IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 26456/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI DATE: 12-07- 2021

In the matter between:

SANGWENI, ANNA SPHIWE **FIRST PLAINTIFF**

MAHLANGU, MKHOSINI JOHANNES **SECOND PLAINTIFF**

and

MEC FOR HEALTH, GAUTENG PROVINCIAL DIVISION **DEFENDANT**

JUDGMENT

KUBUSHI J,

Delivered: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 12 July 2021*

INTRODUCTION

[1] The plaintiffs are in this application excepting to the defendant's special plea on the grounds that the special plea is vague and embarrassing and/or misses the allegations necessary to sustain the defence.

[2] The defendant has filed a notice of intention to oppose the exception but has not taken the matter any further as they have not filed heads of argument. I deal, therefore, with this matter on the papers filed by the plaintiffs.

[3] It was directed that the matter be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL MATRIX

[4] The chronology of events, as set out hereunder, are gleaned from the affidavit filed by the plaintiffs in support of the exception.

[5] In the main action, the plaintiffs are suing the defendant for having negligently caused their minor son to suffer a global hypoxic ischaemic injury to his brain, as a result of which he suffers from mixed cerebral palsy secondary

to perinatal asphyxia, severe global developmental delays, epilepsy, intellectual disablement and all the consequences thereof.

[6] Summons herein was duly served on the office of the State Attorney, Pretoria on 24 June 2020, and on the defendant on 10 July 2020. On 15 February 2021 the defendant served a special plea and plea on the merits electronically, *per* email, on the plaintiffs.

[7] On 18 February 2021 the plaintiffs served a notice in terms of Uniform Rule 23 (1) on the defendant, notifying the defendant of their intention to take exception to the defendant's special plea on the ground that the special plea is vague and embarrassing and/or misses the allegations necessary to sustain a defence.

[8] The plaintiffs indicated the grounds upon which they rely on, and the plaintiffs causes of complaint as the following:

8.1 In paragraph 1 of the special plea, it is alleged that the plaintiffs have not complied with Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("Act 40 of 2002"). The defendant, whilst relying on the plaintiffs' non-compliance, fails to furnish details in which respect/s the plaintiffs failed to comply with the provisions of Section 3 of Act 40 of 2002;

8.2 In paragraph 2 of the special plea it Is alleged that the plaintiffs have not complied with section 2 (2) of the State Liability Act 20 of 1957 ("the State Liability Act"). The defendant fails to furnish details in which respect/s the plaintiffs failed to comply with the provisions of section 2 (2) thereof;

8.3 In paragraph 3 of the special plea the defendant pleads that the plaintiffs did not comply with the provisions of section 5 (4) of the State Liability Act. The defendant fails to furnish details in which respect/s the plaintiffs failed to comply with the provisions of Section 5 (4). Furthermore, section 5 of the State Liability Act does not contain a subsection 4 and section 5 deals with the repeal of Act 1 of 1910.

8.4 In the premises the defendant's special plea is vague and embarrassing alternatively lacks averments necessary to sustain the defendant's defence.

[9] The plaintiffs informed the defendant that unless the defendant removes the aforesaid causes of complain within fifteen (15) days after delivery of the plaintiffs' notice in terms of Uniform Rule 23 (1), the plaintiffs will deliver an exception to the defendant's special plea. The defendant did not reply to the

plaintiffs' notice in terms of Uniform Rule 23 (1) and on 16 March 2021 the plaintiffs served a notice of exception on the defendant.

[10] The defendant did not reply to the notice of exception, as well. The plaintiffs contend that in such circumstances they are not in the position to plead to the defendant's special plea, which renders the defendant's special plea excipiable.

ARGUMENT

[11] In contending for the exception to be upheld and that the defendant's special plea be struck out with costs, the plaintiffs make the following arguments in their heads of argument:

[12] It is contended that an exception may be taken to a pleading on the grounds that it is vague and embarrassing if the vagueness and embarrassment strike at the root of the defence, i.e. if the plaintiff will be seriously prejudiced if the allegations remain. The submission, as a result, is that the vagueness and embarrassment in the defendant's special plea strike at the root of their defence.

[13] The plaintiffs contend, further, that they will be seriously prejudiced in that they do not know the facts on which the defendant intends to rely on, so as to be able to counter them by the filing of a replication; and the plaintiffs

are, furthermore, seriously prejudiced in their preparations for trial in that they do not know what facts would have to be established or refuted in evidence in order to defeat the special defences of non- compliance with the statutory provisions referred to. The plaintiffs have demonstrated this argument by reference to each of the special pleas and the legal provision sought to be relied upon, as indicated below.

Ad Paragraph 1 thereof

[14] The defendant pleads that the plaintiffs have not complied with section 3 of Act 40 of 2002, and that the claim must therefore be dismissed.

[15] This section, as argued by the plaintiffs, requires notice of intended legal proceedings to be given to an organ of state. What a claimant must do, and accordingly the facts relevant to the question whether section 3 has been complied with, include:

15.1 That notice of the intention to institute legal proceedings in question must be given in writing.

15.2 Whether or not the organ of state has consented in writing to the institution of the legal proceedings without such notice having been given, or without a compliant notice having been given.

15.3 The notice must be served on the organ of state in accordance with section 4 (1).

15.4 The notice must be served within six months from the date on which the claim became due.

15.5 That the debt did not become due more than six months before the date on which the notice was served on the organ of state. In this regard the factual issue arises whether the plaintiffs as creditors had knowledge of the identity of the organ of state and of the facts giving rise to the debt, or could have acquired such knowledge by exercising reasonable care.

15.6 The notice must briefly set out the facts giving rise to the debt. The notice must briefly set out such particulars of the debt as are within the knowledge of the creditor.

[16] Section 3 (4) (a) provides that "*if an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to court having Jurisdiction for condonation of such failure.*" The defendant relies upon an alleged failure, in that, in paragraph 1 of the special plea the defendant

alleges non-compliance with section 3, and pleads that the plaintiffs' claim should accordingly be dismissed.

[17] Non-compliance, having regard to the provisions of section 3 (4), is not a basis for dismissal of the claim, as the claimant is entitled to seek condonation, and only if condonation is refused, would a dismissal of the claim be competent.

[18] The allegation of non-compliance is accordingly insufficient to sustain the defence that the claim must be dismissed, so it is argued.

[19] It is well-established that an application for condonation as envisaged in section 3 (4) may be brought and granted after proceedings have already been instituted.

[20] Accordingly, so the argument goes, in order to know the factual basis on which the defendant relies for non-compliance, in order to be able to replicate to the special plea, and if necessary in order to bring a condonation application, the plaintiffs need to know what the primary facts are upon which the defendant will seek to rely for the legal conclusion that the plaintiffs have not complied with section 3.

[21] Under the circumstances it is submitted that paragraph 1 of the special plea is undoubtedly vague and embarrassing, that the plaintiffs are seriously prejudiced thereby, and that paragraph 1 of the special plea lacks the

allegations necessary to sustain the defence and the contention that the claim should be dismissed.

Ad Paragraph 2 thereof

[22] In paragraph 2 of the special plea the defendant pleads that the plaintiff have not complied with section 2 (2) of the State Liability Act.

[23] Section 2 (2) provides as follows:

> "The plaintiff or applicant, as the case may be, or his or her legal representative must-
>
> (a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; and
>
> (b) within 5 days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued."

[24] It is argued on behalf of the plaintiffs that the actions which a plaintiff must take, and accordingly the facts relevant to the question whether or not there has been compliance with section 2 (2) include:

24.1 That a copy of the legal process must be served on the head of the department concerned at the head office of the department (the section does not require personal service);

24.2 That a copy of the legal process must be served on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued;

24.3 That a copy of the legal process must be served on the State Attorney within five (5) days after service of the process on the head of the department.

[25] The defendant, without pleading the factual basis for such a conclusion, pleads that the plaintiffs have not complied with section 2 (2), and pleads that the plaintiffs' claims must, therefore, be dismissed with costs.

[26] The plaintiffs' submission, in this regard, is that there is no provision in the State Liability Act to the effect that if section 2 (2) is not complied with, the legal proceedings must be dismissed. Under circumstances where there has not been compliance precisely in accordance with the provisions of section 2 (2), what a court would be called upon to determine is whether there was

substantial compliance in the sense that the purpose or objective of section 2 (2) has been achieved, and whether there is any prejudice to the defendant.

[27] Section 2 (3) provides that on receipt of the process by the State Attorney, the State Attorney must without undue delay send a request to the head of the department concerned to provide the State Attorney with written instructions, and must thereafter provide the head of department with legal advice on the merits of the matter.

[28] The combined summons was served on the State Attorney, Pretoria by the sheriff on 24 June 2020, before it was served on the head of the Department of Health. The combined summons was served by the sheriff on the person in charge of the head office of the defendant on 10 July 2020. This was good service in terms of Rules of Court.

[29] The State Attorney gave notice of intention to defend the action, on behalf of the defendant, on 17 July 2020, after the combined summons had been served at the head office of the defendant. The defendant, represented by the State Attorney, has delivered a plea on the merits, in which the allegations in the particulars of claim have been responded to. The State Attorney, accordingly, must have received instructions from the defendant to

defend the action and to plead to the particulars of claim in the manner in which the defendant has pleaded.

[30] The contention is that it is not disclosed whether the defendant intends to rely on the fact that the summons was served on the State Attorney before it was served at the defendant's head office as a basis for the alleged non-compliance.

[31] It is thus, submitted on behalf of the plaintiffs that under the circumstances as set out above, it is clear that the second special plea is vague and embarrassing, and that the plaintiffs are seriously prejudiced by the failure of the defendant to plead the facts upon which it relies for its legal conclusion of non-compliance; and that the prejudice to the plaintiffs relate not only to whether or not a replication should be filed and what should be pleaded in such replication, but also in regard to the preparation for trial and the identification of the facts which would need to be proved or rebutted in respect of the second special plea. Furthermore, the special plea (in paragraph 2 thereof) misses the allegations necessary to sustain the defence that the plaintiffs' claims is unsustainable and must be dismissed.

Ad Paragraph 3 thereof

[32] In paragraph 3 of the special plea the defendant pleads that the plaintiffs have not complied with section 5 (4) of the State Liability Act, 20 of 1957 and that the plaintiffs' claim must on that basis be dismissed with costs.

[33] There is no section such as section 5 (4) of the State Liability Act. Section 5 of the State Liability Act reads as follows: "*The Crown Liabilities Act, 1910, is hereby repealed.*"

[34] Although the defendant in paragraph 3 of the special plea alleges non-compliances with the provisions of section 5 (4) of the State Liability Act, which section does not exist, the plaintiffs contend that it is conceivable that the defendant might have intended to plead and rely on non-compliance with section 5 (4) of Act 40 of 2002 (being the Act relied upon in paragraph 1 of the special plea), and that the defendant might in future seek to amend the name of the Act which reference is made in paragraph 3 of the special plea.

[35] Section 5 (4) of Act 40 of 2002 provides as follows:

> "Any process by which legal proceedings contemplated in section 3 (1) are instituted must be issued by the court in whose area of jurisdiction the cause of action arose, unless the organ of state in writing consents to the institution of legal proceedings in a different jurisdiction".

[36] The plaintiffs argue that in the particulars of claim it is alleged that the injury suffered by the minor child and the consequent damages were caused by negligence of the employees of the defendant at the Kwa-Thema Community Clinic and the Pholosong Hospital. In paragraph 3.2 of the particulars of claim it is alleged that these hospitals were under the control and administration of the defendant, which the defendant admits in the plea on the merits. The defendant is the MEC for Health for the Gauteng Provincial Government.

[37] In paragraph 4.2 of the particulars of claim it is alleged that the nurses and medical practitioners at the hospitals which are referred to, were in the employ of the Department of Health of the Gauteng Provincial Government and were acting in the course and scope of their employment. This is admitted in paragraph 3 of the defendant's plea on the merits.

[38] Accordingly, the plaintiffs argue that there is no basis upon which the defendant could contend that this action, which was instituted in the High Court of South Africa, Gauteng Division, Pretoria and which bears the stamp of the Registrar of this court dated 22 June 2020 and is signed by both the Registrar and the plaintiffs' attorney, was not issued by the court in whose area of jurisdiction the cause of action arose.

[39] Accordingly, as contended for by the plaintiffs, it is clear that paragraph 3 of the special plea is vague and embarrassing in that the plaintiffs cannot know what facts or legal provision the defendant seeks to rely upon. Furthermore, the allegation of non- compliance with a non-existence section of the State Liability Act, does not justify a conclusion that the plaintiffs' claim must be dismissed with costs.

ANALYSIS

[40] For the reasons that follow hereunder, I am in agreement with the above arguments of the plaintiffs.

[41] Uniform Rule 23 (1) stipulates that 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.

[42] In *Giant Leap Workspace Specialists (Pty) Ltd v Scoin Trading (Pty) Ltd t/a The South African Gold Coin Exchange*,[1] when considering whether a pleading was vague and embarrassing, the court had the following to say:

[1] (2014/37464) [2016] ZAGPJHC 321 (23 November 2016).

"An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. See also in this regard Jowell v Bramwell-Jones and Others."

"If the defendant knows which claim it must meet, the particulars of claim cannot be vague and embarrassing, and the exception cannot be upheld. This exception covers the instance where, although there is a cause of action, it is incomplete or defective in the way it is set out, resulting in embarrassment to the defendant. At issue is the formulation of the cause of action, not its validity."

[43] It is, similarly, a well-established and trite principle that if a defendant relies on a particular statutory provision, she/he must either specifically refer to it or she/he must formulate her/his defence sufficiently clearly to indicate that she/he relies on it. If she/he contends that there was an illegality or non-compliance with a statutory provision, she/he must plead the primary facts which would justify such a conclusion.[2]

[44] The plaintiffs' submission that the vagueness and embarrassment in the defendant's special plea strikes at the root of the defence and that they will be seriously prejudiced if the allegations remain, is correct.

[2] Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623; P Trimborn Agency CC v Grace Trucking CC 2006 (1) SA 427 (N) at 430.

[45] This is so because, the three defences pleaded in the special plea do not establish the facts on which the defendant intends to rely on. The defences are, therefore, prejudicial to the plaintiffs in that the plaintiffs will not be able to counter the defences by either the filing of a replication or in their preparation for trial. The plaintiffs do not know what facts would have to be established or refuted in evidence in order to defeat the special defences of non- compliance with the statutory provisions referred to in the special plea.

[46] On these grounds the exception stands to be upheld.

CONCLUSION

[47] Although in the notice of motion, the plaintiffs seek relief for either the dismissal of the special plea or that the defendant be afforded leave to amend the special plea in terms of Uniform Rule 28, they nevertheless, in the heads of argument pray for the summary dismissal of the special plea with costs.

[48] As reasoned in *Giant Leap Workspace Specialists (Pty) Ltd,* an exception in terms of Uniform Rule 23 (1) covers the instance where, although there is a cause of action, it is incomplete or defective in the way it is set out, resulting in embarrassment to the defendant. At issue is the formulation of the cause of action, not its validity.

[49] It is, therefore, my view that the special plea ought not to be struck out at this stage of the proceedings. The defendant should be granted an opportunity to amend the special plea.

COSTS

[50] As is trite costs should be awarded the successful party. The plaintiffs being successful are entitled to be awarded the costs of this application.

ORDER

[51] In the circumstances I make the following order:

1. The exception is upheld with costs.

2. The defendant is granted leave to amend the special plea within fifteen (15) days of this order.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA