

SOUTH AFRICA / JUDGMENT

## Ndaliso v MEC of the Department of Health of the Eastern Cape Government, Bisho (EL 478/12, ECD 1178/12) [2012] ZAECELLC 20 (30 November 2012)

[2012] ZAECELLC 20

COURT

Eastern Cape High Court, East London Local Court

BEFORE

J.E Smith

CASE / FILE NUMBER

EL 478/12, ECD 1178/12

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – EAST LONDON

Case no: EL 478/12

ECD 1178/12

Date Heard: 27/11/12

Date Delivered: 30/11/12

In the matter between:

BONISILE CHRIS NDALISO ..... PLAINTIFF

And

MEMBER OF THE EXECUTIVE COUNCIL OF THE

DEPARTMENT OF HEALTH OF THE EASTERN CAPE

GOVERNMENT, BHISHO ..... DEFENDANT

JUDGMENT

SMITH J:

The Plaintiff issued summons against the Defendant for damages in the amount of R1 020 000, arising out of the alleged negligence of the medical staff of the Frere Hospital, East London, during the course of medical treatment administered to the Plaintiff in respect of a fracture of his right patella. The Defendant has filed an exception to the Plaintiff's particulars of claim on the grounds that:

- (a) they are vague and embarrassing; and
- (b) they lack averments necessary to sustain a cause of action.

The Defendant has in particular averred that the plaintiff's particulars of claim do not:

set out the basis of the defendant's alleged negligence;

state the period and time when the alleged negligence took place;

state whether the alleged negligence occurred at the time of, or after, the defendant's medical and hospital staff conducted the open reduction procedure and internal fixation; and

state when, how and by whom the foreign body which was lodged in the plaintiff's knee was discovered.

The impugned paragraphs of the Plaintiff's particulars of claim read as follow:

*"6. Despite the agreement, the Defendant, through its medical and hospital staff, carried out medical treatment to the Plaintiff negligently in one or more of the following respects:*

6.1 an open reduction procedure and internal fixation was, performed in the course of which a foreign body, being the end of a Kwire became lodged in the Plaintiff's knee;

6.2 the said medical and hospital staff failed to prevent the lodging of the said foreign body in the Plaintiff's knee;

6.3 they failed to notice the presence of the said foreign body in the Plaintiff's knee;

6.4 they failed to have Xrays taken after the internal fixation had been performed;

6.5 they failed to remove foreign body from the Plaintiff's knee.

7. As a result of the foregoing the Plaintiff suffered a significant degree of injury involving the articular surfaces of the knee for a period of about 7 years resulting in premature degenerative changes with resultant inability to perform certain weightbearing activities on a permanent basis together with the associated pain and suffering and the loss of amenities of life."

In terms of Rule 18(4) of the Uniform rules of Court:

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

And in terms of Rule 18.10 a plaintiff suing for damages is required to set them out in such a manner “as will enable the defendant reasonably to assess the quantum thereof.”

A plaintiff is therefore required to plead a summary of the material facts on which he or she will rely with sufficient clarity to enable the defendant to plead thereto. These primary factual allegations, which are also referred to the *facta probanda*, are those which the plaintiff will be required to prove at the trial in order to succeed with his or her claim. They must be distinguished from the secondary allegations, or *facta probantia*, which are usually matters for evidence. (*Jowel v Bramwell Jones* 1998 (1) SA 836 (WLD) at 903 AB).

The enquiry as to whether a pleading is vague and embarrassing involves a twofold consideration. The first being whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. (*Trope v South African Reserve Bank And other two cases* 1992 (3) SA 208 (TPD) 211BE.) An exception on the ground that the pleading is vague and embarrassing will only be allowed if the excipient will be prejudiced if the offending paragraphs are allowed to stand. (*Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (CPD) at 298AD.)

Mr Sishuba, on behalf of the Defendant, has submitted that it is not clear from paragraph 6 of the Plaintiff's particulars of claim whether the Plaintiff's cause of action is founded on an averment that the medical staff were negligent in making use of a foreign object (namely the Kwire) during the operation, or the fact that a portion of the Kwire, namely the head thereof, was left lodged in the Plaintiff's knee. The impugned portions are therefore open to different interpretations, and the Defendant is left guessing as to what the Plaintiff's actual cause of action is. They will therefore be prejudiced if the particulars are allowed to stand in their present form, so he argued. In my view this argument cannot be upheld. It is clear on a reasonable reading of the Plaintiff's particulars of claim that he relies on the alleged negligence of the medical staff in: allowing a foreign object, namely the head of a Kwire, to become lodged in his knee; failing to take reasonable steps to detect the said foreign object; and in failing to arrange for it to be removed. It is also clear that the alleged negligent conduct of the hospital staff occurred during, and after, the open reduction procedure which was performed during September 2004. In my view therefore the Plaintiff has set out the material facts on which he will rely with sufficient clarity and particularity so as to enable the Defendant to plead thereto.

I am also satisfied that paragraph 7 of the particulars of claim contain sufficient particularity to enable the Defendant reasonably to assess the quantum of the Plaintiff's damages. The Plaintiff has set out with sufficient particularity: the nature of the injury; the duration; and the sequelae thereof. The detail relating to the discovery of the foreign object lodged in the plaintiff's knee, which Mr Sishuba has submitted should have been pleaded by the Plaintiff, in my view do not form part of the *facta probanda*, and it was therefore not incumbent on the Plaintiff to plead them. In the result I am of the view that the exception cannot be upheld.

I therefore make the following order:

The exception is dismissed with costs.

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J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff : Advocate Sishuba

Attorney for the Applicant : Niehouse McMahon Attorneys

12 Belgravia Crescent

Southernwood

Eass London

Ref: McMahon/ap/gn1071

Counsel for the Respondents : Advocate Louw

Attorney for the Respondents : State Attorney'

1st Floor, Permanent Building

East London

Ref: 358/12p11(Mr Maqambayi)

Date Heard : 27 November 2012

Date Delivered : 30 November 2012

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