

SOUTH AFRICA / JUDGMENT

A.E.S obo L.T.S v Member of the Executive Council for Health and Social Development of the Free State (1094/2024) [2025] ZAFSHC 34 (13 February 2025)

[2025] ZAFSHC 34

COURT

Free State High Court, Bloemfontein

BEFORE

J J F Hefer

CASE / FILE NUMBER

1094/2024

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****FREE STATE DIVISION,****BLOEMFONTEIN****Reportable Yes/No****Case No: 1094/2024****In**

the matter between:

A[...]

E[...] S[...] obo

L[...]

T[...] S[...]

Plaintiff

/ Respondent

and

THE

MEMBER OF THE EXECUTIVE COUNCIL FOR

HEALTH

AND SOCIAL DEVELOPMENT OF THE

FREE

STATE

Defendant
/ Excipient

CORAM:

Hefer AJ

Heard:

15 November 2024

Delivered:

13 February 2025

ORDER

1.

The exception is upheld in regards to the first ground raised by the defendant.

2.

The exception is dismissed on the second ground raised by the defendant.

3.

The plaintiff is granted leave to amend her particulars of claim within twenty-one (21) days of this order.

4.

No order as to costs.

JUDGMENT

Hefer AJ

[1] Plaintiff is cited as a major unemployed female ‘who acts in this action in her personal capacity and her representative capacity of her minor daughter L[...] T[...] S[...]’

(hereinafter referred as ‘L[...]’), born on 17 June 2004’.

[2] Plaintiff instituted action for the recovery of damages against the defendant arising from the alleged negligent acts of the personnel / employees at the Bongani Hospital, Welkom when L[...] was treated for urinary tract infection and tonsils over the period 6 November 2004 to November 2015.

[3] The defendant is sued in a representative capacity as nominal defendant for all claims arising against the Bongani Hospital in Welkom.

[4] After the defendant has raised an exception to plaintiff’s particulars of claim during August 2024, defendant filed an amended particulars of claim in an attempt to remove such causes for exception.

[5] In spite of such amendments being effected, the defendant filed a further notice in terms of rule 23 which currently serves before Court.

First ground:

- [6] According to the defendant it appears from the particulars of claim that L[...] was born on 17 June 2004, meaning that she was 19 years old and a major when the summons was issued on what appears to be 27 February 2024. L[...] thus, has, according to the defendant, legal capacity to claim any damages she alleged to have suffered personally (in her own name) from the defendant.
- [7] In the premises, the plaintiff does not have locus standi to claim damages from the defendant in a representative capacity on behalf of L[...] and, as contended by the defendant, the amended

particulars of claim does not disclose a cause of action.

- [8] Defendant's exception in this regard is further in the alternative based on the particulars of claim being vague and embarrassing in that no basis is pleaded for the plaintiff to claim damages from the defendant in her representative capacity as L[...]’s mother, on behalf of L[...].

Second ground:

- [9] According to the defendant, the allegations pertaining to the treatment which L[...] received from 6 November 2004 until November 2015 for urinary tract infection and tonsils are vague and embarrassing in that the plaintiff fails to specify:
- (i) on which dates during the period 6 November 2004 to November 2015 the treatment took place at Bongani Hospital; and
 - (ii) whether the treatment on each date was for urinary tract infection or for tonsils.

First ground – locus standi of plaintiff:

- [10] The first question which needs to be decided upon, is whether the lack of locus standi can be raised on exception.
- [11] In *Anirudh v Samdei and Others*[1] the plaintiff excepted to the claim in reconvention on the ground that it lacks averments which are necessary to sustain an action, in that amongst others grounds, the defendants lacked the necessary locus standi to make the claim and the claim in reconvention did not allege any facts which would entitle them to do so.
- [12] Howard J held that if the particulars of claim did not sustain a cause of action, the exception in issue was maintainable in terms of rule 23 of the Uniform Rules of Court, irrespective of the label attached to the complaint being raised. Howard J stated as follows:

‘Even if the plaintiff’s objection is really one of non-joinder or non-locus standi I think that it was competent for him to raise it by way of exception under rule 23(1). The plaintiff takes a claim in reconvention as it stands and says, correctly in my opinion, that even if the defendant succeeds in proving each and every averment contained therein they will not be entitled in law to any of the relief claimed. That being so, it cannot be gainsaid that the claim in reconvention ‘lacks averments which are necessary to sustain an action’. It is true that the grounds of exception are

limited to those specified in rule 23(1), but there is nothing to indicate that the framers of the Rules intended to place any further limitation on the right to except to a pleading.’[2]

[13] Although not relying on that decision, because it dealt solely with the practice of the erstwhile Rhodesian Courts, Howard J further added that the following passage quoted from *Edwards v Woodnutt* NO[3] find support to the proposition that an objection of locus standi can be raised by way of exception in an appropriate case:

‘Objections to the locus standi of a litigant to sue are more properly taken by way of plea in bar or abatement than by exception. The practice of this Court is to employ the procedure of excepting for those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all, and not for those cases where only the locus standi of a particular plaintiff to sue is concerned. The basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement evidence may be led, whereas in the case of an exception the facts stated in the pleading must be accepted.’

I similarly do not rely on the *Edwards* matter but do find it useful in the present matter.

[14] In the present matter however, it can be accepted that L[...] was born during June 2004. The question is however can it be accepted that L[...] was a minor at the time of the institution of the action as alleged by the plaintiff in her particulars of claim.

[15] In *Ahmadiyya Anjuman Ishaati-Islam Lahore (SA) and Another v Muslem Judicial Council (Cape) and Others*[4] it was evident ex facie the impugned particulars of claim that the first plaintiff had no standing in law to claim the relief it sought. The demonstratable

defect was, on any approach, not amenable to being redressed by factual evidence of any kind. In reaching its decision, Tebbutt J endorsed the conclusion of Howard J as to whether a particular party has the necessary locus standi to sue or be sued, is a matter which can competently be dealt with on exception.

[16] In the recent judgment of *Titan Asset Management (Pty) Ltd and Others v Lanzerac Estate Investments (Pty) Ltd and Another*[5] the Court extensively dealt with the *Anirudh*

judgment

and said the following:

‘A founding pleading that does not set out the basis for the claimant’s standing to bring the claim and the Court’s jurisdiction to entertain it, lacks averments which are necessary to sustain an action and is the susceptible to exception in terms of Uniform Rule 23 ... The fact that the objection in issue could have been raised by way of special plea rather than an exception, is no bar to it being advanced by way of an exception if it is demonstratable ex facie the pleading that it lacks averments to sustain a cause of action. That, in short, is the relevant import of the judgment in *Anirudh*.’ (emphasis added).

- [17] Mr Prinsloo, appearing on behalf of the plaintiff, referred me to the matter of Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA[6] and H v Feta Assessment Centre[7] in which it was held that an exception provides a useful mechanism for weeding out cases without legal merit. Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part and avoid the dealing of unnecessary evidence at the trial.[8]
- [18] The question in the present matter is, if it is clear to the Court that allegations pertaining to the status of L[...], as alleged by the plaintiff to be a minor at the date when the action was instituted is not correct, can and should it not be entertained by way of exception? Save for reliance on the authorities referred to by both parties, it actually will be to the advantage of the plaintiff if it is dealt with on exception . If the exception is to be upheld, the plaintiff will have the opportunity to amend its particulars of claim which will not necessarily be the case when the lack of locus standi is raised by special plea.
- [19] Both counsel have referred me to the matter of Malcolm v Premier, Western Cape Government[9] and in particular to the rule of construction and that Wallis JA confirmed the principle applicable when a statute brings about change in law as it was summarised by Corbett CJ:
- ‘There is at common law a prima facie rule of construction that a statute (including a particular provision of a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already passed.’[10]
- [20] S 17 of the Children’s Act 38 of 2005 changed the age of majority from 21 to 18. This came into operation on 1 July 2007.
- [21] According to Mr Prinsloo, because L[...] was born on 17 June 2004 she will only achieve the age of majority in terms of s 1 of the Age of Majority Act 57 of 1972 on 17 June 2025 and will therefore remain a minor till that date. For this, Mr Prinsloo relied upon the principle that a change in law does not operate retrospectively and therefore any person born before s 17 came into operation is indeed governed by s 1 of the Age of Majority Act. According to him, the age of majority remains 21 for such persons.
- [22] Mr Malcolm in the authority referred to, was born during June 1987. The Supreme Court of Appeal held that because the age of majority was altered to 18 years by way of the Children’s Act, Mr Malcolm attained his majority at that stage.

- [23] The case of Malcolm dealt with extinctive prescription and the Court found that the word ‘minor’ in s 13(1)(a) of the Prescription Act 68 of 1969 means a person under the age of 18. The Court held that the meaning applies only to claims arising after 1 July 2007. In the event of the claim having arisen before 1 July 2007, the word ‘minor’ means a person under the age of 21.
- [24] In the matter of Shange v MEC for Education, KwaZulu Natal[11] the applicant applied for condonation in terms of s 3(4) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 for the non-compliance with s 3(2)(a) of the Act. The applicant’s cause of action was based on a claim for damages arising from an alleged assault upon him by the deputy principal at his school during June 2003 (before the reduction of the age of majority) when he was 15 years old. In this regard Govindasamy AJ held that, as far as extinctive prescription is concerned, s 17 of the Children’s Act read with s 13(1) of the Prescription Act 68 of 1969 did not affect accrued rights of a child whose cause of action arose before the change came into effect. Such a child is entitled to the same period for institution of action as existed before the change. The Court further held that s 17 of the Children’s Act could never have been intended to take rights away from a child.

[25] Govindasamy AJ stated as follows:

‘Nothing in the Children’s Act indicates that it will operate retrospectively. In this context I refer to Minister of Public Works v Haffejee NO, where Marais JA after reviewing the authorities had the following to say:

‘In other words it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted

as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive

rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that a new procedure was not intended to apply’.

In my view, therefore, the amending statute will not always be interpreted as having retrospective effect. It will depend on the impact of the applicant’s substantive rights. Accordingly, the Children’s Act must be interpreted in a manner which promotes the spirit, purport of objects of the Bill of Rights as contained in the Constitution. At the time when the applicant’s cause of action arose he had accrued rights which were protected by statute until he had attained the age of 22, within which time he might bring his claim for damages.’[12]

[26] In the matter of Malcolm, Wallis JA stated as follows:

‘South Africa has become a constitutional democracy in which the dignity of all citizens is subject to constitutional protection. Our Constitution, which affords special protection to children, defines them as persons under the age of 18. The corollary is that persons older than 18 are to be

regarded as adults. Our society recognises their dignity as adults by giving them the right to vote and allow them to conclude contracts and enter into marriages, to give consent to medical treatment, to obtain a passport and many other things. To treat them as less than adult for a purpose as important as the law governing prescription infringes their dignity by affording them an advantage, on the grounds of their supposed immaturity and irresponsibility, that is not available to other adults. It is the notion that they are by virtue of their age immature and irresponsible that constitutes the infringement.’ (emphasis added).[13]

[27] To the same extent, I agree with the submissions by Ms Pauer, appearing on behalf of the defendant to the effect that the reduction in age for majority by the Children’s Act from 21 years to 18 years can clearly not be regarded as retrospective in its effect when it comes to locus standi in judicio, since it recognises 18 year old young people’s dignity as adults by giving them the right to litigate in their own name and it does not take away or impairs a vested right that was acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already passed. Such an interpretation will indeed promote the rights enshrined in the Bill of Rights, in particular those contained in s 10 of the Constitution, dealing with a person’s right to dignity as well as s 34 dealing with access to Courts.

[28] In *McKelvey v Cowan* NO[14] it was stated that in dealing with matters of exception, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.

[29] Whereas in the present matter, L[...] was 19 at the time of the institution of the action and therefore had the capacity to claim in her own name when the summons was issued, and no evidence can be led to prove the contrary, the particulars of claim is indeed excipiable on this basis. The particulars of claim does not disclose a cause of action in regards to the representative capacity of the plaintiff.

[30] Furthermore, if it is accepted that L[...] is indeed to be regarded as an adult / major at the time of the institution of the action, the particulars of claim is also vague and embarrassing in that the plaintiff fails to allege on what basis she is representing L[...]. There is namely no allegation to the effect that the plaintiff was authorised by L[...] to act on her behalf whilst L[...] is an adult.

Second ground – allegations pertaining to particulars of dates of treatment:

[31] In *Titan Asset Management (Pty) Ltd and Others v Lanzerac Estate Investments (Pty) Ltd and Another* (supra), Binns-Ward J stated inter alia as follows in regards to the principles applicable in the adjudication of exceptions:

‘Suffice it to say that a pragmatic approach is called for, bearing in mind the purpose of an exception; being to weed out claims that should not proceed to trial because a cognisable claim or defence, as the case may be, has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing.’ (emphasis added) [15]

[32] ‘If an exception on the ground that certain allegations are vague and embarrassing is to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity.’[16]

[33] In *Standard Bank v Hunkydory Investments (No 1)*[17], Steyn AJ stated:

‘Prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent’s case.’[18]

[34] It is now settled law that the ultimate test as to whether or not an exception should be upheld is whether the excipient is prejudiced.[19]

[35] It is also now settled law that the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice.

[36] In the recent judgment of *Smith NO and Others v Dabula Manzi Farmers (Pty) Ltd*[20], Van Rhyn J stated the following:

‘It is a basic principle that particulars of claim should be so phrased that a defendant may reasonable and fairly be required to plead thereto. The purpose of pleadings is to define the issues to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.’[21]

[37] Van Rhyn J continued as follows:

‘The plaintiffs are merely required to plead a summary of the material facts. An attack on a pleading as being vague and embarrassing cannot be found on the mere averment of lack of particularity. There are no inconsistencies amounting to contradictions which could amount to vagueness and embarrassment.’[22]

[38] This is applicable also in the present matter. Nothing prevents the defendant from pleading its version. The defendant is the head of the relevant health department in the Free State. She therefore has access to all computerised or other records in respect of the treatment of L[...] over the relevant period.

[39] If one further considers the allegations contained in the particulars of claim regarding the grounds of negligence, the particulars of claim, read as a whole and not a particular paragraph, identify the issues relied upon by the plaintiff and in respect of which evidence will be led during the trial. As in the words of Van Rhyn J, ‘what the defendant is demanding is not merely an ‘outline’ of the plaintiff’s case but a complete ‘framework like a crossword

puzzle in which every gap can be filled by logical deduction'. Having regard to the facts of this matter, the period of the loan spans a period of approximately eight years. In order to disclose a cause of action, the plaintiff's pleading must set out 'every fact (material fact) which it would be necessary for the plaintiff to prove, if traversed in order to support their right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact'.^[23]

[40] The details that are lacking are *facta probantia* and not *facta probanda*. Therefore the exception on the second ground contended by the defendant cannot be upheld.

Costs

[41] Whereas the defendant is only successful in regards to one of two grounds raised in exception, I deem it fair that each party is to pay its own cost.

[42] Finally, whereas the defendant in respect of both grounds of exception and more in particular the first ground in respect of *locus standi in judicio* is not asking that the particulars of claim in regards to the plaintiff in her representative capacity be set aside, I deem it prudent that the plaintiff be afforded a period of time to amend her pleadings.

Order

Therefore, I make the following order:

1. The exception is upheld in regards to the first ground relied upon by the defendant.
2. The exception is dismissed on the second ground raised by the Defendant.

J J F HEFER, AJ

Appearances: On behalf of the plaintiff / respondent: Adv JC Prinsloo Instructed by:

Van der Lith Inc Attorney for plaintiff c/o Alberts Attorneys Bloemfontein On behalf of the defendant / excipient: Adv F Pauer Instructed by: State Attorney Bloemfontein

[1] 1975 (2) SA 706 (N)

[2] At p. 708 E – F.

[3] 1968 (4) SA 184 (R) at p. 186

[4] 1983 (4) SA 855

[5] 2023 JDR 2084 (WCC)

[6] 2006 (1) SA 461 (SCA)

[7] 2015 (2) SA 193 (CC)

- [8] Dharampal Transport (Pty) Ltd v Dharampal 1956 (1) SA 700 (A); Van Lochen v Associated Office Contracts (Pty) Ltd 2004 (3) SA 247 (W); Alphina Investments Ltd v Blacher 2008 (5) SA 479 (C).
- [9] 2014 (3) SA 177 (SCA).
- [10] National Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475 (A) at 483 H – I.
- [11] 2012 (2) SA 519 (KZD)
- [12]
- p. 527, par. [31].
- [13]
- p. 183, par. [13].
- [14] 1980 (4) SA 525 (Z)
- [15] Par. [10].
- [16] International Tobacco Company of SA Ltd v Wollheim and Others 1953 (2) SA 603 (AD); Lockhat and Others v Minister of the Interior 1960 (3) SA 765 (D).
- [17] 2010 (1) SA 627 (CPD)
- [18]
- p. 630, par. [10].
- [19] Francis v Sharp 2004 (3) SA 230 (C) at 240 E – F; Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211 B.
- [20] (5874/2021) [2023] ZAFSHC 389 (9 October 2023)
- [21] Par. [5].
- [22] Par. [15].
- [23] Par. [22].

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