

SOUTH AFRICA / JUDGMENT

Ngwenya v Allied Builders Home Centre (Pty) Ltd (2022/18959) [2023]

ZAGPJHC 1330 (17 November 2023)

[2023] ZAGPJHC 1330

COURT

South Gauteng High Court, Johannesburg

BEFORE

Salmon AJ

CASE / FILE NUMBER

2022/18959

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE NO. 2022/18959

In the matter between:

MARIA

NTOMBIZODWA NGWENYA

(ID[...])

PLAINTIFF

And

ALLIED

BUILDERS HOME CENTRE (PTY) LTD

DEFENDANT

Coram: Salmon AJ

Heard on: 16 October

2023, (MS Teams)

Delivered on: 17 November

2023

JUDGMENT

SALMON AJ:

- [1] This is an exception taken by the Defendant to the Particulars of Claim on the basis that the pleading contains allegations which are vague and embarrassing and/or which fail to disclose a cause of action. The complaint contiguously forms an objection under Rule 30 of the Uniform Rules of Court of a lack of compliance with the Rules.
- [2] The Plaintiff's cause of action arises out of an incident in which, it is alleged, she was injured at the premises of the Defendant. The claim is for past and future medical expenses, loss of earnings and general damages. The total amount claimed is in the region of R6 million.
- [3] The particular allegations which give the Defendant cause to take exception arise as follows. In the first place, the following[1] is alleged: -

"4. On or about 16th April 2021, in the store/shop (The Defendant) "the premises" situated at 23 Tile Crescent, Olifantsfontein Road, Claysville,

Gauteng Province (Shop 02, Claysville Shopping Centre), the Plaintiff climbed on a tile that was not properly completed, and/or did not have enough concrete underneath/hollow floor tiles and slipped wherein she was seriously injured.

5. At the time of the incident, the abovementioned store/shop was managed/owned and/or under the control of the Defendant, the Defendant had a legal duty to keep the store/shop safe, well maintained and to protect the public and anyone entering the store/shop from any hazardous and or from being injured in the store/shop. Alternatively, the Defendant had a duty to take all reasonable steps to ensure the public and or anyone entering the premises and/or the plaintiff in particular, were safe and well protected whilst inside the premises.
6. In the alternative to paragraph 5 above, the Defendant was/were the beneficial and risk bearing possessor/s of the property/store/shop in question."

- [4] Under the heading "Damages" the following is alleged[2]:-

"12. As a result of the Defendant's wrongful conduct and the sequelae of Plaintiff's injuries, Plaintiff suffered damages in the total sum of R6 000 000,00 (Six million rand), which sum is made up and calculated as follows:

- a. ESTIMATED PAST HOSPITAL MEDICAL AND RELATED EXPENSES – R150 000,00
- i. The relevant vouchers will be provided in due course.
- ii. The Plaintiff reserves the right to amend this estimated claim in future.
- b. ESTIMATED FUTURE HOSPITAL MEDICAL AND RELATED EXPENSES – R1 000 000,00
- i. The Plaintiff will in future require the use of pain medication.

- ii. The Plaintiff will in future require further surgery to his right leg.
 - iii. The Plaintiff will in future require a prosthesis for his right leg to be replaced at regular intervals.
 - iv. Full and further details will appear from the expert reports.
 - v. The Plaintiff reserves the right to amend the estimated claim in future.
 - vi. No actuarial principles have been applied to this estimated claim.
- c. ESTIMATED PAST AND FUTURE OF EARNINGS, ALTERNATIVELY, EARNING CAPACITY – R3 000 000,00
- i. As a result of the injuries and the sequelae thereof the Plaintiff's working capacity and therefore his earning capacity has and will be diminished.
 - ii. As a result of the injuries and the sequelae thereof, the Plaintiff's prospects for obtaining and retaining employment, promotions and earning bonuses have been affected and diminished, alternatively, his potential of building, growing, expanding and developing his businesses have seriously been diminished.
 - iii. As a result of the injuries and the sequelae hereof, The Plaintiff's productivity has and will be diminished.
 - iv. Accordingly, it is submitted that the Plaintiff has and will suffer a loss of earnings, alternatively, earning capacity in the amount of R3 000 000,00
 - v. Full and further details will appear from experts reports.
 - vi. The Plaintiff reserves the right to amend this estimated claim.
 - vii. No actuarial principles have been applied to this estimated claim.
- d. GENERAL DAMAGES – R1 850 000,00

The Plaintiff's claim for general damages is based on sequelae as set out hereinabove, and as will be set out in the expert reports to be obtained and delivered in due course, the treatment the Plaintiff has received in the past and will receive in the future, the fact that the Plaintiff has suffered a loss of amenities of life and experienced pain and suffering and will do so in the future on a permanent basis."

- [5] I intend to deal with the two paragraphs allegedly giving rise to excipiability separately. First, paragraph [4].

- [6] Ms Mpulo-Merafe appeared for the Excipient, whose complaint is that the paragraph in question fails to comply with Rule 18(4) of the Uniform Rules of Court. This is because it does not allege sufficient facts from which the Excipient is able to assess what case it is to meet. Ms Mpulo-Merafe submitted that the nature of the allegation was such that the only way that the Defendant was able to deal with it was to plead a bare denial. In her submission this was unacceptable as it did not constitute proper pleading.
- [7] The contention proceeded further on the basis that there is no particularity as to: -
- a) The time the alleged incident occurred;
 - b) The direction in which the Plaintiff was walking;
 - c) Where exactly in the shop did the incident occur;
 - d) How and in what manner the Plaintiff allegedly slipped;
 - e) What injuries were sustained; and
 - f) The exact cause of the alleged incident.
- [8] Ms Mpulo-Merafe's point was that this is necessary in order to establish a link in the chain between paragraphs [4] and [5] of the Particulars of Claim (cited above). Otherwise, there was no intelligible allegation of liability to which the Defendant could meaningfully respond and/or assess its position. In short, the allegations do not constitute a clear and concise statement of the material facts relied upon by the Plaintiff with sufficient particularity to enable the Defendant to plead.
- [9] Mr Makopo, who appeared for the Plaintiff, countered that the picture to which the Defendant had to plead was clearly established by paragraph [4]. The Defendant's objection amounted to no more than the Defendant requiring of the Plaintiff to do its work; in other words, the Defendant was simply seeking further particulars, and it was able to plead quite competently to the allegations.
- [10] I do not agree with Mr Makopo. Paragraph
- [4] requires more of one's imagination than comprehension to form the picture he suggests. For example, it is alleged – indeed, it is crucial to the apparently inciting incident – that the Plaintiff “climbed on a tile”. It is difficult to know what this means, and Mr Makopo was not able to explain it when I raised this with him. I would think that the Defendant needs to know with greater clarity how the incident happened. How a woman, 66 years old, climbing on a tile as a result of which she sustained injuries (giving rise to a claim of many millions of rands) requires something more to establish a link into the allegations in paragraph [5] that gave rise to the Defendant having the legal duty upon which the Plaintiff has based its claim.

- [11] A further indication of the vagueness and potentially multifarious meanings of paragraph [4] is that it is uncertain as to what is meant by a “tile that was not properly completed”. Or, for that matter, that it “did not have enough concrete underneath/hollow floor tiles”. Try as one might, I do not think it is possible to fathom what happened, nor why.
- [12] Mr Makopo is correct in submitting that the *facta probantia* necessary to sustain a claim do not have to be pleaded. But *facta probantia* are the facts (evidence) which prove the essential and material facts and it is those which have to be clearly and concisely set out. The Defendant is not obliged to be taken by surprise at the trial; it is entitled to conduct its own enquiries about the case it is called upon to meet and prepare evidence accordingly. To do this, it must know what the case is.
- [13] I conclude that the allegations in paragraph [4] of the Particulars of Claim are not compliant with Rule 18(4) and they are vague and embarrassing as understood by the authorities. They give rise to prejudice in the Defendant’s inability to understand the case to plead, to assess its position (including *vis á vis* public liability insurance) and so forth. The relief in this regard is set out below.
- [14] I turn to deal with the allegations in paragraph 12 of the Particulars of Claim. As of the time of the launch of the action, the Plaintiff was a 65-year-old woman. (No further relevant detail in her regard is provided.) It is alleged that:
- “[9] *In and because of the incident, the Plaintiff sustained bodily injuries (“the injuries”) consisting of:*
- a) A right knee open patella tendon injury;
 - b) Has been permanently disfigured and disabled;
 - c) Has suffered Post-Traumatic Stress Disorder and anxiety and shall continue to suffer from such for her entire life
- [10] Full and further details of the nature, effects and duration of the injuries are set out hereunder and will appear from the relevant medical reports and experts’ reports (“the experts reports”) which the plaintiff will obtain and deliver in due course.”
- [15] As it turns out, the “nature, effects and duration of the injuries” are not set out anywhere in the Particulars of Claim, but the Plaintiff claims damages from the Defendant arising out of the referred to incident on a variety of bases. The Excipient’s contention is that the Particulars fail to satisfy paragraph 18(10) of the Uniform Rules of Court and are therefore lacking in particularity to sustain a cause of action; and/or are vague and embarrassing.
- [16] Past hospital, medical and related expenses - the Plaintiff claims R150 000,00. These are said to be “estimated” and the “relevant vouchers will be provided in due course”. This is an unacceptable form of pleading a claim for past expenses, which are capable of ready ascertainment. A Defendant is entitled to know how, and on what grounds a claim for expenses

already incurred is made up. This is the reason for Rule 18(10) - in order to inform a view as to whether to tender, to defend, to confess and avoid, or to concede.

- [17] Future hospital related expenses – the Plaintiff claims the amount of R1 000 000,00. It is alleged that the Plaintiff will, in future, require the use of pain medication, will in future require further surgery to his[3] right leg, will require a prosthesis for his right leg to be replaced at regular intervals and so forth. Mr Makopo submitted that the information in this regard will be presented via experts reports in due course, and the Defendant will then have the particularity that it needs in order to be able to prepare for trial. In my view this stance is not in conformity with the ethos of Rule 18(10). The Defendant is entitled to know and understand why a claim of R1 000 000,00 is being made against it.
- [18] Estimated past and future earnings, alternatively earning capacity – the Plaintiff claims R3 million. The same considerations apply. There is no allegation, for example, as to what the Plaintiff's current earning capacity is; nor what Ms Ngwenya's earning capacity will be going ahead (as a 66-year-old woman), nor for how long. The broad-brush allegations one finds in the Particulars of Claim are not compliant with Rule 18(10) of the Uniform Rules of Court. They give the impression of a copy-and-paste[4] and anyway they leave the Defendant in a position that it does not know why and on what grounds the amount of R3 000 000,00 is being claimed.
- [19] General damages – the amount claimed is R 1 850 000. The same can be said.
- [20] Rule 18 of the Uniform Rules of Court contains several requirements. Thus:
- a) Rule 18(4) - Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence, or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.
 - b) Rule 18(10) - A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his or her date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for —
 - (a) medical costs, hospital costs and other similar expenses and how these costs and expenses are made up;
 - (b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
 - (c) disability in respect of;-
 - (i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars) and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

[21] The Plaintiff's allegations fall far short of compliance with these requirements. They contain insufficient particularity so as to conform with what is required of a Plaintiff in terms of the Rules of Court, and in terms of pleading practice in general. The allegations are vague in the extreme, and the Defendant is undoubtedly prejudiced as a result.

[22] Claims for personal injury such as the present need to be particularised to the extent that the parties, and the Court, know why there is a case and to where it is going. For the Defendant, this latter aspect embodies the reasonable expectation of what it can be called upon to pay. For the Plaintiff, it creates a reasonable expectation of financial recovery. Figures which are not justified in the way postulated by the Rules do a disservice to the interests of both.

[23] The order I make is the following:-

1. The Defendant's objection to paragraph [4] of the Particulars of Claim in terms of Rule 18(4) read with Rule 30, and its exception based on the contention that the pleading is vague and embarrassing, are upheld;
2. The Defendant's objection to paragraph [12] of the Particulars of Claim in terms of Rule 18(10) read with Rule 30, and its exception based on the contention that the pleading is vague and embarrassing, are upheld;
3. The Particulars of Claim are set aside;
4. The Plaintiff is given leave to deliver fresh Particulars of Claim within 20 days from the date hereof;
5. In the event of the Plaintiff failing so to deliver fresh Particulars of Claim, the Defendant is given leave to approach the Court for an order striking out the Plaintiff's claim;
6. The Plaintiff is ordered to pay the Defendant's costs on the party and party scale, such to include the costs of counsel.

SALMON AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of Judgment: 16 October 2023

Date Delivered: 17 November 2023

For the Plaintiff: Adv T Makopo

Instructed by: SL Attorneys, Pretoria

For the Defendant/Excipient: Adv T Mpulo-Merafe

Instructed by: Clyde & Co, Sandton

[1] The text is quoted exactly.

[2] The text is quoted exactly.

[3] sic

[4] Given that all that is pleaded of the Plaintiff (relevantly) is that she is a 65-year-old woman, the allegation that “... his potential of building, growing, expanding and developing his businesses have seriously been diminished...” (quoted above in paragraph [4]) presents a curious disconnect.

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