

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION - EAST LONDON

Case number: EL: 34/14

ECD: 344/14

Date Heard: 05/02/2015

Date Delivered: 17/02/2015

In the matter between:

N[...] E[...] N[...] obo T[...]

PLAINTIFF

And

DR E M SEKWABE

1ST DEFENDANT

THE MEDICAL MANAGER OF LIFE ST. DOMINICS

2nd DEFENDANT

JUDGMENT

SMITH J:

[1] The plaintiff, who acts in her capacity as mother and natural guardian of her minor child, instituted civil action against the defendants for damages arising out of injuries suffered by her ward during child birth. The first defendant, Dr E.M Sekwabe, is described in the particulars of claim as a gynaecologist "*attached to the maternity section of LIFE ST DOMINIC'S HOSPITAL*", and the second defendant as "*THE MEDICAL MANAGER OF THE BORDER HOSPITAL (PTY) LTD*". The particulars of claim further state that the second defendant is sued in "*his official capacity and on the basis that he is vicariously liable for the wrongful conduct of the employees of the Border Hospital*". Both defendants subsequently filed exceptions on the ground that the particulars of claim are vague and embarrassing.

[2] The plaintiff's claim is pursuant to injuries suffered by her ward during child birth on 15 January 2001, and allegedly caused by the "*first defendant, alternatively, the second defendant through the medical and hospital staff of the Life St Dominies Hospital,*" in that they:

(a) failed to comply with their duties in accordance with an oral, "*alternatively tacit agreement*", to provide proper medical care to the plaintiff and her baby; and alternatively

(b) negligently acted in breach of their duty of care towards the plaintiff's baby.

[3] Both defendants filed notices requiring the plaintiff to remove the causes of complaint, and when she failed to remedy the alleged defects, they filed exceptions in the following terms:

(a) first defendant averred that the particulars of claim are vague and embarrassing since;

(i) it is unclear from paragraph 7 thereof whether It is alleged that the first respondent breached his duty of care to the plaintiff or her baby, or whether it is the medical and hospital staff who had breached their duty of care;

(ii) it is not clear from paragraph 8 thereof on which ground the plaintiff rely for the averment that the first defendant had breached the agreement between the parties, alternatively, had breached his duty of care to the plaintiff and her baby; and

(iii) the plaintiff has failed to plead sufficient particularity of the injuries, and has in particular failed to state whether the pain and suffering is of a permanent or temporary nature, and also failed to provide sufficient particularity of the nature of the injuries her ward had allegedly suffered.

(b) The second defendant's exception avers substantially the same grounds and, in addition, avers that the plaintiff has failed: to plead a proper basis for the citation of the second defendant (there being no such functionary); to state on what basis he would bear vicarious liability for the conduct of the employees of the Border Hospital; and to set out grounds for the averment that the defendants, or the hospital staff, negligently breached their duty of care.

[4] Paragraph 7 of the particulars of claim reads as follows:

"7. Upon admission to the said hospital, an oral alternatively tacit agreement came into being between the parties, alternatively, the defendants incurred legal duty, in terms whereof the defendants would, through medical and hospital staff of the said hospital:

7.1 Attend to the Plaintiff and her baby with the skill and diligence reasonably expected of such medical and hospital staff which included the taking of the necessary steps and doing the necessary tests to ascertain and monitor the condition of the Plaintiff's baby at all relevant times in order to ensure that the Plaintiff's baby will be born without abnormalities.

7.2 Follow the generally acceptable procedures prior to and during delivery of the baby and/or any emergency in relation thereto timeously to ensure that the baby is born normal;

7.3 In any event provide medical care and attention to the Plaintiff's baby as circumstances may require;

7.4 Take all the necessary and reasonable steps to prevent or minimize pain and trauma for the Plaintiff's baby;

7.5 Take all such steps as may be reasonably required to keep the baby normal at all times both prior to and after the delivery process".

[5] And paragraph 8 reads as follows:

"The First Defendant, alternatively, the Second Defendant through the medical and hospital staff of the Life St Dominic's Hospital, acting within the course and the scope of their employment with the Second Defendant failed to comply with their duties as set out in paragraphs 7.1 to 7.5 hereinabove and thereby breach the agreement between the parties, alternatively, negligently acted in breach of their of care towards the Plaintiff's baby in and as a result whereof the baby suffered an injury on the right arm and shoulder which led to the right arm being immobile".

[6] Mr *Godongwana*, who appeared for the plaintiff, conceded during oral argument that the second defendant's complaint regarding the manner of his citation was valid and that this has rendered the particulars of claim vague and embarrassing - at least in respect of the second defendant. He thus accepted that the second defendant's exception should be upheld on this basis. He argued, however, that the other grounds raised by the defendants are untenable.

[7] I do not agree with the latter submission. In my view Mr *Bester*, for the first defendant, and Mr *Woods*, for the second defendant, correctly argued that it is unclear on what basis the defendants are alleged to have breached the oral, alternatively tacit terms of the agreement. In addition, although the defendants are alleged (in the alternative) to have negligently breached their duty of care towards the plaintiff's ward, the particulars of claim fail to set out any grounds of negligence. Furthermore, the averments contained in the particulars of claim fail to establish a clear nexus between the alleged negligence of the first defendant and that of the

second defendant, or the hospital staff.

[8] In respect if the Injuries suffered by the plaintiff's ward, the particulars of claim state only that: "the baby suffered an injury on the right arm and shoulder which led to the right arm being immobile."

[9] Rule 18(10) requires of a plaintiff to plead facts relating to damages *"in such a manner as will enable the defendant reasonably to assess the quantum thereof: provided that the plaintiff suing for damages for personal injury shall specify his 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..."*

[10] I am of the view that paragraphs 7 and 8 of the plaintiff's particulars of claim are indeed vague and embarrassing for the reasons contended for by the defendants. It is not possible, on every conceivable reading, to distil a clear single meaning from these paragraphs, and the defendants are left guessing as to the legal basis on which they allegedly incurred liability for the actions of the hospital staff. (*Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) at 644-B*).

[11] In addition, the averments relating to the nature of the injuries contained in paragraph 18 of the plaintiff's particulars of claim lack particularity as required in terms of Rule 18 of the Uniform Rules of Court, and are accordingly vague and embarrassing.

[12] In my view it is virtually impossible for the defendants to distil from the particulars of claim exactly what case it is that they are required to plead to, and they would accordingly be severely prejudiced should they be required to plead thereto in its present state. That it may be possible for them to simply plead a bare denial does not detract from the fact that the pleading remains vague and embarrassing, and they are accordingly entitled to except thereto. I am accordingly of the view that the exceptions must succeed.

[13] In the result the following order issues:

1. The first and second defendant's exceptions are upheld with costs;
2. The plaintiff is granted leave to amend her particulars of claim within fifteen (15) days from the date of this order;

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

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