

SOUTH AFRICA / JUDGMENT

Ngovhela v Mbele and Another (23641/2019) [2020] ZAGPPHC 664 (18 November 2020)

[2020] ZAGPPHC 664

COURT

North Gauteng High Court, Pretoria

BEFORE

S D J Wilson

CASE / FILE NUMBER

23641/2019

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED.

Case

No: 23641/2019

In the matter between:

SP
NENGOVHELA
Plaintiff
and
MBELE,
A.M.
First Defendant
NETCARE
FEMINA
HOSPITAL
Second Defendant

JUDGMENT**ON EXCEPTION****WILSON AJ:**

1 The plaintiff (“Ms. Nengovhela”) sues for loss she claims was caused by the first defendant (“Dr. Mbele”)

and staff employed by the second defendant (“Netcare”) during and after intrauterine foetal death surgery. The surgery

involved the performance of a hysterectomy. It is alleged that during and after this surgery Dr. Mbele and Netcare staff were responsible

for various negligent acts and omissions that led to serious post-operative complications, and longer-term harm. Chief among the

acts of negligence alleged is that a swab was left inside Ms. Nengovhela’s abdominal cavity. This allegedly caused an ileus

and various other life-threatening complications.

2 Netcare now takes exception to Ms. Nengovhela’s particulars of claim, on the grounds that they are vague and embarrassing, and that they do not comply with Rule 18, in four discrete respects. All four of Netcare’s complaints relate to a lack of particularity in the way that Ms. Nengovhela has pleaded her damages.

3 I will address Netcare’s complaints below. Before I do so, however, it is necessary for me to say something about the difference, if any, between an ordinary exception on the basis that a pleading is vague and embarrassing, and an exception based on non-compliance with Rule 18 (10).

4 Mr. Posthumus, who appeared for Netcare, drew a distinction between an exception based on the ordinary common law ground of vagueness and embarrassment, and an exception based on non-compliance with Rule 18. The common law, Mr. Posthumus submitted, requires an excipient to demonstrate an ambiguity in a pleading that prevents the excipient from understanding and responding to the case it must meet. In other words, the common law requires both an ambiguity in the pleading and prejudice to the party called upon to respond to it.

5 An exception based on Rule 18 (10), Mr. Posthumus contended, is different. Rule 18 (10) lays down strict requirements for the form

in which damages must be pleaded. Non-compliance with those strict requirements is prejudicial in itself, meaning that an excipient need only show non-compliance with the Rule to demonstrate that the exception is well-taken.

6 I am not persuaded by the distinction that Mr. Posthumus seeks to draw. The question in this case is whether there is an ambiguity

that prevents Netcare from reasonably estimating the quantum of Ms. Nengovhela's damages and pleading to her particulars of claim. This is the test when an exception involves an allegation of non-compliance with Rule 18 (10) (*Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 952I to 953C). It is not materially different to the test that is generally applied in all exceptions taken on the grounds that a pleading is vague and embarrassing (see, for example, *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74, in which it was said that particulars of claim are vague and embarrassing if they do not disclose to the defendant "with reasonable distinctness . . . the case he has to meet").

7 Strictly speaking, mere non-compliance with Rule 18 does not in itself supply the grounds for an exception. If a pleading does not

contain the particularity required by Rule 18, the ordinary course is to object to the pleading as an irregular step under Rule

30. If, and only if, the lack of particularity "goes to the root of the cause of action" (if in other words the lack of particularity prevents the opposing party from reasonably ascertaining the case to be answered), an exception can be taken on the grounds of vagueness and embarrassment (*Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902F-H).

8 In this case, Netcare has chosen to except. I am not sure that its complaints about Ms. Nengovhela's particulars of claim really support that procedure, in that none of them seem to me to go to the root of Ms. Nengovhela's cause of action. However, this is a question that it is not necessary for me to address, since the none of the ambiguities that Netcare complains of offend against Rule 18 (10), or otherwise yield questions of interpretation that cannot be resolved simply by reading the particulars of claim reasonably, sensibly and as a whole.

Netcare's first complaint

9 Netcare's first complaint relates to long-term shortness of breath alleged to have resulted from respiratory failure. The complaint is that the particulars of claim do not set out the nature of the future treatment the shortness of breath will require and that they do not state whether the shortness of breath is temporary or permanent. These defects in pleading are said to be in breach of Rule 18 (10) (c).

10 I am unable to conclude that the failure to allege the kind of future treatment required for shortness of breath is in any way vague

or in breach of Rule 18 (10) (c). There is nothing in the Rule that requires the nature of future treatment to be set out, and it seems to me that this level of particularity is not necessary to enable Netcare to plead to the particulars.

11 Mr. Posthumus concentrated his fire on the alleged failure to state whether the shortness of breath is temporary or permanent. This

is a requirement of Rule 18 (10) (c) (ii), in that Ms. Nengovhela must specify whether a disability alleged is temporary or permanent.

12 The answer to Netcare's complaint is that Ms. Nengovhela does just that in paragraphs 10.5.4 and 10.5.6 of her particulars of claim. Paragraph 10.5.4 states that "it is anticipated that the plaintiff will be permanently, moderately disabled". Paragraph 10.5.6 states that the plaintiff "suffers fatigue, body aches, shortness of breath, depression and anxiety". Reading these allegations together, in the context of the particulars of claim as a whole, the irresistible conclusion seems to me to be that Ms. Nengovhela expects her shortness of breath to be permanent. Mr. Posthumus was unable to advance any other reasonable interpretation of these allegations, or of the particulars of claim as a whole.

13 It follows that Netcare's first complaint cannot be sustained.

Netcare's second complaint

14 The second complaint relates to paragraph 10.1 of the particulars of claim. Mr. Posthumus argued that the pleading of the sum Ms. Nengovhela claims for past hospital and medical expenses offends against Rule 18 (10) (a). Mr. Posthumus argued that the Rule's requirement that medical costs and hospital expenses be specified, together with an account of "how these costs and expenses are made up", means that Ms. Nengovhela must provide a line item account of these expenses, with a specific sum attached to

each expense.

15 What Ms. Nengovhela has instead done is list the individual expenses and provide a globular estimated sum of R350 000 that covers them all. The reason for pleading in this way is that Ms. Nengovhela is not yet in possession of the medical aid vouchers that quantify her hospital costs.

16 It is a matter for comment that at least some of these costs must be amounts that are due to, or have been paid to, Netcare itself. It seems artificial to demand particularity of sums which are within Netcare's own knowledge.

17 Be that as it may, the question is whether Rule 18 (10) (a) has been complied with. It seems to me that it has. Ms. Nengovhela has provided a sum – R350 000 – and provided a list of expenses that make up the sum. She has accordingly set out her

costs and expenses, together with "how these costs and expenses are made up". Mr. Posthumus was unable to point me to any authority that Rule 18 (10) (a) requires Ms. Nengovhela to go further than this, by providing a line item account of each expense. That would, it seems to me, be a particularly restrictive interpretation of the Rule for which strongly persuasive or binding authority would be required.

18 There appears to be no such authority. In its absence, I am not prepared to adopt the restrictive interpretation of the Rule Mr.

Posthumus urges, which seems to me to strain its language to an unintended purpose.

19 It follows that Netcare's second complaint cannot be sustained.

Netcare's third complaint

20 Netcare's third complaint relates to how Ms. Nengovhela's particulars of claim deal with loss of past and future income. It is argued that paragraph 10.3 of the particulars fails to specify the period during which Ms. Nengovhela was unable to work as a result of the negligence she alleges, to provide any computation of the amount claimed for loss of past or future income, or to specify Ms. Nengovhela's past or future occupation.

21 I am unable to agree. Paragraphs 10.3.3 and 10.3.4 state that Ms. Nengovhela expected to return to work after her operation on 27

March 2017. As a result of the complications which Ms. Nengovhela states were caused by the defendants' negligence, she was only able to return to work on 10 April 2017. That is just shy of two weeks. The claim for loss of past income is R7234.38 (specified in paragraph 10.3), which is about half of Ms. Nengovhela's monthly income of R14 468.75 (specified in paragraph 10.3.2).

This provides both the particularity and the computation that Netcare says is absent.

22 It is clear from the particulars of claim that Ms. Nenghovela was employed as a prison officer before her surgery, and continues to be so employed. Netcare argues that Ms. Nenghovela is required to set out exactly what tasks her job entails, and how, if at all, her ability to perform the various tasks connected to her job has changed. Rule 18 simply does not require that level of specificity.

What it requires is a statement of "the nature of the work the plaintiff will in future be able to do". The particulars

provide this.

23 Mr. Posthumus was unable to point me to any authority that requires a comparison between the tasks within a specific occupation that a plaintiff is able to perform before and after the harm. In the absence of such authority, I am not prepared to adopt an interpretation of the Rule as demanding as Mr. Posthumus urges.

24 As to loss of future income, Rule 18 (10) (c) requires no more than a reasoned estimate, not a "computation". Paragraph

10.4 provides a detailed, reasoned estimate that more than meets the requirements of the Rule.

25 It follows that Netcare's third complaint cannot be sustained.

Netcare's fourth complaint

26 The final arrow in Netcare's quiver is the claim that Ms. Nengovhela's particulars of claim fail to state which "amenities of life" she has lost as a result of the harm she alleges. This is said to conflict with Rule 18 (10) (c) (ii), which requires that the plaintiff must quantify any disability suffered in respect of "the enjoyment of amenities of life (giving particulars)".

27 Again, a sensible examination of the particulars reveals the specificity that the Rule requires. The amenities lost, according to

paragraph 10.5.6 of the particulars, include freedom from "fatigue, body aches, shortness of breath, depression and anxiety". That is all the particularity the Rule requires.

28 For these reasons, Netcare's fourth complaint fails, and Netcare's exception must accordingly be dismissed.

Costs

29 In truth, the way damages have been pleaded in this case is more than adequate. In the circumstances, it is exemplary. Every relevant particular that can be given has been given. Read as a whole, the particulars are more than sufficient to allow Netcare to reasonably assess the quantum claimed, and to plead.

30 What Netcare appears to demand instead is a level of particularity that will allow it to check the correctness of Ms. Nengovhela's calculations. But that is not required at this stage of the proceedings (*Thonar v Union and South West Africa Insurance Co Ltd* 1981 (3) SA 545 (W) at 551C).

31 Ms. Munro, who appeared for Ms. Nengovhela, asked that I dismiss the exception with costs on the attorney and client scale. There is precedent for this where an exception has been taken "under a complete misconception as to the function of particulars"

(*Reid NO v Royal Insurance Co Ltd* 1951 (1) SA 713 (T) at 720D).

32 Netcare has taken an unreasonably exacting approach to Ms. Nengovhela's particulars of claim. I accept that its approach was based on a misconception of the function of particulars in general, and the content and meaning of the particulars of claim in this case. This is not least because Netcare's complaints are advanced in the face of plain language in the particulars of claim that shows them to be unfounded.

33 It seems to me that the exception was so poorly taken that Ms. Nengovhela ought to be more fully indemnified against the costs of

opposing the exception than an ordinary party and party order would allow. Exceptions are not occasions for word games, or abstract

debates about whether there has been technical compliance with the letter of Rule 18. They are meant to insulate a party against having to plead to allegations that they cannot reasonably be expected to answer. In other words, they are meant to prevent or cure actual prejudice.

34 Netcare seems to have lost sight of this. Indeed, Mr. Posthumus submitted that, in the event of a breach of Rule 18, no prejudice at all need be established for the exception to succeed. That, as I have already held, cannot be correct.

35 For all of these reasons, the exception is dismissed with costs on the scale as between attorney and client.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or 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 18 November 2020.

HEARD ON: 5 November 2020

DECIDED ON: 18 November 2020

For the Excipient:

I Posthumus

Instructed by Whalley and van der Lith Incorporated

For the Respondent:

W Munro

Instructed by Adams and Adams

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