the context in which they fell to be adjudicated.

Nothing in the judgment determined whether the defendant's medical personnel were negligent or whether any negligence caused the plaintiff's alleged harm. Those issues remained for determination at trial.

All six special pleas dismissed with costs.

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

INTRODUCTION

- [1] This matter concerns six special pleas raised by the defendant in an amended plea delivered in December 2025 in an action for damages arising from medical treatment received by the plaintiff at various public hospitals falling under the control of the defendant.
- [2] The action was instituted in 2018. The defendant delivered its original plea during April 2019. The litigation thereafter progressed through expert processes and a Rule 37 pre-trial conference was held on the 2nd of November 2023.
- [3] During the pre-trial process the defendant made material admissions. Of particular significance, it admitted that the doctors and nurses involved were, at all material times, acting in the course and scope of their duties. It expressly declined, however, to admit medical negligence.
- [4] Approximately two years later on or about the 12th of December 2025,

the defendant delivered an amended plea containing six special pleas. Certain of those pleas seek to place in issue matters previously admitted. Others challenge the legal sufficiency of the plaintiff's particulars of claim.

- [5] The special pleas must accordingly be considered not only by reference to their formulation, but also against the procedural history of the litigation and the issues which had already been narrowed during the pre-trial process.

THE PLAINTIFF'S CLAIM

- [6] The plaintiff's claim arises from medical treatment received during 2016 at hospitals and medical facilities identified in his particulars of claim.
- [7] He alleges that medical personnel employed by the defendant prescribed medication to him and that the treatment thereafter afforded to him was negligent.
- [8] The pleaded grounds of negligence include allegations that the medical staff failed properly to examine the plaintiff; prescribed incorrect medication; failed to determine whether the medication was appropriate and safe; failed adequately to respond to its consequences; delayed in withdrawing it; failed adequately to examine and monitor him after adverse effects were reported; failed to adhere to the professional standard reasonably expected of medical practitioners; and failed timeously to involve specialist ophthalmological care following the development of Stevens-Johnson Syndrome.
- [9] The plaintiff further alleges that the relevant medical personnel acted wrongfully and negligently and that their conduct caused the injuries and damages for which compensation is claimed.
- [10] Whether those allegations are ultimately established by the evidence is not presently before this Court. The present enquiry concerns the six special pleas.

THE RULE 37 PRE-TRIAL PROCEEDINGS

- [11] Rule 37 is not merely an administrative formality. Its purpose includes identifying what is genuinely in dispute, removing what is not, narrowing the issues requiring adjudication and facilitating the efficient conduct of the trial.
- [12] In *Filta-Matix (Pty) Ltd v Freudenberg and Others*,¹ the Supreme Court of Appeal held that, absent special circumstances, a party should not be permitted to resile from an agreement deliberately reached at a pre-trial conference. To permit otherwise would undermine the very purpose of the pre-trial process.
- [13] More recently, in *Nel and Others v Cilliers*,² the Supreme Court of Appeal again emphasised the significance and binding character of the pre-trial process. The Court held that pre-trial proceedings are important legally binding proceedings in which the issues to be determined at trial are identified and crystallised. The trial proceeds upon the dispute which remains after admissions and concessions have been made. The concession in that matter had not been withdrawn when the party concerned had the opportunity to do so and the party was held to it.³
- [14] The principle is particularly apposite in *casu*. The defendant was expressly asked whether it admitted that the doctors and nurses involved were, at all material times, acting in the course and scope of their duties. It answered affirmatively.
- [15] When separately asked whether it admitted medical negligence on the part of the aforesaid medical personnel, the defendant answered in the

¹ *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614B-D

² *Nel and Others v Cilliers* (197/2023) [2024] ZASCA 57

³ *Ibid* para 16-18

negative.

- [16] The juxtaposition is significant. The defendant consciously distinguished between a fact which it was prepared to make common cause and an issue which it wished to preserve for determination at trial. Course and scope was removed from dispute; negligence was not.
- [17] This is therefore not a case involving an ambiguous statement from which an admission is sought to be inferred. It concerns an express admission made in response to a direct question during the process designed to identify and crystalise the issues for trial.
- [18] A subsequently amended plea does not, without more, extinguish such an admission. Were it otherwise, the narrowing of issues achieved under Rule 37 could readily be undone by the unilateral delivery of an inconsistent pleading. That would be inimical to the purpose of the pre-trial process identified in both *Filta-Matix*⁴ and *Nel v Cilliers*.⁵
- [19] This does not mean that a party may never be permitted to resile from a pre-trial admission. *Filta-Matix*⁶ recognises that special circumstances may justify departure from a pre-trial agreement. *Nel v Cilliers*⁷ is significant in this regard because the Supreme Court of Appeal expressly noted that the concession in that matter had not been withdrawn when the party had the opportunity to do so.
- [20] In the present matter there is no application to withdraw the relevant admission and no special circumstances have been demonstrated which

⁴ *Filta-Matix (Pty) Ltd v Freudenberg and Others supra*

⁵ *Nel and Others v Cilliers supra*

⁶ *Filta-Matix (Pty) Ltd v Freudenberg and Others supra*

⁷ *Nel and Others v Cilliers supra*

would justify releasing the defendant from it.

- [21] The importance of the parties defining the issues is not confined to admissions. In *Nel v Cilliers*⁸ the Supreme Court of Appeal also held that it was impermissible for a Court to determine an issue which had not been pleaded or fully canvassed at trial, particularly where doing so caused prejudice. In reaching that conclusion the Court applied *Minister of Safety and Security v Slabbert*⁹ and *Fischer and Another v Ramahlele and Others*.¹⁰
- [22] The aforesaid principles provide the procedural framework within which the special pleas must be considered.

FIRST SPECIAL PLEA: NON-JOINDER OF DR KURATA

- [23] The first special plea concerns the alleged non-joinder of Dr MT Kurata.
- [24] Dr Kurata is not a person whose possible involvement in the plaintiff's treatment emerged only at a late stage of the proceedings. He was originally cited as the second defendant. The action against him was withdrawn on 17 August 2020. The defendant was therefore aware, from that time, that the plaintiff intended to pursue the action against the present defendant without seeking relief against Dr Kurata.
- [25] The litigation nevertheless continued. The defendant pleaded to the plaintiff's case and participated in the subsequent conduct of the proceedings. The matter proceeded through the expert and pre-trial processes without the defendant then contending that Dr Kurata's

⁸ *Nel and Others v Cilliers supra*

⁹ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11

¹⁰ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13-14

absence rendered the action incapable of determination.

- [26] It was only approximately two years later and approximately five years and four months after the action was withdrawn against Dr Kurata that the defendant sought by way of special plea, to contend that Dr Kurata was a necessary party.
- [27] The aforesaid procedural history is relevant, although it is not in itself determinative. Delay or prior participation in proceedings cannot dispense with the joinder of the person who, in law, has a direct and substantial interest in the order sought. The determinative enquiry therefore remains whether Dr Kurata possesses such an interest.
- [28] The test for necessary joinder is settled. It is not sufficient that an absent person has an interest in the facts or even in findings which may be made in the course of litigation. The person must have a direct and substantial legal interest in the order which the Court may make – an interest which may be prejudicially affected by that order.¹¹
- [29] No relief is sought against Dr Kurata. The plaintiff deliberately withdrew the action against him in 2020. No order in the present proceedings will impose an obligation upon him, deprive him of a right or determine any liability on his part to the plaintiff.
- [30] The defendant contends, nevertheless, that Dr Kurata's treatment remains relevant to determining whether the defendant is liable and, if so, to what extent. Indeed, in its plea over the defendant alleges that his treatment constituted an independent factual cause of the consequences suffered by the plaintiff.
- [31] That contention demonstrates why it is necessary to distinguish an

¹¹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) and *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA)

interest in the factual findings which may be made from a direct and substantial legal interest in the order sought. Dr Kurata's treatment may well be relevant to factual and legal causation. Although it does not, without more, make him a necessary party.

[32] The Trial Court may be required to consider whether the conduct of Dr Kurata constituted an intervening or independent cause or otherwise bears upon the causal connection between the conduct attributed to the defendant's employees and the harm suffered by the plaintiff. Such an enquiry does not require the Court to determine liability as between the plaintiff and Dr Kurata.

[33] The withdrawal of the action against Dr Kurata does not prevent the defendant from advancing a properly pleaded causation defence based upon his treatment or from leading admissible evidence relevant to that defence.

[34] The procedural history reinforces rather than determines the aforesaid conclusion. Dr Kurata's identity, his involvement and the withdrawal of the claim against him have been known to the defendant since 2020. The defendant thereafter participated in the litigation without treating his presence as indispensable. Although the aforesaid conduct cannot confer jurisdiction over an absent necessary party or cure a true non-joinder, it provides context for the belated assertion that the litigation cannot now proceed without him.

[35] What remains absent from the special plea is a basis for concluding that the order sought against the defendant will itself prejudicially affect a direct and substantial legal interest of Dr Kurata.

[36] The first special plea must accordingly be dismissed.

SECOND SPECIAL PLEA: VICARIOUS LIABILITY

[37] The second special plea alleges that the plaintiff failed to plead that the

persons who treated him at certain hospitals were acting within the course and scope of their employment. The amended plea seeks the striking out of the relevant allegations on that basis.

- [38] In *Loureiro and Others v iMvula Quality Protection (Pty) Ltd*,¹² the Constitutional Court restated the requirements for the imposition of vicarious liability: the employee must have committed a delict; an employer-employee relationship must exist; and the delict must have been committed while the employee was acting within the course and scope of employment. The case itself involved both contractual and delictual liability arising from the same broad factual matrix.
- [39] There is, however, a more immediate answer to the second special plea.
- [40] The defendant expressly admitted during the Rule 37 process that the doctors and nurses involved were acting in the course and scope of their duties.
- [41] The defendant cannot require the plaintiff to prove a fact, which it has formally admitted and has not withdrawn.
- [42] The defendant's express denial of negligence immediately thereafter confirms the limited ambit of its admission. It did not concede liability. It conceded course and scope while preserving the issues of negligence and causation for trial.
- [43] This is consistent with the defendant's plea over. In relation to the Charlotte Maxeke medical staff, for example, the defendant expressly admits that they acted within the course and scope of their employment when prescribing the medication.

¹² *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 50

- [44] It bears emphasis that the effect of this conclusion is limited. The plaintiff remains required at trial to establish the negligence relied upon and the requisite causal connection between any such negligence and the harm for which damages are claimed. What no longer requires determination is whether the relevant medical personnel were acting in the course and scope of their duties.
- [45] Holding the defendant to that admission does not amount to a finding of liability. It merely preserves the distinction which the defendant itself drew between what was admitted and what remained in dispute.
- [46] The second special plea must accordingly be dismissed.

THE NATURE OF THE THIRD, FOURTH AND FIFTH SPECIAL PLEAS

- [47] Although styled as special pleas, the third, fourth and fifth special pleas are directed substantially at the legal sufficiency of allegations appearing in the particulars of claim themselves.
- [48] There is a material procedural distinction between an exception and a special plea. In *Jugwanth v Mobile Telephone Networks (Pty) Ltd*,¹³ the Supreme Court of Appeal considered that distinction. An exception is determined upon the pleading as it stands: the excipient is confined to the allegations contained in the pleading, which are accepted as correct for purposes of the exception, and may not introduce fresh matter. A special plea, by contrast, ordinarily introduces matter outside the plaintiff's pleading which, if established, defeats or postpones the plaintiff's claim.
- [49] Thus, as a general rule, where the alleged defect appears *ex facie* the particulars of claim, the appropriate procedure is an exception. Were facts extraneous to the particulars are required to establish the defence, a

¹³ *Jugwanth v Mobile Telephone Networks (Pty) Ltd* (529/2020) [2021] ZASCA 114; [2021] 4 All SA 346 (SCA)

special plea is ordinarily appropriate. *Jugwanth*¹⁴ recognises that there may be exceptions to this general distinction, prescription being the obvious example.

[50] The distinction is material in the present case. The third, fourth and fifth special pleas do not, in substance, introduce independent facts which, if proved, would defeat or postpone otherwise sustainable causes of action. They contend instead that the plaintiff's particulars themselves lack allegations necessary to sustain the causes of action relied upon.

[51] Those objections are, in substance, objections to the legal sufficiency of the particulars of claim of the kind ordinarily raised by exception under Rule 23.

[52] The Court should nevertheless have regard to substance rather than merely the label attached to the objection.

[53] I accordingly consider each special plea as formulated and the relief sought pursuant to it.

THIRD SPECIAL PLEA: ALLEGED FAILURE TO PLEAD A DELICTUAL CAUSE OF ACTION

[54] The third special plea alleges that the plaintiff has failed to plead facts sustaining a delictual cause of action in respect of treatment at Pholosong Hospital, Tambo Memorial Hospital and St John's Hospital.

[55] The defendant alleges, broadly, that the particulars fail adequately to plead the elements of a delictual cause of action in respect of the aforesaid hospitals.

¹⁴ *Jugwanth v Mobile Telephone Networks (Pty) Ltd supra*

- [56] The contention rests upon too narrow a reading of the particulars.
- [57] Pleadings must be read as a whole. Rule 18(4) requires a clear and concise statement of the material facts upon which the pleader relies, with sufficient particularity to enable the opposite party to reply. It does not require the evidence by which each allegation will ultimately be established to be pleaded.
- [58] The distinction is between the *facta probanda*, which must be pleaded, and the *facta probantia*, by which those material facts are ultimately proved.¹⁵ The same distinction is reflected in *Mbhiyozo v Eskom Holdings (SOC) Ltd*.¹⁶
- [59] The particulars identify the treatment received, the alleged acts and omissions of the defendant's medical personnel, the respects in which the treatment is said to have been negligent, the alleged causal consequences and the damages claimed.
- [60] The allegations concerning the individual hospitals cannot properly be isolated from the general allegations of negligence and wrongfulness contained elsewhere in the particulars.
- [61] In *Goliath v MEC for Health, Eastern Cape*,¹⁷ the Supreme Court of Appeal reaffirmed the professional standard applicable in medical-negligence cases. Whether the treatment in the present case fell below that standard is a matter for evidence at trial.
- [62] The plaintiff is not required at pleading stage to establish by expert

¹⁵ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W)

¹⁶ *Mbhiyozo v Eskom Holdings (SOC) Ltd* (Case No. 3133/2023) 2024 ZAECHMC 53 (25 June 2024)

¹⁷ *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA)

evidence the medical proposition upon which each alleged act or omission depends.

[63] Whether the pleaded allegations can ultimately be proved is a different question from whether a cause of action has been pleaded.

[64] The third special plea must accordingly be dismissed.

FOURTH SPECIAL PLEA: ALLEGED FAILURE TO PLEAD A CONTRACTUAL CAUSE OF ACTION

[65] The fourth special plea requires separate consideration.

[66] The plaintiff alleges in paragraph 8 of his particulars, *inter alia*, that the defendant acted "*in breach of the parties' agreement*". The defendant complains that the plaintiff failed to plead whether the agreement was written or oral, when and where it was concluded and by whom. It further alleges that the particulars fail to sustain a contractual cause of action.

[67] Rule 18(6) prescribes the allegations which must be made by a party who relies upon a contract.

[68] The defendant's complaint is accordingly directed to the sufficiency of the plaintiff's particulars as they stand. It does not introduce an extraneous fact which, if established, destroys or postpones the operation of an otherwise existing cause of action.

[69] In substance, the objection is of the kind ordinarily raised by exception.

[70] The defendant did not except. It pleaded over and now seeks, by way of special plea, to defeat the plaintiff's claim.

[71] I do not consider it appropriate in those circumstances to convert the special plea into an exception and to grant relief which was not sought through that procedure.

- [72] This conclusion should not be misunderstood. I make no finding that the plaintiff has adequately pleaded a contractual cause of action or that the contractual allegations comply with Rule 18(6).
- [73] Hospital records or other evidence, without appropriate pleaded allegations, could also not substitute for material averments necessary to sustain a contractual cause of action. Pleading and proof perform different functions.
- [74] The decisive point for purposes of the special plea as formulated is that the alleged deficiency in the contractual allegations does not constitute a special defence, which defeats or postpones the plaintiff's independently pleaded delictual medical-negligence claim.
- [75] The defendant itself distinguishes the two bases in its plea over. It admits that the plaintiff accepted the medication as part of his treatment but denies that this occurred pursuant to an agreement.
- [76] The delictual claim therefore does not depend for its existence upon the alleged contract.
- [77] The fourth special plea, as formulated, must accordingly be dismissed.

FIFTH SPECIAL PLEA: RELIANCE UPON CONTRACT AND DELICT

- [78] The fifth special plea concerns the presence of contractual and delictual allegations in the particulars and contends that the plaintiff's claim is fatally defective.
- [79] The mere fact that contractual and delictual allegations arise from the same factual matrix does not render an otherwise identifiable delictual cause of action unsustainable.

- [80] *Loureiro*¹⁸ illustrates that contractual and delictual liability are not, as a matter of principle, mutually exclusive. The Constitutional Court ultimately imposed contractual liability in favour of one applicant and delictual liability in favour of the remaining applicants arising from the same incident.
- [81] That does not mean that the existence of a contract automatically generates a parallel delictual claim. The requirements of each cause of action must independently be satisfied.
- [82] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*¹⁹ and *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*²⁰ caution against imposing Aquilian liability where the obligation relied upon is essentially contractual, particularly in cases involving pure economic loss.
- [83] The present claim is materially different. It concerns bodily injury allegedly caused by negligent medical treatment. The plaintiff's delictual claim does not depend upon the existence or enforceability of the alleged agreement.
- [84] The pleaded facts are that medical personnel employed by the defendant undertook the plaintiff's treatment and, in rendering that treatment, acted wrongfully and negligently in specified respects, thereby causing bodily injury.
- [85] The defendant's own plea over demonstrates that it understands and distinguishes the two alleged bases of liability: it denies the alleged agreement while separately pleading to the medical treatment and

¹⁸ *Loureiro and Others v iMvula Quality Protection (Pty) Ltd supra*

¹⁹ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A)

²⁰ *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA)

allegations of negligence.

- [86] The failure, if any, adequately to plead the purported contractual cause of action does not render the independently identifiable delictual claim fatally defective.
- [87] Nor does a failure expressly to label the bases of liability as "*concurrent*" or "*alternative*", without more, constitute a special defence capable of defeating or postponing the delictual action.
- [88] The fifth special plea must accordingly be dismissed.

SIXTH SPECIAL PLEA: ALLEGED FAILURE TO PLEAD A LEGAL DUTY

- [89] The sixth special plea alleges that the plaintiff's claim is fatally defective because, in respect of various pleaded omissions, he failed to allege a legal duty owed by the defendant and a breach thereof.
- [90] The terminology requires care.
- [91] South African delictual law requires the enquiries into wrongfulness and negligence to be kept conceptually distinct. In *Loureiro* ²¹ the Constitutional Court expressly cautioned against conflating the two. Wrongfulness concerns whether the law regards the conduct as actionable and whether liability should be imposed; negligence concerns fault and the comparison of the conduct with the standard legally required in the circumstances.
- [92] The aforesaid distinction is of particular significance where liability is founded upon an omission. Whether the law imposes liability for a failure to act forms part of the wrongfulness enquiry. Whether medical personnel failed to exercise the degree of professional skill and care reasonably

²¹ *Loureiro and Others v iMvula Quality Protection (Pty) Ltd supra*

required of them ordinarily concerns negligence.

- [93] The expression "*duty of care*", derived from English law, should therefore not be employed in a manner which obscures the aforesaid distinct enquiries.
- [94] In *Van Wyk v Lewis*,²² the professional standard was articulated by reference to the skill and diligence reasonably expected of a medical practitioner. That standard continues to inform the enquiry whether medical treatment was negligently rendered.
- [95] In *Goliath*,²³ the Supreme Court of Appeal likewise confirmed the professional standard applicable to medical negligence.
- [96] More recently, in *Louw v Patel*,²⁴ the Supreme Court of Appeal considered a medical-negligence claim arising, *inter alia*, from a failure timeously to transfer a patient to definitive care and a failure adequately to communicate with the receiving doctor. The majority upheld the finding of liability, including the finding that the negligent delay was causally connected to the harm suffered. The case concerned precisely the significance of alleged omissions in the course of medical treatment and their causal consequences.
- [97] *Louw*²⁵ illustrates that a medical-negligence claim does not become legally deficient merely because some of the conduct complained of consists of omissions. The question at pleading stage remains whether the material facts alleged are capable, if established, of satisfying the

²² *Van Wyk v Lewis* 1924 AD 438

²³ *Goliath v MEC for Health, Eastern Cape supra*

²⁴ *Louw v Patel* (245/2021) [2023] ZASCA 22

²⁵ *Louw v Patel supra*

requirements of the delict.

- [98] The plaintiff alleges that the defendant's medical personnel undertook his treatment and thereafter failed, amongst other things, properly to examine and monitor him; determine whether the medication was safe and appropriate; respond adequately to its adverse consequences; withdraw it timeously; and obtain appropriate specialist intervention.
- [99] The aforesaid allegations provide the factual foundation upon which the plaintiff relies for wrongfulness and negligence.
- [100] This is not a case in which the Court is asked to convert a purely contractual obligation into an Aquilian legal duty of the kind cautioned against in *Lillicrap*.²⁶ The alleged harm is bodily injury said to have resulted from negligent medical treatment.
- [101] Whether the alleged omissions were wrongful, whether the medical personnel failed to meet the professional standard reasonably required of them, and whether any such failure caused the plaintiff's harm are ultimately matters to be determined upon the evidence.
- [102] The sixth special plea must accordingly be dismissed.

EXPERT JOINT MINUTES

- [103] A further issue arose concerning the significance of expert joint minutes.
- [104] There is an important distinction between an agreement or opinion recorded by expert witnesses and an admission deliberately made by a litigant during the Rule 37 process.
- [105] Experts do not determine the issues which a court is required to decide.

²⁶ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra*

Their function is to assist the court on matters falling within their expertise. Experts, by agreement between themselves, cannot amend the pleadings or create a cause of action which has not been pleaded.

[106] Expert joint minutes nevertheless perform an important case-management function. In *Bee v Road Accident Fund*,²⁷ the Supreme Court of Appeal emphasised their role in narrowing the issues upon which expert evidence remains necessary. Effective case management would be undermined if a party could proceed on the basis that an expert issue had been resolved and later find it unexpectedly revived.

[107] The significance of such agreements is also apparent from *DSS v MEC for Health, Gauteng*,²⁸ where the Court referred to *Thomas v BD Sarens (Pty) Ltd*²⁹ and *Bee*³⁰ and recognised the importance of expert joint minutes in limiting issues and facilitating effective case management.

[108] That principle must nevertheless be distinguished from the ultimate judicial evaluation of expert opinion. In *NSS obo AS v MEC for Health, Eastern Cape Province*,³¹ the Supreme Court of Appeal made clear that the ultimate decision on expert opinion remains for the court. A court does not become bound to adopt an expert opinion merely because the opinion has been admitted or agreed. The same qualification was recognised in *DSS*.³²

[109] A further distinction is important in the present matter. An agreement

²⁷ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA)

²⁸ *DSS v MEC for Health, Gauteng* (2447/2018) 2024 ZAGPPHC 119 (15 November 2024)

²⁹ *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 (GJ), paras 9-14

³⁰ *Bee supra*

³¹ *NSS obo AS v MEC for Health, Eastern Cape Province* 2023 (6) SA 408 (SCA)

³² *DSS supra*

between experts cannot amend the parties' pleadings or create a cause of action which has not been pleaded. That is different from an express admission made by a litigant itself during the Rule 37 process concerning an issue falling within the pleadings.

[110] I accordingly accept the defendant's proposition, at the level of principle, that an expert agreement concerning a matter which genuinely falls outside the plaintiff's pleaded case does not itself amend that case.

[111] That proposition, however, does not resolve the present special pleas.

[112] My conclusions do not depend upon treating expert reports or joint minutes as amendments to the particulars of claim. They rest upon the particulars themselves, read as a whole, and, where relevant, upon the defendant's own formal admissions during the Rule 37 process.

[113] The distinction is material. An expert's agreement performs an evidential and case-management function. A litigant's deliberate admission that a fact is common cause performs a distinct procedural function by removing that fact from the field of controversy and assisting in defining the issues remaining for adjudication.

[114] The defendant remains entitled at trial to contend that particular expert evidence travels beyond the pleadings and to raise such objections to its admissibility, relevance or weight as may properly be available.

[115] What it may not do, without properly withdrawing its own Rule 37 admission, is rely upon the principles governing expert evidence to restore as disputed a fact which it formally admitted during the pre-trial process.

CONCLUSION

[116] The six special pleas arise against a significant procedural history. The defendant pleaded to the action in 2019. The matter thereafter proceeded through expert and pre-trial processes during which the issues were

narrowed.

- [117] The significance of the procedural history should not be overstated, but neither can it be ignored. The defendant pleaded to the action, participated in its subsequent conduct and made express admissions during the pre-trial process. It was only at a considerably later stage that it introduced special pleas, in material respects, seeking either to revisit matters previously made common cause or to challenge alleged deficiencies which were apparent from the plaintiff's pleadings at an earlier stage.
- [118] Of particular importance, the defendant expressly admitted that the doctors and nurses involved were acting in the course and scope of their duties, while expressly declining to admit negligence. As *Nel v Cilliers*³³ makes clear, the pre-trial process serves to identify and crystallise the issues to be determined, and the trial proceeds upon the dispute remaining after admissions and concessions have been made admission.
- [119] The later delivery of an amended plea cannot, without more, undo the aforesaid admission.
- [120] The remaining special pleas directed at the legal sufficiency of the particulars likewise do not establish special defences which defeat or postpone the plaintiff's independently pleaded delictual medical-negligence claim.
- [121] This conclusion does not mean that every aspect of the plaintiff's pleading is necessarily beyond criticism. In particular, I have made no finding that the purported contractual cause of action complies with Rule 18(6). That question is not determined by the dismissal of the fourth special plea.

³³ *Nel v Cilliers supra*

- [122] Treatment of expert joint minutes also does not permit expert witnesses to enlarge the plaintiff's pleaded case. The plaintiff remains bound by the cause of action pleaded and the defendant remains entitled to object at trial to evidence which genuinely falls beyond it.
- [123] Equally, the defendant remains bound by an express pre-trial admission which has neither been withdrawn nor shown to be subject to special circumstances justifying departure from it.
- [124] Nothing in this judgment determines whether the defendant's medical personnel were negligent or whether any such negligence caused the harm alleged by the plaintiff. The aforesaid issues remain for determination at trial. The present judgment determines only the special pleas and gives effect, where relevant, to matters which the parties had already removed from dispute through the pre-trial process.
- [125] The action should accordingly proceed upon the issues which remain genuinely in dispute.

COSTS

- [126] The plaintiff has successfully resisted all six special pleas and is ordinarily entitled to the costs occasioned thereby.
- [127] I take into account that the special pleas were introduced at an advanced stage of the litigation and that the second special plea sought to place in issue a matter which the defendant had expressly admitted during the pre-trial process.
- [128] I also take into account that some of the issues raised, particularly the distinction between the pleaded case, expert joint minutes and formal pre-trial admissions, required determination.
- [129] I am therefore not persuaded that a punitive costs order is warranted. Costs on Scale B are appropriate.

ORDER

[130] In the result, the following order is made:

[130.1] The defendant's first special plea, relating to the alleged non-joinder of Dr MT Kurata, is dismissed.

[130.2] The defendant's second special plea, relating to vicarious liability, is dismissed.

[130.3] The defendant's third special plea, relating to the alleged failure to plead a delictual cause of action, is dismissed.

[130.4] The defendant's fourth special plea, relating to the alleged failure to plead a contractual cause of action, is dismissed.

[130.5] The defendant's fifth special plea, relating to the alleged defect arising from the plaintiff's reliance upon contract and delict, is dismissed.

[130.6] The defendant's sixth special plea, relating to the alleged failure to plead a legal duty, is dismissed.

[130.7] The defendant is ordered to pay the plaintiff's costs occasioned by the determination of the special pleas on Scale B including the costs of counsel.



M VAN NIEUWENHUIZEN

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it

to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 28 August 2026.

HEARD ON:	21 and 22 April 2026
DATE OF JUDGMENT:	28 August 2026
FOR PLAINTIFF:	Advocate D F Makhubele Monwa & Associates Inc.
INSTRUCTED BY:	Mr Melford Monwa Email: melford@monwa.co.za
FOR DEFENDANT:	Advocate T Mbana
INSTRUCTED BY:	Nkosi Sabelo Incorporated Email: george@nsattorneys.co.za