IN THE HIGH COURT OF SOUTH AFRICA
{EAST LONDON CIRCUIT LOCAL DIVISION}

Case no. EL 826/17
ECD: 2126/17

In the matter between:

TEMBALONKE TSHAYA Plaintiff

And

MINISTER OF POLICE, REPUBLIC OF SOUTH AFRICA Defendant

JUDGMENT

TONI AJ

Introduction

[1] The plaintiff sued out summons against the defendant in terms whereof he seeks payment of R1000 000.00 for damages he allegedly suffered consequent upon assault by a member of the South African Police Service (SAPS). The defendant raised an exception to plaintiff's summons on the ground that the summons lacks the averments necessary to disclose a cause of action against the defendant.

[2] The summons is ostensibly premised on vicarious liability of the defendant for the wrongs committed by a member of the SAPS, namely; Mja, who on 8 April 2017 allegedly discharged a fire arm which shot and injured the plaintiff. The defendant is the functionary of the State and the political head of the Department of Police (the Department).

[3] This court is required to determine whether the plaintiff's summons is excipiable on the grounds as alleged by the defendant that the summons lacks averments necessary to sustain a valid cause of action.

Facts

[4] The facts of this matter are briefly that on the 8 April 2017 the plaintiff, Tembalonke Tshaya, was at Orange Groove Location, East London, when Mzukisi Mja (Mja), a police officer employed by the defendant, allegedly discharged a fire-arm at him which caused an injury of a permanent nature in the form of a fracture of his right arm. This resulted in excessive bleeding and excruciating pain and as a result the plaintiff was put on analgesics.

[5] According to the plaintiff the conduct of Mja amounted to the unlawful and intentional / negligent discharge of a firearm and "*the defendant is vicariously liable for the wrongful acts that are committed by its member if such acts were committed whilst the aforesaid member was in the exercise of his official duties*."

[6] Consequent to the injuries sustained, the plaintiff sued out summons against the defendant. Upon service of the summons, and consequent to filing a notice to defend, the defendant filed a notice of exception on 9 October 2017. On defendant's own saying the exception is premised on Rule 20 of the Rules of Superior Court Practice (the Rules). Rule 20 provides that "*the declaration shall set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated thereon, and prayer for the relief claimed*".

[7] The exception is opposed by the plaintiff on the ground that the particulars of claim are not excipiable. The plaintiff has also raised a point of law that the defendant's reliance of Rule 20 (2) in noting its exception is ill-conceived and misplaced.

The merits of the exception

[8] The nub of the defendant's exception[1] is that the plaintiff did not set out facts and / or conclusions of law to sustain or to disclose a cause of action against the defendant. The question to be asked is whether the plaintiff's particulars of claim are so lacking in particularity that the defendant is unable to discern therefrom the case it has to meet and plead thereto without embarrassment or prejudice.

[9] It is trite that the excipient bears the onus of persuading the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed[2]. In determining whether the plaintiff's pleadings are excipiable, the court must assume the correctness of the allegations in the pleadings[3].

[10] The purpose of the pleadings is to ensure that a summary of facts is set forth that will enable the opposing side to plead thereto and come to trial prepared to meet the case of the other side and not be taken by surprise. It is incumbent on a plaintiff to formulate its statement of grounds upon which its claim is based in a concise, lucid, logical and intelligible manner and the cause of action must appear clearly from the factual allegations made. The above is more discernible from the reading of the provisions of Rule 18 (4) of the Rules which provides:

> "Each pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto."

The applicable legal provisions

[11] For a pleading to be exception proof, it must comply with the peremptory requirements set forth in Rule 18 (4). The basic rule is that the particulars of claim should be so phrased that a defendant may reasonably and fairly plead thereto. In *Trope v South African Reserve Bank*[4], the court illustrated the importance of compliance with the requirements laid down in Rule 18 (4) as follows:

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[1] As contained in parapgraph 5 of the notice of exception
[2] See Francis v Sharp 2004 (3) SA 230 C at 233.
[3] Marney v Watson and another 1978 (4) SA 140 CPA at 144 P
[4] 1993 [3] SA 264 A at 273A

"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading. The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law."

[12] In *Buchner and another v Johannesburg Consolidated Investment Co Ltd 1995 [1] SA 215 T at 216H-J,* De Klerk J stated the following:

"I emphasize the words 'shall contain a clear and concise statement of the material facts'. The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinizing the facts upon which the opinion is based."

[13] The learned Judge continued at 217E-G:

"The conclusion that the appellants are liable can only be reached or justified if those terms support the conclusion set out in the summons. … I realise that the exposition of the facts contained in a summons is no more than the pleader's opinion, or of his averment as to what the facts are. If such a statement is not disputed those alleged facts have to be accepted as proven. An opinion or conclusion as to what the parties' liabilities are, even if undisputed, does not

become a statement of fact and a failure to dispute the conclusion is of no consequence."

[14] Rule 18 (4) introduces two basic requirements with which a pleading must comply, namely; firstly, it should contain the material facts upon which the pleader relies for its claim or defence, which relates to the substance of the pleading and, secondly; it should contain a concise statement upon which a pleader relies for its claim with sufficient particularity to enable the opposite party to reply thereto, which is concerned with the way in which a pleading should be formulated.

[15] All that the plaintiff is required to do is to ensure that its summons is not excipiable by alleging facts which must be proved in order to disclose the cause of action (*facta probanda*) and not the facts or evidence which proves such facts (*facta probantia*). *In Jowell v Bramwell-Jones*[5], the court summarised the general principles applicable to exceptions as follows:

" (a) minor blemishes are irrelevant: pleadings must be read as a whole: no paragraph can be read in isolation;

(b) ...;

(c) a distinction must be drawn between facta probanda or primary factual allegations which a plaintiff must make and facta probantia which are the secondary allegations upon which the plaintiff must rely in support of his primary factual allegations. Generally speaking the latter are matters for particulars for trial and even then are limited. For the rest, they are matters of evidence.

(d) only facts need pleaded; conclusions of law need not be pleaded[6]".

[16] The true object of an exception is to dispose of the case or a portion thereof in as speedily and less costly a basis as possible and its aim is to avoid the

[5] 1998 (1) SA 836 at 902-938
[6] My underlinings

leading of unnecessary evidence at trial[7]. In the High Court exceptions are regulated by Rule 23 (1) which provides:

> "(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph *(f)* of sub rule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

[16] Rule 23 (1) creates two mechanisms upon which a defendant may except to the plaintiff's summons, namely; that the summons are vague and embarrassing or that it does not disclose averments necessary to disclose the cause of action. These two mechanisms are not mutually exclusive in that a summons may lack the averments necessary to sustain a cause of action due to material vagueness. A pleading is vague if it causes an embarrassment and prejudice on the other party. In *Torpe v South African Reserve Bank supra*, the court said:

> "An exception to a pleading on the grounds that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to such that it is vague. The second is whether vagueness causes an embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice the ability of the excipient to produce an exception proof plea is not the only, or indeed the most important, test. If that were the only test the object of the pleadings to enable the parties to come to trial, prepared to meet the other's case and be taken by surprise, may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any one of a number of ways by

[7] See Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553; Also Glaser v Heller 1940 (2) PH F119 (C); Kahn v Stuart 1942 CPD 386 at 391; Santos v Standard General Insurance Co Ltd 1971 (3) SA 434 (O)

simply denying the allegations made, likewise to a pleading which leaves ones guessing as to the actual meaning. Yet, there can be no doubt that such a pleadings is excipiable as being vague and embarrassing".

]18] A summons that does not disclose a cause of action or lacks the averments necessary to disclose a cause goes to a decision on a point of law without which the whole cause of action or part thereof may be disposed off without leading unnecessary evidence at trial[8]. In *McKenzie v Farmers' Co-operative Meat Industries Ltd*[9], the term "cause of action" is defined to mean:

"… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[19] The definition of cause of action in *McKenzie* above was quoted with approval in <u>*Dusheiko v Milburn*</u> *1964 (4) SA 648 (A) at 658A*:

"I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in McKenzie v Farmers' Co-operative Meat Industries Ltd (supra) to any given case, it is borne in mind that the definition relates only to 'material facts', and if at the same time due regard be paid to the distinction between the facta probanda and the facta probantia."

[20] Statement of material facts upon which the cause of action is founded is what distinguishes *facta probanda* from *facta probantia* as the latter refers to pieces of evidence required to prove the former[10]. It is the trite rule of evidence that the latter is not a prerequisite for pleadings and the contents of any pleading should be restricted to those facts only which serve to establish the cause of action, excluding any evidence required to prove them.

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[8] See Santos v Standard General Insurance Co Ltd 1971 (3) SA 434 (O) at 437 B;
[9] 1922 AD 16 at 23
[10] See Evins v Shield Insurance Co Ltd 1980 [2] SA 814 A at 825G; See Makgae v Sentraboer [Kooperatief] Bpk *supra* at 244C-H; King's Transport v Viljoen 1954 (1) SA 133 (K) at 138 – 139

[21] Makgoka J summarised the basic principles governing an exception in *Living Hands (Pty) Ltd and Another v Ditz and Others*[11], as follows:

> "(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
>
> (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs.
>
> (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties.
>
> (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
>
> (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
> (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
>
> (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[22] The defendant's cause of complaint in this exception is premised on Rule 20 (2) and it is that the plaintiff's particulars of claim do not disclose a cause of action and further that the plaintiff did not set out material facts and / or conclusions of law to sustain or disclose a cause of action against the defendant. The defendant's exception, however, does not go to the heart of the problem and falls short of saying that it is unable to plead as a result of material vagueness in the plaintiff's particulars of claim or that it will suffer prejudice if it were to plead to the summons in its current form.

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[23] I do not agree with the defendant that the plaintiff has to plead the conclusions of law for its summons to sustain or disclose a cause of action. It is sufficient for the plaintiff to plead material facts upon which its cause of action is based but such facts should be pleaded in clear and concise terms in keeping with the provisions of Rule 18 (4). A pleading that contains the conclusions of law, in my view, would go beyond the requirement that the pleader must plead "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court*", as set out in McKenzie *supra*.

[24] All that a pleader is required to do is to set out clearly and concisely the full factual basis for its claim or defence and set it in such a way that the other party will be able to plead thereto without suffering an embarrassment or prejudice as a result of material defect in the pleading sought to be impugned. In other words a plaintiff only has to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it.

[25] It is trite that vagueness of pleadings has to do with the formulation of the claim which generally results from the defect therein. As a general principle an exception stands to fail even if the claim is shown to be vague and embarrassing and thus in order to succeed the excipient has to show that not only is the cause of action vague and embarrassing but that he or she will suffer serious prejudice if compelled to plead in the face of the defect in the cause of action.

[26] One of the plaintiff's ground of attack against the defendant's exception is that its reliance on Rule 20 (2) is misplaced. I cannot agree more with that submission. I am, however, not fazed by the plaintiff's submission as it does not dispose of the issue at hand. The issue is whether taken as a whole, the plaintiff summons is excipiable or put differently whether the defendant is prejudiced thereby.

[27] As aforesaid, the defendant bears the onus to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action or defence is disclosed, failing which the exception must fail.

[28] At this juncture, it is apposite to pause and interrogate the relevant paragraph upon which the plaintiff relies for its damages claim, namely; paragraph 10 of its particulars of claim. Paragraph 10 reads as follows:

> "The defendant is vicariously liable for the wrongful acts that are committed by members of the South African Police Service, if such acts were committed whilst the aforesaid member of the South African was in the exercise of his official.

[29] What is pertinently clear from the reading of the above paragraph is that the plaintiff's claim is based on the vicarious liability of the respondent for wrongful acts committed by its members, if such acts were committed in the course of duty[12]. Paragraph 10 above should be read with paragraph 5 of the plaintiff's particulars of claim. In paragraph 5 the plaintiff states: "*The shooting … was wrongful and unlawful and the bullet fired by the aforesaid member of the South African Police Services (sic)…*" In paragraph 2 of its particulars of claim, the plaintiff states that: "*the defendant is cited in his official representative capacity as the Minister responsible for the South African Police Services* (*sic*)", and in paragraph 4 thereof the plaintiff states that: "*On or about …when one police official, Mzukisi Mja, fired a gunshot at the plaintiff…"* Paragraph 5 reads: "*The shooting on the person of the Plaintiff is wrongful and unlawful and…*"

[30] Equally important is paragraph 9 of the particulars of claim which seeks to emphasise that Mja was at all material times a member of the South African Police Service and in which the plaintiff states the reasons why he believes that the conduct of the aforesaid official was unlawful before concluding that firing gun shots in the direction of the plaintiff placed in jeopardy whoever might have

[12] My underlinings

appeared in direction of gun fire. All the above paragraphs make it clear that at the time of the alleged shooting incident, Mja was a member of the South African who discharged an arm in circumstances where he put the life of the plaintiff and any other person in the direction of fire in danger.

[31] It seems to me that the defendant's only source of disturbance is that "*the plaintiff has not pleaded material facts and conclusions of law…*" It is not the defendant's case that the plaintiff should have specifically stated in its summons that Mja was in the execution of his duties at the time he allegedly discharged a fire-arm. Even if it was, I suppose it would be difficult to fathom how the plaintiff would have known at this stage if Mja was on duty or not. It is a difficult question to comprehend with. In my view, this is a matter for evidence at trial.

[32] Police officers, generally, have a constitutional mandate to protect members of the public and also bear a statutory duty to prevent crime[13]. When they fail to discharge their constitutional and statutory obligations, either through commission or omission, they expose their employer to civil claims through vicarious liability. It would not be easy for a member of the public, like the plaintiff in *casu*, to know if a particular police officer who goes on a shooting spree with a fire-arm and injure members of the public is on duty or not. This can only be supplemented by evidence during trial. In *K v Minister of Safety and Security supra*, the Constitutional Court held:

> "... It was also part of the duties of every police officer to ensure the safety and security of the individual and to prevent crime. These were constitutional obligations affirmed by the Police Act 68 of 1995"

[33] I agree with the proposition set out in *McKelvey v Cowan NO* (referred to in the plaintiff's Heads of Argument) that: *"… If evidence can be led which can disclose a cause of action alleged in the pleadings".* I further agree with the

[13] See K v Minister and Safety and Security 2005 (6) SA 419 (CC)

assertion contained therein that: "*A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action"*.

[34] In the instant case the police officer concerned was armed with a fire-arm which police officers usually carry when they are on duty. He shot at the plaintiff without provocation and the plaintiff was injured. It is important to establish a causal link between the conduct of the police officer concerned and the business of his employer. It is worth noting that if the conduct of the police officer concerned is inimical to the business of his employer, namely; that of the protection of members of the public, the employer may well be held liable for the conduct of its employee.

[35] The above, in my view, will depend on the holistic consideration and evaluation of evidence at trial. The trial process has not been set in motion as yet and all that is before the court is the factual basis for the plaintiff's claim.

Conclusion

[36] I am not convinced *in casu* that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Evidence may still be led at trial supplementing the facts alleged by the plaintiff in his particulars of claim.

[37] For the reasons stated above, the exception raised by the defendant must fail.

[38] May I interpose to mention that this is not the end of the road for both the defendant and the plaintiff. The defendant could still ventilate himself and re-argued the point at the trial. **(Erasmus Superior Court Practice B1-152).** Similarly the plaintiff could still amend its summons in terms of Rule 28 if he feels that certain allegations contained in its current particulars of claim require amplification.

Order

[39] In the result, the following order shall issue:

1. The exception is dismissed with costs.

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H. S. TONI

ACTING JUDGE OF THE HIGH COURT

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HEARD ON	:	31 MAY 2018
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